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# Judging by the Numbers: An Empirical Study of the Power of Story

Kenneth D. Chestek\*

I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book; it is also about how our laws affect the daily realities of people's lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes.

—President Barack Obama<sup>1</sup>

[O]ur system will only be further corrupted as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy."

—Sen. Jeff Sessions<sup>2</sup>

The recent retirement of Justice David Souter from the Supreme Court touched off a public debate about the extent to which a judge's personal history and experiences should, or should not, inform his or her

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\* © Kenneth D. Chestek 2010. Clinical Professor of Law, Indiana University School of Law–Indianapolis. This article is based on a presentation that the author made to the Applied Legal Storytelling Conference, Chapter Two: Once Upon a Legal Story, held at Lewis & Clark Law School in Portland, Oregon in July 2009; I am grateful for the excellent feedback and discussion by participants at that conference. I was assisted during the design phase of my study by Professors Ruth Anne Robbins, Richard Neumann, and Michael Smith, who helped me kick around ideas for how to isolate the "story" variable in order to create a meaningful study. I also want to thank the members of the combined Indiana Supreme Court and Court of Appeals, and the Appellate Practice Committee of the Section of Litigation of the American Bar Association, all of whom provided input to the design of the study. I also wish to thank Professors Ruth Anne Robbins, Ruth Vance, and Laura Graham, who participated in a small-group session with me at the Legal Writing Institute's 2009 Writer's Workshop in Welches, Oregon; the faculties at Indiana University School of Law–Indianapolis and the Lewis & Clark Law School for providing valuable input after faculty colloquia; and Professors Kathy Stanchi, Linda Edwards, and Susan Duncan for their helpful comments. I would also like to thank my research assistants, Kelly Brummett (who managed the online survey expertly) and Shena Wheeler (who provided valuable research assistance on the article itself).

**1** Remarks of President Barack Obama, *Press Briefing by Press Secretary Robert Gibbs* (May 1, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09/](http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09/) (accessed Apr. 3, 2010). President Obama made an unannounced visit to the podium during the daily press briefing.

**2** See Nomination of Sonia Sotomayor to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. (July 13, 2009, opening statement of Sen. Jeff Sessions) (available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit\\_id=515](http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=515)).

decision making. President Obama said while campaigning for office, and again upon learning of the impending vacancy, that “empathy” was a quality he valued in a Supreme Court justice. Predictably, conservative senators attacked this statement as “code” for “biased judges.”<sup>3</sup> But does this debate obscure a more basic reality: that all judges’ perceptions are shaped by their own personal histories?

Modern thinking in brain science and cognitive psychology suggests that humans cannot help but interpret the world they see through the lens of their personal experiences.<sup>4</sup> A more productive discussion, therefore, might begin by acknowledging that fact, and then studying how those experiences might (or might not) inform the application of legal principles to result in a just decision.

The role of empathy, or emotional reasoning,<sup>5</sup> in judicial thinking is a controversial question. But before we can fully address the proper role, if any, for emotional reasoning in judging, several preliminary questions need to be examined. First, are judges actually influenced by emotional reasoning, which classical rhetoricians would refer to as pathos-based appeals? And, if so, by what mechanism does this influence occur? If in fact judges are influenced by pathos-based appeals, and if we know how that occurs, we will then be in a position to discuss whether this influence is a good thing, or something to try to avoid.

One form of a pathos-based appeal is storytelling. Stories (which some scholars refer to as “narrative reasoning”<sup>6</sup>) work because they allow readers to imagine for themselves how the protagonist might be feeling, and relate that feeling to the readers’ own experiences.<sup>7</sup>

3 Senator Orrin G. Hatch, Republican of Utah, speaking on ABC’s This Week Today in May 2009, called empathy a “code word for an activist judge” who would be “partisan on the bench.” ABC News This Week, *Sens. Leahy & Hatch* (May 3, 2009), <http://abcnews.go.com/ThisWeek/story?id=7491153&page=1> (accessed Apr. 3, 2010). The subsequent nomination and debate over the confirmation of Judge Sonia Sotomayor continued in the same vein. See Nomination, *supra* n. 2. But cf. Ben Bratman, *A Defense of Sotomayor’s “Wise Latina” Remark—with No Rewording Required* (July 17, 2009), [http://writ.news.findlaw.com/commentary/20090717\\_bratman.html](http://writ.news.findlaw.com/commentary/20090717_bratman.html) (accessed Apr. 3, 2010) (arguing that in employment discrimination cases, her background as a Latina could help her imagine the perspective of a person claiming discrimination, as the law often requires a judge to do). Curiously, conservative Senators did not object to President George H.W. Bush’s endorsement of Clarence Thomas as a “warm, intelligent person who has great empathy . . . .” *Excerpts from News Conference Announcing Court Nominee*, N.Y. Times A14 (July 2, 1991) (available at 1991 WLNR 311110).

4 See e.g. Antonio R. Damasio, *Descartes’ Error* 96–97 (Putnam 1994); George Lakoff, *Whose Freedom? The Battle over America’s Most Important Idea* 16 (Farrar, Straus & Giroux 2006) (describing how a person’s thinking is “constrained by the frames and metaphors shaping your brain and limiting how you see the world”).

5 Classical rhetoricians would refer to this as an “appeal to pathos.” Aristotle described three modes of persuasion: *ethos*, deriving from the character of the speaker; *pathos*, drawing on the attitudes created in the audience; and *logos*, relying on the demonstration of argument. *The Rhetoric of Aristotle* 8 (Lane Cooper trans., D. Appleton & Co. 1932).

6 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 1, 9–10 (1996).

7 Anthony G. Amsterdam & Jerome Bruner, *Minding The Law* 30–31 (Harv. U. Press 2000) (arguing that humans are predisposed to use narrative structure to construct meaning out of the events of everyday life); Michael J. Higdon, *Something*

This article focuses on the question of whether appellate judges are actually influenced by the stories of the litigants who appear before them. Part I will describe what I call the “DNA model of persuasion,” setting forth the hypothesis that logical argumentation, while a necessary part of persuasion, is not sufficient by itself and that using the form of a story to weave a pathos-based appeal into a brief will produce a more persuasive document. Part II of this article will describe a study that I devised and implemented to test whether appellate judges find story argumentation persuasive; Part III will present the results of the study. Part IV addresses possible objections to the validity of the test and the sample collected. Part V will begin an analysis of what the data might mean. Among other things, I conclude that stories are indeed persuasive to appellate judges and others, but also that recent law school graduates are not as impressed by stories as more experienced lawyers (and judges) are. Finally, I suggest that stories are helpful because, properly done, they evoke emotional responses within the reader that make the legal claim seem more “real,” and hence believable, to the reader.

## I. The DNA Model for Persuasive Writing

Stories have gotten a bum rap. Most people think of “stories” as entertaining works of fiction,<sup>8</sup> lies, or falsehoods.<sup>9</sup> The prosecution in a criminal case is likely to characterize the defendant’s version of events as a “story,” implying that it lacks credibility.

Yet intuitively, we know that stories persuade. Stories are inherently interesting. We grow up listening to stories, and we learn to tell stories to each other.<sup>10</sup> We are entertained by stories. Politicians and public speakers often use stories to make points and to teach, and often to persuade. A good story affects the listener, or the reader, at a gut level. When the audience reacts in the way the storyteller intends, the reader will “get” the message internally in a way that is profound. But are stories too “soft” or unreliable to include in appellate briefs? To the extent that stories present

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*Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. Rich. L. Rev. \_\_\_\_ (2010) (manuscript at 8–9) (collecting scholarship showing that readers of narratives must actively engage the text in order to create meaning, thereby creating a powerful opportunity to persuade).

<sup>8</sup> Among the alternative definitions provided by Webster’s Dictionary are: “2 a: an account of some incident or event; often: a tale written or told esp. for the entertainment of children”; “3 b: a fiction that is shorter or has a more unified plot than the usual novel.” Webster’s Third New International Dictionary (unabridged ed., G & C Merriam Co. 1961).

<sup>9</sup> “6: fib, lie, falsehood.” *Id.*

<sup>10</sup> Storyteller Kendall Haven claims that stories go back 100,000 years in human history, even predating language. Kendall Haven, *Story Proof: The Science Behind the Startling Power of Story* 3 (Libs. Unlimited 2007).

an appeal to pathos, as opposed to logos, are they inappropriate in appellate advocacy?

Some appellate judges claim that they are persuaded only by the legal argument, not by any emotional appeal. Some reject the notion that emotional appeal has any place in appellate advocacy.<sup>11</sup> The rule of law, they claim, requires logical arguments, clearly and neutrally applied. For example, Justice Antonin Scalia and author Bryan Garner argue that “[a]ppealing to judges’ emotions is misguided . . . . Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”<sup>12</sup> Instead of emotional appeals, they write, “persuasion is possible only because all human beings are born with a capacity for logical thought. . . . The most rigorous form of logic, and hence the most persuasive, is the syllogism.”<sup>13</sup> Senior Judge Ruggero J. Aldisert writes that a brief is “nothing more or less than an expanded categorical syllogism.”<sup>14</sup>

But is this formulation complete? Is there no room for judicial intuition,<sup>15</sup> or any form of emotional reasoning? In short, are stories inappropriate forms of argumentation?

My claim in this article (and one I have made elsewhere<sup>16</sup>) is that logic alone is not the best method of persuasion. Rather, a sound legal argument

11 Some United States Senators apparently agree. See comments of Sens. Jeff Sessions and Orrin Hatch, *supra* n. 2 & 3.

12 Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 32 (Thomson West 2008). There is some evidence that Justice Scalia practices what he preaches about not letting emotional reactions influence legal outcomes. In a recent dissent from a petition granting a writ of habeas corpus, he wrote:

This 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.

*In re Davis*, 130 S. Ct. 1, 3 (2009) (emphasis in original).

13 Scalia & Garner, *supra* n. 12, at 41. To be fair, Scalia & Garner do admit that there is a distinction between an overt appeal to emotion and the setting forth of facts that may engage the judge’s emotions uninvited. You may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home. But don’t make an overt, passionate attempt to play upon the judicial heart-string. It can have a nasty backlash.

*Id.* at 32. Although the authors don’t explain why it is okay to make covert emotional appeals but not overt ones, I do agree with this advice. See text accompanying *infra* n. 99.

