FOUR ESSAYS ON THE TRIAL OF CASES
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CLAUDE MONET AND THE THEORY OF YOUR CASE

Our lives, and those of jurors, are governed by impressions. A hundred times a day, we make a decision -- turn left, step off the curb, order that hamburger, cross the street to avoid someone who looks a little suspicious -- based on a moment's observation. We bring to bear our sight, hearing, touch, smell, and taste. Our past experience informs our choice.

- One: Two lovers, hand in hand, checked in to a hotel.
- Two: Two deviant fornicators showed up at the Motel 6.

One and Two describe the same event. However, your mental picture based on One or Two will almost certainly be different. That difference is based not only on the words of One and Two but also on your own social and cultural conditioning at this point in history.

The "impression" is an either-or. Is Edward Snowden a "traitor" or a patriot? What impression does a police officer have about a person of color he confronts in the street, and how does that impression differ from that of so many others in the community?

When we try a case, we want the jurors to have a particular impression of our client and her cause. Yet, we sometimes become so involved in the details of case preparation that we forget or ignore the impression that we must seek to create.

In 1874, Claude Monet exhibited a painting in Paris, an unconventional depiction of sunrise at Le Havre. "What shall we call it?," his brother asked. "*Mettez 'impression*,'" – Call it an impression -- Monet replied. Impressionism got its name.

Monet rented rooms across from the Rouen cathedral facade and painted it 30 times. Each painting, with different effects of light, shade, weather and time of day, gives one a different impression. His paintings of the seashore direct us to consider particular people, and to see them in particular ways.

Yet, Monet's work is not "abstract," nor does it bend and reshape the real world that he depicts. Monet was a careful observer. The different impressions of the same scene are creatures of the same reality, which can be seen differently depending on circumstances. His paintings from this period, including notably his Gare St. Lazare series, make the material world come alive. "One can hear the roaring of the trains," wrote Emile Zola.

We trial lawyers are impressionists, seeking to present a certain image of our case within a framework defined by the rules of evidence and procedure.

Look carefully at some of Monet's paintings, having in mind what he was trying to say to you. He has considered every detail, every stone. He has considered light and shadow. The impression evokes a reaction because the artistry is honest and accurate.

Someday, go to the Musée Marmottan on the outskirts of Paris. Look at Monet's personal collection of Japanese line drawings; he was impressed by that exacting form of depiction.

Our task from when we first see the client is to build an impression of her and her cause. That impression will be present in every pleading, argument, witness and exhibit.

Seeing ourselves as impressionists is more than an idea about case theory and case preparation. Monet's work gives us a sense that the impressions we might create can be powerful enough to shake juror prejudices and reshape juror consciousness. Do you doubt that? Re-read Clarence Darrow's summation in the Ossian Sweet case and see the work of this master impressionist of the courtroom.

As we get deeper into the case, we may adapt our proposed impression, adding details, adjusting light and shadow, giving this or that element greater prominence. But every day in every case, we should perform the exercise of describing what is in our mind's eye about the case as a whole. We should train ourselves to "say our case" in a few words or a paragraph. It is not enough to imagine the impression we wish to depict. We must do the hard work of case preparation.

To consider the power of the impression, think about the punishment phase of a capital case. Here stands a defendant convicted of a crime so serious that he or she is subject to the death penalty. The jurors are to give, in Justice O'Connor's words, a "reasoned moral response" to evidence about the offense and the offender. The state portrays the crime in horrific detail, and the offender as a person not fit to live. Victim impact evidence adds to the picture.

The defender's job is to portray this human being as someone whose life matters. In doing that task, we rely on the Supreme Court's mandate about the breadth of mitigation evidence that we may present, and that the trial judge must instruct the jurors to consider. We build an impression. We are not "humanizing" the defendant; he or she is quite human enough. We are seeking to help the jurors see that human-ness. The careful, accurate, evocative impression that skilled and ardent trial lawyering can create provably saves lives. That reasoned and moral impression triumphs over one based on anger and vengeance. I have seen this, and written about it. You can find those writings at the ABA store or on amazon.com.

The impressionist canvas is a work that is imagined and then comes into being. Each witness, each exhibit, adds brushstrokes. Forming the impression begins with the opening statement, a prediction and a sketch. The completed work begins to appear as we and the jurors take the journey of trial together. That is, we do not present an impression. We build, or create, one as the trial unfolds. We introduce jurors to our principal theme, then work just as Monet worked, with exacting attention to detail yet never losing sight of the

whole. Some of us, in opening statement, use the metaphor of a mosaic or a picture puzzle, rather than a painting; these images embody the same basic idea.

Can juror impressions change during the shared journey of a trial? Am I right that thinking of ourselves as impressions helps capture the relevance and the power of Monet's vision? All of us who try cases have seen it happen. In jurisdictions that allow lawyers to talk to jurors after the trial, I have listened as this or that juror described the trial as a process in which details became clear, and initial ideas yielded to new insights, and then as the juror came to have an impression of the case that carried the day. These depictions included not only comments on witnesses and evidence, but on the impression of candor and commitment – or lack of those -- that the lawyers conveyed.

And yes, I know that painting and trials are different disciplines. I will address some of the differences in the next three essays.

WILLIAM BUTLER YEATS AND HOW YOU SAY YOUR CASE

In a Dublin museum, there is a manuscript of William Butler Yeats's poem "The Second Coming." Yeats wrote

> And what rough beast, its hour come round at last
> Marches towards Bethlehem to be born?

He struck out "marches" and wrote "slouches." This is one of the wisest edits in the history of literature.

As I wrote in my earlier essay, we persuade with impressions. For the most part, we must create those impressions not with paint, but with words: Our words in jury argument , the witnesses' testimonial words, the judges words in jury instructions, the words in our pleadings. The impression I have in mind does the case no good unless I can express it, or have the witnesses do so. A young writer said to Stephan Mallarme, "I have an idea for a poem." "That's too bad," Mallarme said, "you don't make a poem with ideas, you make it with words."

Different words give the hearer different impressions. Consider these two statements, which describe the same event:

1. Two lovers checked into a hotel.
2. Two degenerates went to the Motel 6.

The words we choose must convey the impression to a particular audience. Our audience -- jurors or judges -- will interpret what we say with the social and cultural attitudes they bring with them. Anais Nin wrote "we do not see things as they are; we see them as we are." She could as well have said that we understand words not as they are, but was we are. Language is not universal: we do not all conjure the same mental picture from any given word.

Here is a word: "pediatrician." Did you, the reader, conjure an image of a male pediatrician or a female pediatrician? If you use a word -- truck, hotel, lover, kiss, refugee -- we must surround it with just enough context so that our audience has the same mental picture -- the same impression -- that we want them to have.

We must use the right words, and not too many of them.. "Omit needless words," say Strunk and White in that iconic little treatise on writing. But what kinds of words are presumptively needless? Unless we ask that question, the admonition is too general to be helpful. C.S. Lewis warned us against using adjectives and adverbs as a substitute for good evocative writing. Write well, and the readers or hearers will discover for themselves that something is "mysterious," or "loathsome." ."Let me
taste for myself," Lewis said, "and you'll have no need to tell me how I should react to the flavour.". He gave us an example:

> In Donne's couplet
> "Your gown going off, such beautious state reveals
> As when from flow'ry meads th' hills shadow steals"
> beautious is the only word of the whole seventeen which is doing no work.

When Edward Bennett Williams wanted to excoriate the prosecutors in the John Connally case for making a plea bargain with a thief and confessed bribe-giver, he used a figure of speech. He described the flawed bargain, in plain words delivered in a somewhat censorious tone of voice. He noted that the prosecutors had helped this cooperating witness to keep his law license: "They dropped this piranha back in the tank."