14 Ruggero J. Aldisert, *Winning On Appeal: Better Briefs and Oral Arguments* 21 (2d ed., NITA 2003). Judge Aldisert admits that trial lawyers often do, and probably should, rely on “shamelessly emotional matters,” but he cautions the advocate “not [to] carry this stuff upstairs to the appellate court.” *Id.* at 5. On the other hand, he does advise “that the statement of facts [in an appellate brief should] command and retain the reader’s attention. Do not bore the judge. Do not make the brief difficult to read. Do not clutter the narrative. Come closer to Ernest Hemingway than Beltway bureaucrats.” *Id.* at 165. He also devotes a few paragraphs advising lawyers to “tell a story” in the facts sections of briefs.” *Id.* at 168.

15 Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit admits that “[i]ntuition plays a major role in judicial as in most decision making.” Richard A. Posner, *How Judges Think* 107 (Harv. U. Press 2008). Judge Posner also quotes a recent interview with current Supreme Court Justice Anthony Kennedy in which Justice Kennedy suggests that many judges begin with a “quick judgment[]” and then determine whether that judgment “makes sense, if it’s logical, if it’s fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality.” *Id.* at 257.

16 See Kenneth Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127 (2008).

combined with a strong story will be more persuasive than the bare legal argument. At the trial level, this is certainly true. As Professor Robert Burns has noted, trial lawyers can

construct their case from a double helix of norms. One of those strands is constituted by the law of rules. The other strand is constituted by the norms that find their natural home within the life-world of the judge and jury. These common sense norms are embedded primarily in the different sorts of narratives that the trial lawyer may employ at trial, from the fully characterized storytelling of the opening statement to the more Spartan narratives of direct examination.<sup>17</sup>

The image of a “double helix” DNA molecule provides a useful analogy with which to visualize the persuasive process. To insure that decisions are based upon neutral principles, evenly and predictably applied to any set of facts, the law requires a strictly logical component; let’s call that the “logos strand” of the double helix. But pure logic is insufficient in many types of decision making, even at the appellate level. For example, sometimes the legislature enacts a statute that gives the courts wide discretion to decide cases because the possible range of human conduct that might fall within the scope of the statute is too vast for a legislative body to anticipate.<sup>18</sup> In other situations, courts have developed

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<sup>17</sup> Robert P. Burns, *Studying Evidence Law in the Context of Trial Practices*, 50 St. Louis U. L.J. 1155, 1171 (2006); see also J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53 (2008). One study of how trial judges decide cases discusses the interplay of “intuitive” and “deliberative” reasoning processes (similar to the “story” and “logos” threads). See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1 (2007).

Jerome Bruner describes this dichotomy as follows:

There are two modes of cognitive function, two modes of thought, each providing distinctive ways of ordering experience, of constructing reality. The two (though complementary) are irreducible to one another. Efforts to reduce one mode to the other or to ignore one at the expense of the other inevitably fail to capture the rich diversity of thought. . . . A good story and a well-formed argument are different natural kinds. Both can be used as means for convincing another. Yet what they convince of is fundamentally different: arguments convince one of their truth, stories of their lifelikeness. . . . [T]he structure of a well-formed logical argument differs radically from that of a well-wrought story.

Jerome Bruner, *Actual Minds, Possible Worlds* 11 (Harv. U. Press 1986). For a fuller discussion of how narrative reasoning differs from logical reasoning, see Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259, 266–269 (2009).

<sup>18</sup> The law abounds with examples of subjective tests that require consideration of more than just logic. For example, sentencing decisions require a trial court to weigh individual characteristics of the defendant in determining the appropriate sentence. See e.g. Hayley Bennett and Tony Broe, *Judicial Neurobiology, Markarian Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?* 31 Crim. L. J. 75 (2007). For another example, while the Sherman Antitrust Act criminalizes the act of “monopoliz[ing]” or “attempt[ing] to monopolize,” 15 U.S.C. § 2, it leaves the definition of the term “monopolize” to the courts, which have developed a vast array of tests and criteria to help them differentiate between legal and illegal monopolies. See e.g. Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 Cal. L. Rev. 959 (1987). In discussing the rule of judge-made doctrines in adding substance to the skeleton of the Sherman Act, Judge Posner has said, “The progress in antitrust law owes nothing to legalism. Judges and Justices did not learn to read the Sherman Act more carefully. Instead they learned more about how the economy operates.” Posner, *supra* n. 15, at 376. In other words, logic alone was not enough; judges had to rely upon narrative reasoning to give the Act substance.

(either as part of the common law or in response to a broad grant of discretion in interpreting statutory or constitutional law) tests that require judges to weigh various factors before rendering judgment.<sup>19</sup> For example, balancing tests almost by definition require reasoning processes beyond pure logic.<sup>20</sup> (How much “weight” does a judge give to the privacy interest of a criminal defendant in determining the reasonableness of a search of his car?) Likewise, a “totality of the circumstances” test invites the judge to examine a body of evidence to render a decision without specifying the logical rules required to evaluate that evidence.<sup>21</sup> In such cases, it seems that another form of reasoning must join with the purely logical application of rules to allow the judge to make any decision at all.

For the purpose of this article, I will call this other form of reasoning “story argumentation” or “story reasoning.”<sup>22</sup> This becomes the second strand of the DNA molecule. My hypothesis is that a brief that relies purely on a logos-based argument will be lifeless, just as a single strand of the DNA molecule is incomplete. Winding in a solid story-based argument will bring the brief to life.<sup>23</sup>

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**19** For example, employment discrimination law may require even an appellate judge to try to imagine the impact of, for example, a hostile workplace on an individual victim. See Bratman, *supra* n. 3.

**20** See e.g. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (requiring courts to weigh the free speech interests of public employees against the interests of their employers in efficient operations in order to determine whether prior restraint of an employee’s speech is permissible). See also Posner, *supra* n. 15, at 96–97 (“Emotion exerts a huge influence on how people translate their experiences into beliefs, and so on the weights (critical to the balancing tests so widely used in American law) that judges assign to the probable consequences of deciding a case one way or the other.”).

**21** Justice Scalia describes the “reasonable man” test as “the most venerable totality of the circumstances test of them all.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1181 (1989). He suggests that, in a “rule of law” system, when all of the available legal rules “have been exhausted and have yielded no answer, we call what remains to be decided a question of fact . . .” *Id.* But he notes that in some instances, including the determination of what constitutes a “reasonable search” under the Fourth Amendment, courts have declared the application of the “reasonable man” test to be a question of law for the court. But even he does not suggest that such tests can be eliminated from the body of the law altogether: “We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible . . .” *Id.* at 1187.

**22** Others have referred to this type of reasoning as “narrative rationality,” see Rideout, *supra* n. 17, at 56, or “narrative reasoning,” see Edwards, *supra* n. 6, at 9.

**23** Story, of course, is at its most fundamental level a pathos-based appeal. For the classical rhetoricians who are wondering what happened to “ethos” in this model, think of the hydrogen bonds that hold the two strands of the helix together in a DNA molecule and give the molecule its shape. In much the same way, ethos binds together the logos and story strands of a good argument.

The “double helix” analogy also works well in a related context: how law is taught in law schools. The Carnegie Foundation’s recent report, *Educating Lawyers: Preparation for the Profession of Law*, identifies three “apprenticeships” that all students should complete in order to become fully functioning professionals. The first apprenticeship, which the authors designate as the “intellectual or cognitive” apprenticeship, embodies “analytical reasoning, argument, and research” (essentially a “logos strand”). The second apprenticeship “is to the forms of expert practice shared by competent practitioners. . . . [S]tudents learn by taking part in simulated practice situations, as in case studies, or in actual clinical experience with real clients.” (This is directly comparable to the “story” or “pathos” strand.) The third apprenticeship develops the “identity and purpose, [and] introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.” (These would be the “ethos” bonds described above.) William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 28 (Jossey-Bass 2007).

Many scholars and practitioners agree that briefs should tell a story.<sup>24</sup> However, judges don't unanimously agree. Some judges suggest that the key to persuasion is good logical argumentation;<sup>25</sup> others admit that telling a good story is also helpful (although most suggest that the "story" is told only in the fact section).<sup>26</sup>

## II. The Persuasion Study

There is little empirical data on what persuades judges. One study reports that judges prefer briefs that are "essays with a clear train of thought" rather than "repositories of all the information a judge might want to know."<sup>27</sup> Several other studies focus on what judges think of the quality of the briefs they read.<sup>28</sup> But no studies have attempted to systematically measure the effect of story reasoning on a judge's thought process.

<sup>24</sup> See Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001); Robert J. Kapelke, *Some Random Thoughts on Brief Writing*, 32 Colo. Law. 29, 29 (Jan. 2003) ("Good storytelling is a sound technique in brief writing, as in oral advocacy."); see also Steve Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961, 962 (2006); Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 Clin. L. Rev. 329 (2006); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Legal. Ethics 1 (2000); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 Thomas M. Cooley L. Rev. 267 (2008). For a fuller listing of scholarly works that discuss the use of narrative in legal persuasion, see Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ALWD 75, 77–79 (2009).

<sup>25</sup> See text accompanying nn. 12 & 14, *supra*.

<sup>26</sup> Aldisert, *supra* n. 14, at 168; Jacques L. Wiener, *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 Tul. L. Rev. 187, 194 (1995) ("Judges are human—even if some of us may not exhibit all of the qualities of that species at all times—so you must demonstrate both why your client should win (the emotional element) and the proper legal way that your client can win (the intellectual element)."); Patricia M. Wald, *19 Tips From 19 Years on the Appellate Bench*, 1 J. App. Prac. & Proc. 7, 11 (1999) ("Make the facts tell a story. The facts give the fix; spend time amassing them in a compelling way for your side but do not omit the ones that go the other way."); Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 330 (1992) ("There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, *except* as it applies to a particular set of facts.").

Judge Posner suggests that

since judges in our system are [occasional] legislators as well as adjudicators, lawyers should make a greater effort to present facts to judges—not so much the facts of the case, the adjudicative facts, which most lawyers do emphasize, but rather the background or general facts that influence a legislative decision ("legislative facts," in the conventional and in this instance useful terminology).

Posner, *supra* n. 15, at 118–119.

<sup>27</sup> In the summer of 2000, Bryan Garner did a brief survey of 100 appellate judges, asking only if they thought an appellate brief should be "an essay with a clear train of thought" or "a repository of all the information that a curious judge might want to know about a case." Of the 57 judges who responded, 49 (86%) preferred an "essay with a clear train of thought," none preferred the "repository of all information," while 8 (14%) thought neither formulation was quite right. Bryan Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Leg. Writing 1, 2 (2002).

<sup>28</sup> See Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Leg. Writing 257, 260 (2002); Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Leg. Educ. 80, 82–87 (2003). For a study of how judges and clerks read briefs, see James Stratman, *Investigating Persuasive Processes in Legal Discourse*, 17 Discourse Processes 1 (1994).



In early 2009, I conducted a study in an attempt to fill that gap. I wrote a series of test briefs in a hypothetical case and asked appellate judges,<sup>29</sup> their law clerks, and appellate court staff attorneys, appellate lawyers, and law professors to rate the briefs as to how persuasive they were. My purpose (which I did not disclose to the test participants<sup>30</sup>) was to measure whether a brief with a strong strand of story reasoning, woven in with the logos-based argument, would be more persuasive than a “pure logos” brief. I had two test hypotheses: (1) in general, a brief that included a strand of story reasoning would be more persuasive than a pure logos argument, and (2) this effect would be more pronounced if the brief-writer had a “hard case” to make. That is to say, if existing law favored one side of the case, the brief writer on that side could safely rely on a purely logos-based, or legal, argument, while the writer arguing for a change in the law would have a greater chance of success by relying more heavily on the pathos-based, or story, line of reasoning.

### A. What is a “story”?

I first need to define exactly what I mean by “story.” There are many potential definitions, most of which are too general or vague to be of much analytical value.<sup>31</sup> The definition that I used for this study is one crafted by professional storyteller Kendall Haven:

**Story: n.:** A detailed, character-based narration of a character’s struggles to overcome obstacles and reach an important goal.<sup>32</sup>

Haven contrasts “stories” with “information-based narratives,” which he defines as narratives that “provide just the new essential information

29 I chose to limit my study to appellate courts, clerks and practitioners because that is the more controversial arena. It may be more easily accepted that trial judges, who are asked to decide individual cases based upon specific individual characteristics, sometimes gleaned from direct observation of witnesses and parties in their courtrooms, may be more attentive to personal characteristics and the “stories” of the persons who appear before them. Appellate judges, however, are more removed from the disputes and the parties who inhabit those disputes, so that individual “stories” are less likely to be important. See Aldisert, *supra* n. 14, at 5.

30 The instructions sent to all participants said only that “[t]his study is an attempt to measure empirically what technique or techniques might lead to more persuasive writing.” Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story to Persuade (Survey Tool)* (June 17, 2009) (available at <http://ssrn.com/abstract=1421494>).

31 One typical “definition” is that “a story has a beginning, a middle, and an end.” Haven, *supra* n. 10, at 12. But that definition is far too simplistic. By that definition, the sentence “I went to the store and bought a gallon of milk” is a complete “story,” even though standing alone it is of no great interest to the reader and conveys little or no information that is useful.

32 *Id.* at 79. Other storytellers use a similar definition. See e.g. Annette Simmons, *The Story Factor: Secrets of Influence from the Art of Storytelling* 31 (Basic Books 2001) (“A story is a narrative account of an event or events—true or fictional. The difference between giving an example and telling a story is the addition of emotional content and added sensory details in the telling. A story weaves detail, character, and events into a whole that is greater than the sum of its parts.”).

and assume the reader has adequate banks of relevant topical prior knowledge to create context and meaning . . .”<sup>33</sup>

What distinguishes “stories” from mere “information-based narratives,” then, is that stories focus on characters, their goals, and their struggles to achieve their goals. Stories need sufficient context to allow the reader to fully see and understand why the participants in the story behaved as they did, and what they were trying to accomplish in the face of various obstacles. The word “story,” therefore, refers to a method of structuring information in a form that a reader will find engaging.<sup>34</sup>

The need to provide context, however, leaves the writer of an appellate brief in a quandary. Many jurists who have written about what they like to see in briefs emphasize concision.<sup>35</sup> Justice Antonin Scalia and author Bryan Garner urge caution in including “sympathetic facts that are legally irrelevant.”<sup>36</sup> Many appellate court rules require the statement of facts section of an appellate brief to include “relevant facts,” perhaps excluding by implication legally irrelevant facts.<sup>37</sup> But the context necessary to create a complete story (e.g., the details needed to develop the litigants’ character and goals) frequently requires the inclusion of background details that are legally irrelevant, yet necessary for the reader to completely understand what is going on.<sup>38</sup> How can an attorney attempting to tell the client’s story include such detail without annoying the court, or (even worse) risking a sanction for violating the applicable rules of appellate procedure?

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**33** Haven, *supra* n. 10, at 79. Using these definitions, the sentence “I went to the store and bought a gallon of milk” is an information-based narrative rather than a story because it provides no information about the actor, the struggle of the actor, or the actor’s goals. To be a complete story, much more context about the actor’s struggle to obtain milk, and why he needed it, would be necessary.

**34** *Id.* at 15.

**35** Aldisert, *supra* n. 14, at 25–28 and 234–235 (collecting comments from appellate judges emphasizing concision); Scalia & Garner, *supra* n. 12, at 23–25; *see also* Kosse & ButleRitchie, *supra* n. 28, at 85 (noting that their survey of state and federal judges, and other groups, revealed that judges rank clarity and concision as the two most essential elements of good legal writing).

**36** Scalia & Garner, *supra* n. 12, at 94.

**37** *See e.g.* Fed. R. App. P. 28(a)(7); Ind. R. App. P. 46 (A)(6) (requiring the Statement of the Facts to “describe the facts relevant to the issues presented for review”); *In Interest of Michael G.*, 213 Wis. 2d 124 n. 1, 570 N.W. 2d 253 (Table) (Wis. App. 1997) (in a state with a rule identical to Fed. R. App. P. 28(a)(7), criticizing the state’s brief for including background facts that were not legally relevant to the narrow issue before the court).

**38** Storyteller Annette Simmons points out that facts which some persons might consider “irrelevant details” may be highly useful because of their ability to trigger emotional reactions in the listener. “Just because we cannot draw a linear connection of relevance does not mean that a sensory detail is not connected in a nonlinear way to choices we make.” Simmons, *supra* n. 32, at 96.

## B. The test briefs

For my study, I attempted to write two “information-based narratives” (which I will refer to below as the “logos briefs”) and two “story briefs.” Each pair of briefs addressed opposite sides of a hypothetical case in a fictional jurisdiction. Writing these briefs proved to be the most difficult part of this project.<sup>39</sup>

Because one of my hypotheses for this study was that stories would have more impact in a case where the legal support for one side is weak, the fictional case I created involved a hard case: A county in the fictional state of West Dakota had adopted (by voter referendum) an ordinance purporting to prohibit corporations from seeking to influence local government officials, on the theory that corporations are not “persons” protected by either the United States or West Dakota Bill of Rights. The corporate defendant, a retail hardware store, had the “easy case” to make (reliance on the doctrine of *stare decisis* and a 130-year-old Supreme Court precedent), while the county had a much harder case to make (seeking to overturn that long-settled principle of law).<sup>40</sup>

The logos briefs were intentionally spare; they provided just the legally relevant facts (the “new essential information”) and focused tightly on the legal precedents and logical reasoning (the “relevant topical prior knowledge”). For example, the statement of the case in the logos briefs for both the hardware store and the county recited these bare but legally relevant facts: that the county voters had adopted Proposition 3 (the measure which purported to deprive corporations of the right to influence government officials through the expenditure of corporate funds); that the hardware store had sought a rezoning for a parcel of land; that it had purchased a full-page advertisement in the local newspaper seeking to gain popular support among the local citizens for the rezoning request; that the rezoning request had been denied; and that because the

<sup>39</sup> The test briefs are available at Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story to Persuade (Test Briefs)* (June 18, 2009) (available at <http://ssrn.com/abstract=1421900>). The county’s “logos” brief is cited as Respondent Brief 1; the county’s “story” brief as Respondent Brief 2. Similarly, the corporation’s “logos” brief is cited as Petitioner Brief 1, and the corporation’s “story” brief as Petitioner Brief 2.

Professors Ruth Anne Robbins and Richard Neumann provided very helpful comments on the test briefs.

<sup>40</sup> Some may dispute that this scenario is really a “hard case” at all, since the rules of *stare decisis* are well settled and the legal rule at issue in this case, the doctrine of “corporate personhood,” is universal and long-standing. However, such analysis reflects what I would call “law-oriented thinking” since it proceeds from an assumption that the law is primary and correct and only needs to be applied to specific facts. In terms of “fact-oriented thinking,” however, the hypothetical scenario is a hard case because the party on the short end of the law, the county representing the local residents of Old Orleans, seems to have a valid interest in preserving the character of their home town, but has to fight an uphill battle against well-financed adversaries.

For examples of Supreme Court briefs and opinions that counter the assumption that corporations are “persons” who “speak,” see Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 Mercer L. Rev. 949 (2007) and Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004).

advertisement violated the ordinance, the county had levied a fine against the hardware store as specified in the remedial provisions of Proposition 3. While the store's and the county's briefs varied some of the word choices, sentence structures and selection of the facts in order to put more emphasis on the facts each side felt were more helpful to their sides,<sup>41</sup> the end result was that the statements of facts in the two logos briefs were pretty similar.

The fact sections of the story briefs, however, were very different. In both briefs, I spent some time developing a "baseline" for the story: a satisfying pre-existing condition that was lost when the controversy arose.<sup>42</sup> For example, the county's brief described the county seat (the locale for the zoning controversy) as an emerging artistic community:

Almost all of the remaining manufacturing or industrial jobs in the region are located within the Borough of Old Orleans, in an industrial park on the southeast side of the borough. Due to the recent decline in manufacturing jobs, however, more than one third of the structures in that park are now vacant and are deteriorating. The downtown commercial district remains relatively vibrant, however. About ten years ago, there had been a noticeable decline in commercial activity downtown, with numerous vacant storefronts appearing. In the past three or four years, many of those vacant storefronts have been replaced with art galleries, craft shops, restaurants, or other stores catering to tourists and the growing artist community.<sup>43</sup>

Note that this description, while delivered in facially neutral language (i.e., the description does not include intensifiers or overblown rhetoric), evokes an image of a pleasant little village, struggling to re-invent itself in the face of a declining industrial base.<sup>44</sup> It not only provides a glimpse of what the county is trying to protect, but subtly suggests that this vision is worth protecting. The "important goal" for the protagonist (the county) is set up.