Someone comes forward now and asks, "Where do I learn what words to use, and not too many of them, and perhaps with an occasional figure of speech to liven things up? Most judicial opinions, legal briefs, law student memos and legal treatises are not good places to look. In law school and in thinking about "the law," we often use or imagine words that are distant and different from the way that people talk to one another about matters that concern them. Justice Brennan told me about his first trial. He was appointed counsel for a young man charged with vehicular manslaughter. The defendant testified. Brennan called a neighbor as character witness. Question: "What is the defendant's reputation in the community for veracity?" The neighbor thought for a bit and said, "well, he's is a careful driver, if that's what you mean." Brennan tried again, without success. Finally the judge interrupted to say, "He means to ask if the lad tells the truth. Young Mr. Brennan has been off at Harvard Law School and has forgotten how to talk to folks."

Think of the journalist's lead. In good news writing, the first paragraph or two tells us the who, what, when, why, how. It sets out the basic elements of an impression of the story that is to follow. It should make us want to read on. Read the work of good journalists with an eye to figuring out how they chose the few words with which the story begins.

Consider, then, that in a trial, much of the story must be told with questions and answers, with witnesses on the stand. Pick up and study a few mystery novels by Robert Parker, featuring his detective character Spenser. The action in Parker's novels is driven largely by conversations -- dialogues if you will -- among the characters. The words are those of ordinary speech, their intensity largely created by the rhythms of dialogue.

Taking the next step, read widely from poets whose work is descriptive, and whose choice of words makes their imagery accessible. Yeats is one such poet, and so are Wordsworth, Whitman, Sandburg, and Melville. When Sandburg tells of Chicago, "city of the big shoulders," or Wordsworth is "lonely as a cloud," we may see an image, and more important, how to create an image.

Read transcripts of great advocates' jury work -- Clarence Darrow, Edward Bennett Williams, Clara Shortridge Foltz. See how these lawyers directly addressed jurors, weaving words into impressions that their hearers could seize and hold on to.

Our words, and those we get from the witnesses, are not chosen in the abstract. They will be heard and understood by people at a given time and place. In 1971, I was counsel for Fernandeo Chavez, Cesar's son, charged with draft refusal and set for jury trial in Fresno, California. Fernando and his father would be defense witnesses. Jurors would have been witness to the farm worker organizing campaigns and some of then would work for

growers. It is not far from Los Angeles to Fresno, but I was an outsider. I checked into a motel a week early and listened to local radio and television stations, and read the local newspapers. What were people saying about the events that concerned them, in what words and in what tones of voice?

Carl Sandburg -- whose words created powerful impressions -- warned, "be careful what you say." Words are "fine," and "strong" and "soft" -- their character determined by the uses to which we put them. Choose and use them well.

SARTRE AND HOW THE WITNESSES SEE YOUR CASE

This philosopher walks into a bar. He is Jean-Paul Sartre. He is to meet his friend Pierre. Sartre is late. Pierre is usually punctual. Sartre looks around for Pierre. The bar is full of people, conversation, aromas. But were we later to call Sartre as a witness, he would say "I'll tell you one thing. Pierre was not there."

Discussing his visit to the bar, Sartre wrote:

> "No one object, no group of objects is especially designed to be organized as specifically either ground or figure; all depends on the direction of my attention. When I enter this cafe to look for Pierre, there is formed a synthetic organization of all the objects in the cafe, on the ground of which Pierre is given as about to appear."

Sartre has defined for us what trial testimony is all about. When we ask questions, we are retrieving the witness's consciousness of some past event. That consciousness was formed based on "the direction of [the witness's] attention."

Put another way, we do not see "facts" in litigation. We see instead their remnants, traces, evidences, fossils -- their shadows on the courthouse wall. The witnesses recount: They have perceived, do now remember, can express and want to tell the truth, more or less. This characterization of testimony is an application to our trial lawyer work of Sartre's insight in *Being and Nothingness*, the book that contains the anecdote about Pierre. Sartre was cutting through the debate about materialism vs. idealism. That debate concerns the external world. For an existentialist, as for the trial lawyer, the external world is only marginally relevant. The question for us is not "what happened?" but rather "what can we – honorably, ethically, and in harmony with the rules of evidence – demonstrate to have happened?"

Therefore, the first question of our prospective witness is not "what did you see?" It is "what were you doing there?" Or, "what was the direction of your attention?" We follow up by asking, "what did you expect to see?" Going deeper, we want to know what set of attitudes and preconceptions the witness brought to the event. After all, as Anais Nin has pointed out, "We do not see things as they are, we see them as we are."

We will also ask this witness what influences have been brought to bear on that initial consciousness of events – the passage of time, the suggestions made innocently or not by others, or the natural tendency to favor ones friends.

Consider the fallibility of eyewitness identification in a robbery case. The witness's attention may have been directed towards trying to escape danger, or consumed by the hope of getting out of the situation unharmed. Then, the witness is interviewed by the police and prosecutors, shown photographs or a live lineup and eventually enlisted to testify for the prosecution. By that time, the witness is not simply a vessel containing recollected consciousness: he or she is on one of the teams in an adversary contest.

This last point is significant. In our adversary system, a witness may come to feel that she is on "one side" or another, and that her testimony is aimed at achieving a result rather

than recreating consciousness of a past event. The witness becomes alienated from his or her own remembered experience. We have all seen this phenomenon at work. Our job is not only to explore all the ways in which the initial consciousness was well or imperfectly formed, but to find out what happened to it on the way to the courthouse.

Witness examination, on direct or cross, is a process of reconstruction and deconstruction of consciousness. When I cross-examine a witness, I explore how well or how badly she was able to sense—to perceive—what she describes. What was the direction of her attention? I probe her mode of expression to clarify what she said. I inquire about her biases. These are three of the basic tools of cross-examination: probing perception, meaning, and candor. The fourth focus of cross-examination is a witness's memory. When we relate what we have perceived, time and the tide of events may have eroded or reshaped it. The manipulation of memory – recollected consciousness -- has caused many injustices in the system that calls itself justice.

Of course, our witnesses will not only testify: They will have photographs, documents, charts, and objects. However, none of these has any meaning until and unless it is authenticated by a witness and placed in context.

When we have found and imagined the impression of our case that we want the jurors to have, we may be tempted to believe that our most important work is done. This would be an error.

Our opening statement must honor Sartre's insight – and also Anais Nin's:

> Members of the jury. In this opening statement, I want to share with you a confident prediction about what the evidence in this case will show you. The testimony of the witnesses, and the pictures and physical evidence they will bring, does not come in all at once. You might think of this process as a group of people working on a puzzle. Each person brings a part of the picture. Bit by bit, an image becomes clear. To help this process along, I want to introduce some of what these witnesses will say and bring. But also, I want to set out in advance the whole picture that will emerge when all of the testimony is done.

This image of an opening statement tells you what you must carry around in your head when you think about your case. You should be hearing the voices of witnesses who will tell the story, and not your own words – however eloquent you believe them to be.

Seated in the cafe, waiting for Pierre, you might ask yourself, "If something really important happened right now, how would I tell the story? Which of these people around me would be in the best position to describe the events?"

More prosaically, Edward Bennett Williams used to tell of his going to court in the days before copying machines. He was lugging three or four law books. An old courthouse habitué saw him and said, "Throw away those books, son. Get yourself a witness."

SUSAN SONTAG AND THE PICTURES IN YOUR CASE

"The defendant stole my horse!"

"What evidence do you have?"

"Well, here is a picture of the very horse!"

We want to use pictures at trial. They can become marker buoys along the trial voyage, to be recalled in summation and available for the jurors to examine when they deliberate. But the pictures must be authenticated, if they are to mean anything.