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<sup>41</sup> For example, the brief for the store described the penalty imposed by the District Attorney as "ten times the cost of the advertisement," while the brief for the county described the penalty as "the fine required by section 5 of Proposition 3."

<sup>42</sup> Amsterdam & Bruner describe the arc of a well-crafted plot as having five stages: (1) an initial condition of tranquility which (2) is disrupted by some "Trouble," leading to (3) efforts to remediate the Trouble, (4) so that the original condition of tranquility can be restored, or a new condition of tranquility is created, (5) ending with some *coda* or moral of the story. Amsterdam & Bruner, *supra* n. 7, at 113–114. Others have described the arc of a plot as (1) introduction/exposition (describing the initial condition of stasis), (2) a complicating incident and rising action (the conflict arises), (3) a climax (at which point the protagonist is at maximum peril), (4) resolution/falling action (in which the complication is resolved), and (5) the denouement. See e.g. Chestek, *supra* n. 16, at 147.

<sup>43</sup> Respt. Br. 2, at 3 (available at <http://papers.ssrn.com/abstract=1421900>).

<sup>44</sup> Does this excerpt conjure up an image of a town that you know? At the LWI Writer's Workshop in Welches, Oregon in July 2009, I asked various participants to read this passage and see if it evoked the image of any real town they knew. All participants were able to name real places they saw in their heads; two participants who were from the same state even came up with the very same small town.

The “obstacle” then appears:

In early 2007, BiggBox Lumber Company acquired an option to purchase a vacant tract of land in Wetmarsh Township, about five miles south of the downtown area of Old Orleans. The land is near an interchange of Highway 81, the main highway into the Lost River Recreation Area. Since the land is currently zoned AR-1 Agricultural, BiggBox applied to the township zoning board for a rezoning of the property to C-1 Commercial.

The Old Orleans Industrial Development Agency, which has been in charge of the efforts to redevelop the vacant sawmill site in the borough, then approached BiggBox in an attempt to show BiggBox that the site was large enough and needed no rezoning in order to accommodate BiggBox’s needs. It also put together a favorable tax-free financing package and other incentives hoping to convince BiggBox to locate within the borough. However, BiggBox rejected these overtures and pursued its strategy to obtain a rezoning of the Wetmarsh property. Part of its strategy in seeking this goal was to purchase a full-page ad in the Old Orleans Gazette, the weekly newspaper in the region, seeking to persuade both the local residents and the Wetmarsh Township officials that the rezoning would be in the best economic interest of the township.<sup>45</sup>

In terms of plot development,<sup>46</sup> the newspaper advertisement constitutes the “complicating incident” that upsets the pre-existing condition of stasis and gives rise to the conflict that drives the story forward. Note that the town is portrayed in a favorable light (for example, by proposing a reasonable alternative to the hardware store that the town believed would satisfy the goals of both parties). Conversely, the hardware store is subtly portrayed negatively, as “rejecting” the reasonable compromise proposed by the town and intentionally violating the County ordinance by appealing directly to the town’s residents. Yet once again the language is understated and free from intensifiers or overblown rhetoric; the reader is left to imagine the scene that the writer intends to portray.

The story brief for the hardware store uses similar techniques to create a favorable image. It also sets up a “baseline” condition of stasis:

BiggBox Lumber Co., Inc., is the nation’s fourth largest retail outlet for hardware and home improvement supplies. Its business model is to locate primarily in smaller communities which are not served by either

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<sup>45</sup> Respt. Br. 2, at 3–4 (available at <http://ssrn.com/abstract=1421900>).

<sup>46</sup> See Chestek, *supra* n. 16, at 147–150.

of the two largest companies, Home Depot and Lowe's. In order to remain price competitive in the home improvement market, its operating margins are somewhat smaller than those of its larger competitors.

BiggBox operates three stores in West Dakota, and has filed all of the necessary registration statements to allow it to do business within the state. Early in 2007, BiggBox identified Old Orleans and the Lost River Valley area of West Dakota as a market not served by either Home Depot or Lowe's, but large enough to support a BiggBox retail store.<sup>47</sup>

Once again, an image is created: a small (by comparison) company trying to eke out a living in smaller communities that the "big boys" ignore, thus providing a valuable service to an underserved community.

The hardware store then subtly attempts to portray itself as the reasonable party in the dispute, and the town as an officious intermeddler. After describing its business model in the language quoted above, the store wrote:

[BiggBox] conducted a market study and determined that the best location for a new store would be a vacant parcel of land near the interchange of Highway 81 and County Road BB, several miles outside of the town of Old Orleans. It chose that location because its store would be visible from Highway 81, which is the main route into the Lost River Recreation Area. The fact that the land was relatively flat and undeveloped would also reduce the cost of improving the land so as to support a standard BiggBox retail outlet.

BiggBox thereafter obtained an option to purchase the land, subject to the approval of the Wetmarsh Township Supervisors to rezone the land from agricultural to commercial. However, soon after BiggBox filed its rezoning application, representatives of the Old Orleans Area Industrial Development Agency contacted BiggBox, seeking to persuade BiggBox to abandon the Wetmarsh Township location and locate, instead, in a vacant sawmill within the Borough of Old Orleans. It offered various tax and financing incentives in order to encourage BiggBox to locate in the borough. BiggBox considered the Agency's proposal but ultimately rejected it, because it would have increased the cost of development of the store and because the location in the Borough of Old Orleans was not as visible nor as easily accessible from major thoroughfares.<sup>48</sup>

47 Petr. Br. 2, at 1 (available at <http://ssrn.com/abstract=1421900>).

48 Petr. Br. 2, at 1-2 (available at <http://ssrn.com/abstract=1421900>).

The story briefs thus provided a great deal more context about how the controversy arose (both clients' "struggles") and what both clients hoped to achieve (their "goals"). The character of each client was thus developed, in an effort to build sympathy in the reader's mind toward each client. The conflict became more vivid; the goal of each client was more visible.

Another central element of a story is the "theme."<sup>49</sup> While most appellate brief writing texts recommend choosing a clear theme, in practice much of this advice translates to "present a clear legal theory." For example, Justice Scalia and Garner write that an appellate brief "must form a coherent whole." They recommend that the brief be designed "to bring out your theory of the case and your principal themes,"<sup>50</sup> but they also recommend strongly that the advocate "think syllogistically."<sup>51</sup>

Scalia and Garner's formulation suggests that the "theory of the case" and the "theme" are synonyms, or at least closely related. However, when one analyzes persuasion according to the double-helix "DNA model," "theory of the case" and "theme" become distinct. The "theory of the case" equates to the "legal theory": the logical, law-based reason why a particular result is required (i.e., the logos strand). In a story strand of reasoning, however, the emotional core (or pathos-based) reason why a court should want to rule in a specific client's favor can be described as the "theme" of that case. A good brief, which fully develops both the logical and the story strands of reasoning, should therefore include both a coherent, logical "theory of the case" and an emotionally satisfying "theme."

Consider how this works in the test briefs. The store's "theory of the case" was that the doctrine of stare decisis compelled the lower courts to adhere to the precedents that establish the legal personhood of corporations, while the county's legal theory was that precedents can be overruled when specified standards suggest the continued social utility of a legal rule is questionable. These are both appeals to the logical brain (although the "soft" standards for when changed circumstances are sufficient to allow precedent to be overruled may require some story reasoning).

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<sup>49</sup> See Chestek, *supra* n. 16, at 146–147.

<sup>50</sup> Scalia & Garner, *supra* n. 12, at 59.

<sup>51</sup> *Id.* at 41. Scalia & Garner do emphasize the importance of "knowing your case" and advise the brief writer not to "underestimate the importance of the facts." *Id.* at 8–9. However, they clarify that the facts are important not for their own sake, but only as fodder for applying legal reasoning: "To be sure, you will be arguing to the court about the law, but what law applies—what cases are in point, and what cases can be distinguished—depends ultimately on the facts of your case." *Id.*

Themes, however, work at a different level; they appeal to the emotional brain. The theme of a story brief should evoke an emotional response from the reader. The theme should explain the motivations of the characters, and give the reader a reason to respect and “root for” those characters.<sup>52</sup> Thus, in addition to the legal theories (the propriety, or not, of adhering to precedent in this case), I set about to include a strong theme in both of the story briefs.<sup>53</sup>

In thinking about the theme for the story briefs, I used the concept of “deep frames” described by cognitive scientist George Lakoff. Lakoff describes “deep frames” as “moral and political principles that are so deep they are part of your very identity. . . .” As a result, “the deep frames are the ones that structure how you view the world.”<sup>54</sup> Deep frames can be stated in just a few words, and should evoke a predictable response from the listener. For example, Lakoff describes the word “freedom” as a deep frame. At the heart of every deep frame is what he calls an “uncontested idea”; in his example, the idea is that “freedom” is good and is something all people long for.<sup>55</sup> Deep frames work at an almost unconscious level,<sup>56</sup> and often can trump facts.<sup>57</sup>

In choosing themes for the two story briefs, I sought to identify deep frames that would connect with fundamental and nearly universal values that appellate judges were likely to hold. For the brief on behalf of the hardware store, therefore, I chose the deep frame of the free market: the free enterprise system works best when market actors are free to pursue their economic best interests with the minimum of government inter-

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**52** Professor Ruth Anne Robbins proposes that brief writers should attempt to cast their clients, the protagonists in the stories that a lawyer needs to tell, as heroes, and she suggests various archetypal roles that the clients could fulfill. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006).

**53** Since I view “theme” as the heart of story reasoning, the logos briefs did not include a strong theme. This was one of the ways in which I sought to isolate the variable of story in the two briefs participants were asked to evaluate.

**54** Lakoff, *supra* n. 4, at 12.

**55** *Id.* at 14. Storyteller Annette Simmons makes the same point when she suggests that storytellers “tap into the listener’s momentum” by tapping “into one of the core human needs that we all share.” Simmons, *supra* n. 32, at 110.

**56** Professor Linda Berger points out that “[b]ecause . . . stories shape our recognition of the problem, they control the directions we tend to follow in solving it. So, for instance, when a father is described as a ‘deadbeat dad,’ the Trouble driving the plot can be overcome by requiring him to pay his debt and meet his financial obligations, rather than by requiring him to take responsibility for parenting his children . . . .” Berger, *supra* n. 17, at 282. In her example, the term “deadbeat dad” is a “deep frame” through which the reader is led to a desired emotional response.