Dean Wigmore wrote:

> We are to remember, then, that a document purporting to be a map, picture, or diagram, is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper, testimonial nonentity. It speaks to us no more than a stick or a stone.

Justice Musmanno expressed a similar thought:

> A photograph is merely pictorial testimony. While it is properly assumed that the lens of a camera will not lie, the reliability of the resulting product, insofar as evidence in a factual controversy is concerned, depends on many factors which have little to do with the fidelity of the mechanical process which transfers a physical object from tangible reality to an intangible image on paper.

That's right. A picture does not lie, but a person can. Or perhaps a person – for example the lawyer who chooses which pictures to offer in evidence -- can have a bias or point of view, in selecting what and when to take a picture or which picture to choose from an array that were taken. And of course in the digital age of photo-shopping, no photograph can be presumed innocent.

Dean Wigmore and Justice Musmanno were writing about admissibility, about "produc[ing] evidence sufficient to support a finding that the item is what the proponent claims it is." As trial lawyers, we should have a working understanding that goes beyond getting our pictures in evidence. That is where Susan Sontag can help us. She wrote that the photograph "offers information, but information severed from all lived experience."

Sontag also wrote:

> Through photographs, the world becomes a series of unrelated, freestanding particles, and history, past and present, a set of anecdotes and faits divers. The camera makes reality atomic, manageable, and opaque. It is a view of the world which denies interconnectedness, continuity, but which confers on each moment the character of a mystery.
>
> * * *
>
> If we want to put a photograph back into the context of experience, social experience, social memory, we have to respect the laws of memory. We have to

> situate the printed photograph so that it acquires something of the surprising conclusiveness of that which *was* and *is*.

We who present the photograph have already – in our mind's eye – put it in the context that we choose in order to understand its message for ourselves. The jurors at the moment of seeing the photograph have no such context. The task of "authenticating" the photograph has two parts: First, we respect the rule of evidence that demands a testifier to establish the threshold conditions of admissibility.

Our second task is to put the photograph back into memory of the photographer or other witness to the depicted scene. Thus:

> "I went to the defendant's house. He said he had not seen my horse. So that night I snuck out to his stables and took this picture of my horse, in one of the defendant's stalls."

The picture does not "speak for itself." We must call a witness to describe the scene, tell us about the camera and its setting. The witness must tell us what happened before and after the picture was taken, and to help us see the photographer's literal "point of view."

Dean Wigmore told us only how to make the photograph admissible. Susan Sontag tells us how to make it memorable. She reminds us that the trial narrative is a story. It is a story built from impressions. It is a story built with the words of witnesses. And the witness's words are a depiction of past and remembered consciousness. The picture brings together all the elements of trial discussed in the three earlier essays in this series.

Another lesson from the "horse story" is that pictures may sometimes be evocative, dramatic – and irrelevant. The picture can produce such a strong reaction that the viewer forgets the limits on its true meaning and worth. Therefore, our job in trial is not only to put the photographs in context, but also to remind the jurors that not to overvalue them. At some point, we may argue that particularly evocative photographs be excluded.

In my opening statement in *United States v. Terry Nichols*, I acknowledged that the Oklahoma City bombing had wrought death, injury, and destruction. And then I said:

> But I want to warn you: The prosecutors may choose not to accept the reality that we accept. They may choose to put before you graphic, emotional, tragic evidence of the devastation on April 19. These events, I repeat, they're not in dispute. We understand that there's not a joy the world can give like that it takes away. The prosecutors may replay these terrible images over and over as it to say that somebody has to be punished for these things. That, of course, is not the question. The question for you at the end of the evidence will be who; and that is a question to be answered, we trust, in the light shed by the evidence and the law and not in flashes of anger.

A parting thought: If Dean Wigmore ever met Susan Sontag, would they understand one another's point of view?