**57** “Suppose a fact is inconsistent with the frames and metaphors in your brain that define common sense. Then the frame or metaphor will stay, and the fact will be ignored. For facts to make sense they must fit existing frames and metaphors in the brain.” Lakoff, *supra* n. 4, at 13. As just one example, nearly three years after former President Bush admitted that there was no link between Saddam Hussein and the terrorist attacks of September 11, 2001, three independent polls showed that between 31 and 46% of all respondents still believed there was such a link. Angus Reid Global Monitor, *Some Americans Still Link Hussein to 9/11*, <http://www.angus-reid.com/polls/view/13081> (Sept. 9, 2006). This perception is likely because the link fit people’s “deep frame” that Hussein was involved, a frame created during the run-up to the Iraq war by President Bush and others who frequently mentioned 9/11 and Hussein in close proximity to each other.



ference. For the brief on behalf of the county, the deep frame was Americana: small towns in America should be free to choose for themselves what their community looks like and how it functions. (Both frames, of course, rely on the “uncontested core” that freedom is good.)

In practice, I suspect that most attorneys would write briefs that are something more than pure information-based narratives and which include some elements of story. But to accurately measure the persuasive effect of the story line, I had to isolate the variable of story-based reasoning as much as possible. Both the logos briefs and the story briefs were therefore somewhat exaggerated versions of the types of briefs described above.<sup>58</sup> For example, all four briefs used the same neutral Statement of the Issue.<sup>59</sup> Also, in an effort to make sure that the “logos strand” in each brief was functionally the same as the corresponding story brief (thereby isolating the “story argument” as the only variable), every case cited in the story brief was also discussed in the logos brief on that side of the case.<sup>60</sup> Each logos/story pair of briefs made the same basic legal arguments, although in some cases the arguments were rearranged or stated differently in the story briefs in order to fit the storyline. For example, both briefs for the hardware store began by citing numerous cases which held that corporations were “persons” entitled to the free speech protections of the First Amendment to the United States Constitution, then argued that no reason existed to overturn that precedent. Both briefs concluded with an argument that a “self determination clause” of the West Dakota constitution did not give humans greater rights than corporations; however, the story brief provided additional context for this argument by describing the history surrounding the adoption of that provision. The story brief argued that since the self-determination clause was adopted long after several of the previously cited cases had held that corporations were protected “persons,” the word “people” in the clause should be construed to include corporations.<sup>61</sup>

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<sup>58</sup> I should add here that, within the constraints of attempting to cleanly separate “logos” from “story,” I attempted to write the best briefs I could on each side of the case.

<sup>59</sup> All four briefs used this statement of the issue:

The question certified by this Court is as follows: “Whether Proposition 3, adopted by the voters of Independence County, unconstitutionally deprives corporations of protectable rights under either the First Amendment to the United States Constitution or Article 1, § 6 of the West Dakota Constitution.”

See Chestek, *supra* n. 39, for the text of the briefs.

<sup>60</sup> Both of the logos briefs cited a few more cases than the corresponding story briefs, but all of the major cases relied upon in the logos briefs were also discussed in the story briefs.

<sup>61</sup> See Petr. Br. 2, at 8–9 (available at <http://ssrn.com/abstract=1421900>).

To minimize the reading that participants would have to complete (in an effort to maximize participation in the study), no appendix or record was included; thus, none of the four briefs included citations to the record.

**C. The test subjects**

Next, I had to recruit participants to my study.

While the principal purpose for this study was to measure the persuasive effect of stories on appellate judges, I was also interested to see if different groups would react in different ways to these briefs. Thus, I recruited not only appellate judges, but appellate law clerks, appellate court staff attorneys, practicing appellate lawyers, and legal writing professors to participate in the study.<sup>62</sup> Initially, 175 participants signed up for the study. My research assistant then randomly assigned each participant to review a pair of briefs for the Petitioner or the Respondent.<sup>63</sup>

Ultimately, 95 participants read the briefs and completed the online survey tool:

**Table 1: Survey Participants**

Category	Number participating
Appellate judges	13
Appellate law clerks	12
Appellate court staff attorneys	8
Appellate practitioners	37
Law professors	25
	<b>TOTAL 95</b>

<sup>62</sup> Judicial participants throughout the country were invited to participate in the survey through an e-mail sent by the Hon. Frank Sullivan of the Indiana Supreme Court, who was serving as chairman of the American Bar Association’s Appellate Judges Conference at the time of the study. Appellate practitioners were invited to participate in the study through a similar e-mail sent to members of the ABA’s Appellate Practice Committee. Law professors were invited to participate through e-mails sent to national listservs for legal writing professors and clinical law professors, as well as a more general listserv for all law professors. (The only law professors who participated, however, were legal writing professors and a few professors who teach both legal writing and live client clinics.) None of the e-mails disclosed the test variable; the announcement seeking participants for this study said:

The 2008 Persuasion Study will ask volunteer appellate judges, appellate law clerks, appellate practitioners and legal writing professors to review two short, one-issue briefs, both arguing the same side of a fictional case in a fictional jurisdiction. The two briefs will be carefully written to make the best possible argument available, but using different persuasive approaches to the case. Participants will then be asked to select which of the two briefs they found more persuasive.

E-mail from Hon. Frank Sullivan to participants announcing 2008 Persuasion Study (copy on file with the author).

<sup>63</sup> Because we had to send the test materials out to each participant, my research assistant handled all of these mailings. She was instructed not to disclose to me, and has not disclosed to me, the identity of any participant. A copy of the instructions she sent to participants and the survey questions can be found at Chestek, *supra* n. 30.

The online survey gathered some basic demographic information about the participants (including gender, the job held by the participant, years of experience in that job, and geographic region). Participants were assigned a random participant number and filled out the online survey using only that number, in order to preserve anonymity of responses.<sup>64</sup>

#### D. The survey questions

The heart of the online survey was a series of simple questions. First, participants were asked, “Which of the two briefs you read was more persuasive for the position being advocated?”<sup>65</sup> Participants were then asked to score, on a scale of 1 to 5 (with 1 being “not very persuasive” and 5 being “very persuasive”), the overall brief, the recitation of the facts, and the argument section.<sup>66</sup>

All participants were sent, by e-mail, the logos and the story briefs on a randomly assigned side of the case. At first, this choice may seem odd, since judges are not typically asked to review two briefs on the same side of a single case. Judges are trained to review briefs from opposing parties and render a judgment based on the quality of the legal arguments made. However, since I had chosen a “hard case” as the subject of this study, I feared that asking the participants to judge briefs on opposite sides of the case would inevitably pollute the data by injecting the merits of the case into the scoring process. Because I was attempting to isolate the story variable, I did not want the participants to base their scoring in any way on which side of the case had the better argument on the law.<sup>67</sup>

The survey went live at the end of January 2009 with the electronic delivery of the test briefs and instructions to all 175 participants. Data collection continued through March.

### III. Survey Results

In some respects, the data revealed what I expected, but there were a few surprises as well. I was not surprised to learn that most readers, including judges, tended to prefer the story briefs; however, I was

64 The study was “double blind,” in that not only were the names of the participants hidden from me, I did not identify myself to participants as the principal investigator. Participants were recruited through a SurveyMonkey website that identified me only as a “professor at a major Midwestern university.”

65 Participants in all categories (judges, clerks, practitioners, and professors) were asked the same question. The “writers” (professors and practitioners) were *not* asked to predict which brief they thought the “readers” (judges and clerks) might prefer.

66 The survey questions can be found at Chestek, *supra* n. 30.

67 See *infra* note 69 and accompanying text for further discussion of this question.

surprised to learn that this preference appeared to become stronger the longer a particular participant had held his or her job.

**A. Overall results**

My first hypothesis was that the story brief would prove to be more persuasive than the pure logos brief. The overall data suggest that hypothesis is correct:

**Table 2: All Participants**

Brief	More persuasive (n)	%
Logos brief	29	30.5%
Story brief	61	64.2%
Neither	5	5.3%
<b>TOTAL</b>	<b>95</b>	<b>100%</b>

My second hypothesis was that the story brief would have a greater impact on the Respondent side of the case, since the law favored Petitioner. Table 3 breaks down the results between Petitioner and Respondent briefs.

**Table 3: Petitioner vs. Respondent**

Brief	More persuasive (n)	%
Respondent briefs		
Logos brief	16	33.3%
Story brief	30	62.5%
Neither	2	4.2%
<b>TOTAL</b>	<b>48</b>	<b>100%</b>
Petitioner briefs		
Logos brief	13	27.7%
Story brief	31	66.0%
Neither	3	6.4%
<b>TOTAL</b>	<b>47</b>	<b>100%</b>

Given the sample size, these results likely fall within the margin of error for this study. In short, my second test hypothesis appears to have been disproven; there was no significant difference between the Respondent briefs and the Petitioner briefs. Storytelling seems to work in all cases, not just hard ones.

## B. Differences by job function

One of the main purposes of this study was to determine, if possible, whether stories persuaded the primary audience for briefs: appellate judges.

Unfortunately, while 23 appellate judges initially registered for the study, only 13 ultimately read the briefs and completed the study. Thus, in an effort to get a larger sample, I initially combined the categories of appellate judges, appellate court staff attorneys, and appellate law clerks into a category of “readers of briefs.” I then compared those results with “writers of briefs” (the appellate practitioners), and the law professor category. These results are displayed in Table 4.

**Table 4: Responses by Participant Group**

Brief	“Readers”	“Writers”	Law Profs.
Logos	12 36.4%	8 21.6%	9 36.0%
Story	19 57.6%	27 73.0%	15 60.0%
Neither	2 6.1%	2 5.4%	1 4.0%
<b>Total</b>	<b>33</b>	<b>37</b>	<b>25</b>

In this grouping, it appeared that the law professors reacted to story in almost exactly the same way that the readers group did. Upon reflection, however, I wondered if the readers group was as homogeneous as I thought. I therefore did another chart, breaking the readers group down into its constituent parts. The results of that analysis are shown in Table 5.

**Table 5: Responses by Participant Type**

Brief	Appellate Judges	Law Clerks	Staff Attorneys	Practitioners	Law Professors
Logos	4 30.8%	6 50.0%	2 25.0%	8 21.6%	9 36.0%
Story	7 53.8%	6 50.0%	6 75.0%	27 73.0%	15 60.0%
Neither	2 15.4%	0 0.0%	0 0.0%	2 5.4%	1 4.0%
<b>Total</b>	<b>13</b>	<b>12</b>	<b>8</b>	<b>37</b>	<b>25</b>

The most interesting difference revealed in Table 5 is the wide discrepancy between law clerks and other “readers” as to how persuasive the logos brief was to them. I will explore this finding in more detail in Part V-B *infra*.

**C. Gender differences**

I was also curious to see if there was any gender-based difference in the responses. Stereotypically, women are perceived to be more emotional; would they respond to the story brief in greater numbers than the male participants? It appears that gender made absolutely no difference; men and women reacted to the briefs in virtually identical ways. Table 6 analyzes all participants by gender.

**Table 6: Gender Differences**

Brief	More persuasive (n)	%
Male participants (n=56)		
Logos Brief	17	30.4%
Story Brief	36	64.3%
Neither	3	5.4%
Female participants (n=39)		
Logos Brief	12	30.8%
Story Brief	25	64.1%
Neither	2	5.2%

**D. Job longevity**

One of the demographic questions asked participants how long they had held their current job. I was curious to see if participants got more jaded over time, favoring pure logic over the “softer” story briefs. Surprisingly, I found the opposite to be true. It appears that the longer one works in a particular job, the more the story of the case is persuasive. Table 7 breaks down the responses by the number of years each participant had held his or her current job.

**Table 7: Responses by Experience in Job**

Brief	0–4 yrs.		5–9 yrs.		10–14 yrs.		15–19 yrs.		20–24 yrs.		25+ yrs.	
Logos	11	45.8%	5	33.3%	4	26.7%	1	10.0%	6	35.3%	2	14.3%
Story	13	54.2%	9	60.0%	9	60.0%	9	90.0%	10	58.8%	11	78.6%
Neither	0	0.0%	1	6.7%	2	13.3%	0	0.0%	1	5.9%	1	7.1%
<b>TOTAL</b>	<b>24</b>		<b>15</b>		<b>15</b>		<b>10</b>		<b>17</b>		<b>14</b>	

Grouping the two ends of the spectrum together reveals an interesting pattern:

**Table 8: Responses by Experience Groups**

Brief	More persuasive (n)	%
0–9 years' experience (n = 39)		
Logos brief	16	41.0%
Story brief	22	56.4%
Neither	1	2.6%
15+ years' experience (n = 41)		
Logos brief	9	22.0%
Story brief	30	73.2%
Neither	2	4.9%

I will also explore this finding in greater detail in part V–B, below.

#### **IV. How Reliable Are the Data?**

Before we can evaluate the data, several questions need to be addressed. First, does the survey tool really measure what it claims to measure? Second, was the test itself free from bias? Third, was the sample collected representative of the universe the test sought to study?

##### **A. Does the survey tool accurately measure the intended variable?**

Do the test briefs in this study really measure the persuasive impact of story reasoning? Given the complexity of the effect sought to be measured (what is “persuasive”), it is probably impossible for the briefs, which were themselves complex documents, to cleanly separate “story” from “logic.” But many of the comments left by the survey participants in the final, open-ended “comment” field suggest that the participants were in fact reacting to that variable (or, at least, were reacting to the things I intentionally did to try to isolate those two strands).

The most common theme throughout the responses was that the background information, or context, either distracted the reader or (more often) helped the reader gain perspective on the legal question presented to the court. (The story of the case, of course, is primarily told through those background details; stated otherwise, the context tells the story.) Here is a sampling of some of those comments:

*From participants favoring the story brief*

- [The story brief] worked much better because it provided context to the legal arguments.
- The [story] brief was more persuasive because it provided a far better factual context within which to consider the legal arguments.
- [The logos brief] was reasoned well, but it included no persuasive principles, like ethos and pathos. [The story brief] made the reader aware of the Petitioner's business and, despite being a large corporation, personified it and made the reader sympathize with it.
- The author of [the story brief] provided a much stronger statement of facts by setting the dispute in a broader context and portraying opponents as not driven by any principle. The statement of facts in [the logos brief], although accurate, seemed to forgo the opportunity to define the field on which the parties would battle and, by doing so, essentially allowed the opposing party to do the defining.
- The recitation of facts in [the story brief] helped tremendously in placing petitioner's argument in context.
- [The logos brief] did not personalize the situation for the corporation; [the story brief] did that well. By the end of the facts section, I was predisposed to favor the corporation. . . . [The logos brief] did not seem to have any sense of the big picture. [The story brief] took a much more expansive view and, thus, was more eloquent in every section.
- [The story brief] told a better story, framing the issue in a more colorful way, thus providing better context for the dispute. It gave more detailed information and background, which gave me the context I needed.
- I thought the two briefs were interesting representatives of opposite ends of a spectrum. [The logos brief] lacked any sort of context, while [the story brief] had too much. A happy medium would have been better.
- [The logos brief] did not put the issues in context. [The story brief] provided a story that supported the legal arguments.

*From participants favoring the logos brief*

- [The story brief] included irrelevant facts in the facts section, which hurts its credibility. Its introduction section was too argumentative and not adequately focused on the issue at hand.



- [The logos brief] was cut-to-the-chase and no-nonsense with the argument stated clearly. [The story brief] used more flowery language. . . .
- I found the length and level of detail of the fact section in [the story brief] to be annoying because it seemed that the case should be decided on the law, not the facts. Indeed, the argument section in [the story brief] didn't appear to use a lot of the facts provided, confirming that there [sic] inclusion was unnecessary.
- The goal of appellate courts is to consider and to decide specific questions of law. [The story brief] speaks in very expansive terms of the general issues in this case, including environmental issues, and in so doing distracts from the specific issue of law that is to be argued.
- The almost wholly irrelevant statement of facts, and consistent[ly] irrelevant rhetoric of [the story brief] was off-putting. It was realistically representative of briefs that obscure questions of law under emotional grandstanding.[The logos brief] was concise and to the point. [The story brief] seemed to bury the material facts and legal argument in extraneous background facts, which I found ineffective and distracting.

These comments seem to confirm that many readers were in fact reacting to the story elements I intentionally included in the story briefs.

### **B. Were the test briefs unintentionally biased in favor of story?**

This question is complex and perhaps not susceptible to a definitive answer. As I noted above, in writing the test briefs I tried to create a fair test; that is, I attempted to write the best briefs I could by sticking faithfully to the definitions of “story” and “information-based narrative” described above.<sup>68</sup>

One way of determining whether there was a built-in, unintentional bias in the test would be to look at the numerical scores assigned to the briefs by the participants. If the logos briefs were of significantly lower quality, then those numerical scores would likely be significantly lower than the scores of the story briefs.

Participants were asked to score each brief on a scale of 1 to 5, with 1 being “not very persuasive” and 5 being “very persuasive.” Table 9 shows the average overall scores for each pair of briefs, as well as a combined total.

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<sup>68</sup> See *supra* notes 58–61 and accompanying text.

**Table 9: Average Overall Brief Scores**

Brief	Petitioner	Respondent	Both
Logos	3.44	2.65	3.05
Story	4.10	3.34	3.73
Diff.	0.66	0.69	0.68

As this table demonstrates, the average difference in score between the logos and story briefs was less than a single point. The combined score for all logos briefs was 3.05, or “neutral” on the five-point scale; had the survey participants thought the briefs to be badly written or useless, one would have expected an average score below 3 for the logos briefs.<sup>69</sup>

Another way of looking at this would be to measure the relative strength of the reactions to the briefs by those who preferred the logos brief compared with those who preferred the story brief. Table 10 compares these reactions:

**Table 10: Average Brief Scores by Preference**

Brief	Preferred Logos	Preferred Story
Logos	4.04	2.62
Story	2.87	4.18
Diff.	1.17	1.56

It appears that a participant’s strength of preference was comparable regardless of whether one preferred the logos or the story brief, although those who preferred the story brief seemed to have a slightly stronger preference than those who preferred logos. But most significantly, the participants who indicated a preference for one of the briefs rated their favored brief, on average, just above 4, and the difference between those preferences (4.04 compared to 4.18) was small. If there had been an unintentional bias built into the test, one might have expected the quality ranking of the logos briefs to be significantly lower than that of the story briefs.

It is also instructive to examine individual responses to each pair of briefs. I examined each survey response and calculated the absolute value

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<sup>69</sup> The fact that the Respondent briefs were scored significantly lower than the Petitioner pair likely reflects the fact that the Respondent had the “hard case” to make; that is to say, participants felt the briefs attempting to enforce *stare decisis* were more persuasive than the briefs seeking to overturn long-standing precedent. This seems to bear out my fear, discussed in the text accompanying *supra* note 67, that asking participants to evaluate matched pairs of petitioner and respondent briefs would have injected the merits of the case as an uncontrolled variable in the readers’ evaluations.

of the difference in scores between the two briefs the participant read. By doing so, I sought to determine the strength of each individual participant's reaction to the briefs. Because the scoring scale was a range from 1 to 5, the highest possible differential (4) would suggest that the participant had a very strong preference for one brief over the other, while the lowest possible differential (0) would indicate that the participant had no preference between the two briefs. The median absolute value of the differential between the two briefs proved to be 1, regardless of whether the participant was reviewing the Petitioner or Respondent pair. This analysis also indicates that most participants felt the two briefs were fairly even, and their preferences for one or the other were not strong.<sup>70</sup>

While none of this proves that the test instrument was unbiased, the consistency of the scoring of the Petitioner and Respondent briefs, as well as the relatively weak preferences expressed for one brief over the other, gives me some confidence that the briefs did accomplish the goal of presenting the best briefs possible within the design parameters.

### **C. Was the participant sample representative?**

Because the study relied on self-selected volunteers, another possible objection might be that the pool of participants was unrepresentative. If the pool was unrepresentative, the question then arises whether the skew in the sample introduced some sort of bias in the results.

It is impossible to determine whether a sample is representative of the entire universe of possible test subjects without knowing the demographic makeup of that universe. And, in this case, it is difficult to know much about that universe. Because the main focus of the study was how appellate judges reacted to the two different briefs, I asked my research assistant to visit the websites of all of the appellate courts in all 50 states and for all federal appeals courts. She was able to gather the names, locations, and (in most cases) the genders of the "universe" comprising all appellate court judges or justices in the United States. She counted 1,480 appellate judges in all state and federal appellate courts as of June 2008. Her findings are reported in Table 11:

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<sup>70</sup> Only one participant out of 95 rated one brief as a "1" and the other as a "5" (creating the maximum differential of 4). Fifty-four of the 95 participants rated the difference between the two briefs as either zero or 1.

**Table 11: Demographic Makeup of U.S. Appellate Courts<sup>71</sup>**

Criterion	(n) Judges	% of Total
<b>Gender</b>		
Male	985	66.6%
Female	495	33.4%
<b>TOTAL</b>	<b>1480</b>	<b>100%</b>
<b>Regional Distribution</b>		
Region 1 (Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands)	248	16.8%
Region 2 (Alabama, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Tennessee, Virginia, West Virginia)	335	22.6%
Region 3 (Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin)	338	22.8%
Region 4 (Arkansas, Colorado, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Texas, Utah)	295	19.9%
Region 5 (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington, Wyoming)	264	17.8%
<b>TOTAL</b>	<b>1480</b>	<b>100%</b>

This chart shows the number of judges in each category, as well as the percentage that number represents of the whole of each category. If the sample of judges was perfectly representative of this universe, one would expect the sample to reflect nearly the same percentages.

It appears that the sample actually gathered is not representative of the whole universe, at least on the criteria of gender and region. Of the 13 judges who responded, only 2, or 15.4%, were female (compared to a total universe of 33.4% female). However, because the overall data strongly suggest that gender does not matter,<sup>72</sup> it is possible that this variance did not produce any significant bias in the results.<sup>73</sup>

<sup>71</sup>The regions described below were based upon combinations of the geographic coverage of the various circuits of the United States Courts of Appeals.

<sup>72</sup> See Table 6 and accompanying text, *supra*.

<sup>73</sup> Bias would result if it could be shown that the two female judges who responded to the survey were unrepresentative of the larger population of females who responded to the survey. The two female judges disagreed as to whether Brief 1 or Brief 2 was more persuasive. If one eliminates those two responses from the universe of 95 responses, the percentage hardly changes. Overall, survey participants favored the story brief by a margin of 64.2% to 30.5%; excluding the two female judges changes that ratio only to 64.5% to 30.1%.

The regional breakdown of the participants likewise was unrepresentative of the total universe. Seven of the 13 judicial participants were from Region 3, representing 53.8% of all participants (compared to a total universe of 22.8% from that region). That anomaly is likely related to the fact that the principal means of recruiting judicial participants was an e-mail to the American Bar Association's e-mail list for appellate judges, sent by the chair of the ABA's Appellate Judges Conference, Justice Frank Sullivan of the Indiana Supreme Court. (Indiana is in Region 3.)

The effect, if any, of this overrepresentation of Region 3 is hard to determine. The seven responding judges from that region split evenly between the two briefs: three favored the logos brief, three favored the story brief and one said they were equal. The six judges from the other regions broke heavily for the story brief: one favored the logos brief, four favored the story brief and one said they were equal. Given the small sample size, it is probably impossible to tell whether the Region 3 judges or the other judges are more representative of the entire universe of judges. It is safe to say, however, that any bias that results from the overinclusion of Region 3 judges in the sample appears to be in favor of the logos brief. (Or, stated conversely, it is possible that judges generally prefer the story brief more strongly than this sample would suggest.)

The fact that the other groups in the study also favored the story brief gives me some comfort that the results from the judges are accurate. As noted in Table 5, above, 73% of the 37 appellate lawyers who participated in the study found the story brief more persuasive.<sup>74</sup> Because presumably most appellate judges have had previous job experience as appellate attorneys, the finding that appellate judges also prefer the story briefs is not surprising.

As for the other groups of participants, there is no readily ascertainable data as to how many lawyers consider themselves to be appellate lawyers, nor what their gender and regional makeup would be; the same is true for the other categories. It is thus impossible to determine whether those samples are representative of those groups.

## V. Some Preliminary Conclusions

So what do the data reveal?

Given the relatively small sample size, especially in some groups, it is hard to draw many general conclusions with confidence. However, the data do suggest some preliminary conclusions; hopefully, future studies will help to verify (or not) the following findings.

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<sup>74</sup> See Table 5, *supra*. Note also that 75% of the appellate court staff attorneys also rated the story brief as more persuasive.

### A. Overall results

All responses together indicate that the story briefs were more persuasive. While the appellate judges in the sample tended to prefer the story briefs, this result was even more pronounced among appellate practitioners. This response is not surprising; appellate practitioners are the participants who know the story of their clients most intimately, and therefore they are the people most likely to understand (and respond to) the power of story. The data also suggest, however, that advocates should be cautious in this endeavor; many of the comments from participants (especially those from law clerks and judges) suggested that overly long briefs and “irrelevant details” were distracting and ultimately counterproductive.<sup>75</sup>

Gender appears not to matter at all, but experience seems to. The longer a participant has been in his or her current job, the more it appears that the story brief was persuasive.

### B. Experience-based differences

Perhaps the most surprising finding of this study was that participants with less job experience (especially including law clerks) tended to rate the logos brief more highly than more experienced participants did. It is interesting to consider why experience matters.

Part of the phenomenon might be explained by the fact that the group of participants with less than five years’ experience in their jobs was the group that found the logos brief the most persuasive (more than 45% of that group preferred the logos brief). Of the 24 participants with less than five years’ experience in their jobs, nine were law clerks, who as a group preferred the logos and story briefs equally. (The law clerks were the only group that did not express an overall preference for the story brief.)

There are probably many possible explanations for why law clerks scored the logos briefs higher than any other group. Two that come to mind are these: First, law schools tend to teach that “thinking like a lawyer” means breaking a fact pattern into small, abstract pieces, applying logical rules to those fragments, and then reasoning your way to a conclusion through syllogisms, analogies, or other logical processes.<sup>76</sup> Very few courses in a typical law school curriculum focus on the more

<sup>75</sup> One appellate judge commented that the story brief “spent too much time on irrelevant [sic] background.” More interestingly, five of the six law clerks who judged the logos brief as more persuasive wrote comments explaining why they preferred that brief; four of those five said the logos brief was more concise and/or that the story brief contained too many irrelevant details. See also sampling of comments who favored the logos brief in Part IV–A, *supra*.

<sup>76</sup> The Carnegie Foundation report on legal education describes the nearly ubiquitous case method of instruction as the “signature pedagogy” of law schools. The “deep structure” of that pedagogy, the authors conclude, “is that ‘thinking like a lawyer’ is about processes of analytic reasoning.” Sullivan, *supra* n. 23, at 50–54. The authors also report that one of the students they interviewed identified “formally structured arguments” as the key to “thinking like a lawyer.” *Id.* at 40–41.

human, emotional content of problem solving. Law students, in short, are primarily trained in logos,<sup>77</sup> and not as much in story.

Another plausible explanation may be that law clerks are reading the briefs with a different purpose in mind. Law clerks are not the readers who must be persuaded; the judges are. Law clerks may tend to view their job as helping their judge find the relevant rules of law; thus, briefs that focus more on the law (rather than the story) are more useful for that purpose.<sup>78</sup>

If the latter explanation is correct, one might expect that the nine law clerks in the group of 24 who fell into the “less than five years’ experience” category might have favored the logos brief at a higher rate than the 15 who were not law clerks. However, that proved not to be the case. The nine law clerks in that group favored the story brief by a five-to-four margin (a statistical tie), while the other fifteen participants favored the story brief by an eight-to-seven margin (likewise a statistical tie).<sup>79</sup>

Comparing the median job experience for each group with the level of support for the logos brief also reveals an interesting pattern. Table 12 lists all five groups, in ascending order of the median experience<sup>80</sup> in the job represented in the sample for that group. The third column shows the level of support each group reported for the logos brief. It reveals a nearly

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**77** Judge Richard Posner has talked about the “excessively rhetorical emphasis of legal education.” Posner, *The Role of the Judge in the Twenty-First Century*, 86 Boston L. Rev. 1049, 1049 (2006); see also Posner, *How Judges Think*, *supra* n. 15, at 219 (“The academic emphasis on the formal grounds of a decision conveys to law students and the bar the impression that every judge is a thoroughgoing legalist who can therefore be ‘reached’ only by ceaseless iteration of legalist slogans such as ‘plain meaning’ and by barrages of case citations.”); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17, 41 (2008) (“casebook classes and appellate judges focus on logos, whereas clinics—and actual law practice—focus on all three aspects of persuasion [logos, pathos and ethos.]”); Stacy Caplow, *Putting the “I” in Writing: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 Leg. Writing 249, 259 (“Logos is the process of using logic and reason to persuade. It is the most familiar approach for lawyers whose training prepares them to routinely argue about rules and policies and to draw inferences by analogy”); Marjorie L. Silver, *Emotional Intelligence and Legal Education*, 5 Psychol. Pub. Policy & L. 1173, 1192–93 (1999) (arguing that overemphasis of the Socratic method “alienates students from the people-centered reality of everyday law practice,” and that law schools should do more to develop the emotional intelligences of their students).

**78** When I presented a preliminary version of this article at a faculty colloquium, two of the professors in the audience were former appellate court clerks. They suggested that the clerks who responded to the survey may have had differing reactions to the briefs depending upon their relationship with their judge. One of the professors said that his judge typically read the briefs and made his initial judgment, and then assigned the clerk to assist in writing the judge’s opinion. The other professor said her judge liked to get the clerks involved with the case before rendering his decision, so that he could talk out alternatives while reaching his decision. In the former case, the brief became merely a repository of legal rules, so the clerk would likely view the brief more as a reference to find the law. In the latter case, the brief’s persuasive content (including the story) might be more important to the clerk reading the brief.

**79** There were also three “appellate court staff attorneys” in the 0–4 years’ experience group. If one groups those responses with the law clerks, the law clerk/appellate court staff attorneys split 6–6 between the logos and the story briefs, while the rest of that group (one judge, three practitioners and eight professors) favored the story brief by a 7–5 margin, still a statistical tie.

**80** The survey tool asked participants to place themselves within categories setting a five-year range for length of tenure in their current job, rather than asking them to state the precise number of years the participant had held the job. Thus, the second column of Table 12 shows the median range of experience reported by the participants, rather than the median years of experience.

perfect inversion: the more job experience one has, the less likely one was to find the logos brief more persuasive.<sup>81</sup>

**Table 12: Comparison of Median Range of Experience to Preference for Logos Brief**

Group	Median exp.	% Favoring Logos
Law clerks	0–4 years	50%
Law professors	5–9 years	33.3%
Court staff attorneys	10–14 years	25%
Appellate judges	15–19 years	30.8%
Appellate practitioners	20–24 years	21.6%

All of this suggests that lawyers who have most recently graduated from law school are likely to be more persuaded by logical argumentation, since they think that’s what “thinking like a lawyer” means.<sup>82</sup> As lawyers gain experience, however, the story becomes more persuasive. It is not clear, however, why this is true. Perhaps it is because “the law” becomes familiar and the stories become the “new” information that is interesting and engages the attention of the reader. Or perhaps it is related to the fact that emotional reasoning (the “story strand” of our DNA molecule) evolved in the human brain long before logical reasoning.<sup>83</sup> Perhaps as we mature, we learn to trust our emotional reasoning processes more.

This experience-based preference for story has implications for law school pedagogy, which tends to focus to a high degree on logical reasoning almost to the exclusion of emotional reasoning. The traditional law school curriculum has recently come under close scrutiny in two separate reports: the Carnegie Foundation’s 2007 report *Educating Lawyers: Preparation for the Profession of Law*,<sup>84</sup> and the Clinical Legal Education Association’s report that same year, *Best Practices for Legal Education*.<sup>85</sup> Both of these studies, as well as a number of commentators,<sup>86</sup> suggest that law schools should re-evaluate the traditional focus on legal

<sup>81</sup> The appellate court staff attorneys and the appellate judges rank third and fourth, respectively, in terms of median experience in their jobs, and fourth and third, respectively, in their level of support for the logos brief. The other three groups fit the pattern perfectly.

<sup>82</sup> Note that the law professor group gave the logos brief the second highest ranking among all five groups. See Table 12, *supra*.

<sup>83</sup> Jonah Lehrer, *How We Decide* 24–25 (Houghton Mifflin Harcourt 2009).

<sup>84</sup> Sullivan, *supra* n. 23.

<sup>85</sup> Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* (Clin. Leg. Educ. Assn. 2007).

<sup>86</sup> See e.g. Kathryn Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 Harv. Civ. Rights.–Civ. Liberties L. Rev. 611 (2008); David I. C. Thomson, *Law School 2.0: Legal Education for a Digital Age* 22 (LexisNexis 2009) (“The students of the future will need to know not just how to ‘think like a lawyer’—the traditional pedagogical goal—but how to ‘act and be a lawyer.’”).



theory and increase training in legal skills. A full examination of this question is beyond the scope of this article, although I will observe that changes are starting to happen.<sup>87</sup>

### C. Where do we go from here?

The lesson of my study seems to be that judges are not likely to be persuaded by logic alone; the stories behind the legal dispute in my test briefs captured their attention and helped persuade them, regardless of which side of the case they were randomly assigned to. The data also suggest that as lawyers gain work experience (or, alternatively, as they gain distance from their law school training), the power of stories only grows. These findings have implications not only for how practitioners should write their briefs, but also for how law professors should think about, and teach, persuasion.

I have not attempted to address here the question of how stories work. It seems likely that the reason involves cognitive science and neurobiology, and the way that a human's "emotional brain" informs the "logical brain" in the decision-making process.<sup>88</sup> However, I leave a fuller exploration of that subject to others.<sup>89</sup>

Likewise, I have not attempted to address the normative question of whether stories should work. As the reference to the role of empathy in judicial decision making at the beginning of this article suggests, this is a matter of some controversy: some judges (and perhaps politicians?) seem to believe that the law is all about logic and rules, and would therefore

<sup>87</sup> See generally Thomson, *supra* n. 86. The emergence of the Applied Legal Storytelling conferences, described in note 89, *infra*, and the scholarship that movement has spawned, is another example of how studies of real-world lawyering are beginning to inform classroom teaching around the country. See Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 Leg. Writing 3 (2008); Foley, *supra* n. 77.

<sup>88</sup> See generally Damasio, *supra* n. 4.

<sup>89</sup> The examination of the role of stories in legal reasoning has gained significant scholarly attention in the last 20 years. See e.g. Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 Vt. L. Rev. 565 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807 (1993); Jane B. Baron, *Resistance to Stories*, 67 S. Cal. L. Rev. 255 (1994).

Two conferences devoted to the emerging field of Applied Legal Storytelling have recently been held: the first at the City University of London in July 2007, see generally volume 14 of the *Journal of the Legal Writing Institute*, which published several articles arising from presentations at that conference, and the second at the Lewis & Clark Law School, Portland, Oregon, in June 2009. Both of these conferences brought together a mix of traditional casebook, clinical, and legal writing faculty from around the world to discuss the role of stories in legal practice.

In addition, legal scholars are starting to examine the neuroscience of how persuasion works. In particular, Professor Kathryn M. Stanchi of Temple University has written several excellent articles on this subject. See e.g. Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 Mich. St. L. Rev. 411; Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 Rutgers L. Rev. 381 (2008); Kathryn M. Stanchi, *The Persuasive Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader* (manuscript on file with the author). See also Ruth Anne Robbins & Steve Johansen, Presentation, *This is your Brain on Stories* (Applied Legal Storytelling Conference, Chapter Two: Once Upon a Legal Story, Portland, OR, July 23, 2009) (video available at <http://lawmedia.lclark.edu/LawMedia/SilverlightPlayer/Default.aspx?peid=a07a027332ee44f2b2109cc3c2eece1c>).

deny any role for the “story” of a case (i.e., the human context and the goals of the litigants) in rendering a decision. These critics may worry that accepting the fact that stories persuade judges is a significant step down the road toward the rule of men rather than the rule of law.<sup>90</sup> They may claim that allowing or encouraging judges to respond to stories will give license to judges to indulge their personal ideological preferences and predispositions. They may reason that to preserve uniformity, consistency, and fairness, judges should disregard the “story,” and rule based only upon logic and legal reasoning.

Much has been written about this topic, and much more remains to be written. For my part, I would observe first that pure “legal reasoning” can go only so far; some judicial decisions require a very fact-specific inquiry.<sup>91</sup> (For example, virtually all rules of “law” that require the application of a balancing test require judges to weigh different factors, a process that does not lend itself well to formulaic and rigid “logical” rules.<sup>92</sup>) Second, such an argument assumes that “stories” somehow trigger inappropriate political or ideological responses in the reader. However, recall the definition of story that I propose brief writers should employ: “a detailed, character-based narration of a character’s struggles to overcome

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<sup>90</sup> The familiar concept that the judicial system should strive for the “rule of law” rather than the “rule of man” is often attributed to Aristotle. See e.g. Eric G. Zahnd, *The Application of Universal Laws To Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 L. & Contemp. Probs. 263, 266 (1996) (quoting Aristotle, *Nicomachean Ethics* vol. V, 1129019–25 (Terence Irwin trans., 1985)).

<sup>91</sup> Indeed, Aristotle himself seems to acknowledge that there are some things that judges must decide which cannot be decided by strict resort to legal doctrine:

And at this day there are magistrates, for example judges, who have authority to decide some matters which the law is unable to determine, since no one doubts that the law would command and decide in the best manner whatever it could. But some things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decision of such matters must be left to man, but it is argued that there should be many judges, and not one only.

Aristotle, *Politics*, in *Great Books of the Western World* vol. 9, 485–486 (Robert Maynard Hutchins ed., Benjamin Jowett trans., William Benton 1952).

Aristotle expanded on this concept in his *Nicomachean Ethics*:

The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed.

Aristotle, *Nicomachean Ethics*, in *Great Books of the Western World* vol. 9, 23–24 (Robert Maynard Hutchins ed., W.D. Ross trans., William Benton 1952).

<sup>92</sup> See text accompanying *supra* n. 20.

obstacles and reach an important goal.”<sup>93</sup> There is nothing inherently political<sup>94</sup> or ideological about that definition. Characters of all political stripes struggle to overcome obstacles, and the obstacles can be of any nature. In fact, this definition of a story talks about story structure, not story content.<sup>95</sup>

Kendall Haven, who authored the definition of story that I have used here, contends that the principal benefit of a “good story” is that it commands the listener’s (or reader’s) attention.<sup>96</sup> (As I routinely tell my students as they begin to write their appellate briefs, it is impossible to persuade a judge who is asleep.) Stories also provide the structure that helps listeners remember a story longer than they would remember a less-structured narrative.<sup>97</sup> In addition, stories improve logical thinking.<sup>98</sup> All of these things are important aids to how judges receive and process a lawyer’s arguments on behalf of a client, and they are value-neutral.

This is why I agree with Scalia and Garner’s suggestion that it is permissible to include some legally irrelevant, yet emotionally suggestive, facts in an appellate brief.<sup>99</sup> Stories rely on such facts. The writer’s goal in an appellate brief is to persuade. Persuasion is best when it comes from within.<sup>100</sup> A writer cannot tell somebody how to feel, but if a feeling arises within a reader, apparently “unbidden,” then the reader will perceive it as “real” and inherently believable. If those feelings then form the basis for the “first impression” as to how the case should come out, the writer has created a condition in which persuasion is possible. The writer’s job, therefore, is to tell the client’s story in such a way that these feelings are likely to emerge from within the reader, from that reader’s “deep frame.” If, however, the writer uses highly charged, emotional prose, the reader will see what the writer is up to, will feel manipulated, and will resist.<sup>101</sup> As Scalia and Garner suggest, that can provoke “a nasty backlash” against the writer.<sup>102</sup>

Focusing on the story of the case is the most likely route to finding that sweet spot where a deep frame is activated (becoming the foundation

<sup>93</sup> See *supra* n. 32 and accompanying text.

<sup>94</sup> By this I mean “political” in the traditional sense of “liberal” or “conservative” biases (or any other axis one might choose). Stories often are “political” in the sense that they can be used for political purposes; I merely mean to suggest that they are not political because both sides of any divide can equally use stories to make whatever points they choose to make.

<sup>95</sup> “Story is a way of *structuring* information, a system of informational elements that most effectively create the essential context and relevance that engage receivers and enhance memory and the creation of meaning.” Haven, *supra* n. 10, at 15.

<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Id.* at 69–72.

<sup>98</sup> *Id.* at 98–104.

<sup>99</sup> Scalia & Garner, *supra* n. 12, at 32 and 94.

<sup>100</sup> “People value their own conclusions more highly than yours. They will only have faith in a story that has become real for them personally.” Simmons, *supra* n. 32, at 3.

<sup>101</sup> See *id.* at 4 (“Frankly, manipulation is an inferior method of influence.”).

<sup>102</sup> Scalia & Garner, *supra* n. 12, at 32.

of persuasion) without being so obvious that the reader's natural defenses are triggered. Stories are natural; they are the way humans have communicated and learned for thousands of years. And, as my study suggests, stories work.

