Judging By the Numbers: An Empirical Study of the Power of Story

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ABSTRACT: The recent debate about whether “empathy” is a desirable trait in Supreme Court Justices begs a more fundamental question: are appellate court judges in fact persuaded by appeals to pathos? This article attempts to answer that question by reporting the results of an empirical study the author conducted that investigates whether narrative reasoning, or “stories,” are persuasive to appellate judges. It is the first rigorous study to ever confront this issue directly. The article first describes how the author wrote four test briefs, two on each side of a hypothetical lawsuit. One brief on each side was written as a “pure logic” brief, while the other brief on each side made the same logical argument but also included a great deal more context and interesting, but legally irrelevant, background details to tell a more complete story. Groups of appellate judges, law clerks, appellate court staff attorneys, practicing lawyers and law professors were then asked to read two briefs on a randomly-assigned side of the case (either Petitioner or Respondent), and then report which of the two briefs was more persuasive.

The key findings of the study were that appellate judges, along with most other groups, indeed found the “story” briefs more persuasive. The exception was the law clerk group, which found the logic and the story briefs equally persuasive. The author then speculates as to why the clerks reacted differently, and considers the implications of this finding on law school curricula.

ARTICLE:

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

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1Clinical Professor of Law, Indiana University School of Law—Indianapolis. This article is based on a presentation that the author made to the Once Upon a Legal Story (Chapter Two) conference held at Lewis and 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 Profs. 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 combined Indiana Supreme Court and Court of Appeals, who invited me to describe this study at a joint work session in April, 2008; their input was extremely helpful. The Appellate Practice Committee of the Section of Litigation of the American Bar Association also invited me to address their breakfast meeting at the August, 2008 Annual Meeting of the ABA in New York City; the lively discussion which followed was also of great assistance in designing the study and shaping the briefs. I also wish to thank Profs. 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, OR and who provided me with a great deal of help in rethinking and restructuring this article; the faculties at Indiana University School of Law—Indianapolis and the Lewis and Clark School of Law for providing valuable input after faculty colloquia; and Prof. Kathy Stanchi of Temple University for her 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).
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 Obama²

[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 Sessions³

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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 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.” But does this claim 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 by comparing it to their own perceptions, which are shaped by their personal experiences. A more productive discussion, therefore, might begin from acknowledging that fact, and then studying how those experiences might (or might not) inform the neutral application of legal principles to result in a just decision.

The role of empathy, or emotional reasoning, in judicial thinking is a controversial question. But before one can fully address the proper role, if any for emotional reasoning in

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4“Senator Orrin G. Hatch, Republican of Utah, for example, called empathy a ‘code’ for liberal activism, in contrast to a judge who is impartially ‘fair to the rich, the poor, the weak, the strong’ alike.” Id. The subsequent nomination and debate over the confirmation of Judge Sonia Sotomayor continued in the same vein; see remarks of Sen. Sessions, supra note 3. But cf. Benjamin E. Bratman, A Defense of Sotomayor’s “Wise Latina” Remark - with No Rewording Required, http://writ.news.findlaw.com/commentary/20090717_bratman.html (Last visited Aug. 2, 2009) (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).

5See, e.g., Antonio Damasio, DESCARTES’ ERROR 96-97 (Penguin Books 1994), at 96-97; George Lakoff, WHOSE FREEDOM? THE BATTLE OVER AMERICA’S MOST IMPORTANT IDEA 16 (Farrar, Straus and Giroux 2006), at 16 (describing how a concept he describes as “deep frames . . . define the range within which your ‘free will’ operates. You can’t will something that is outside of your capacity to imagine. . . . Free will is thus . . . radically constrained by the frames and metaphors shaping your brain and limiting how you see the world.”)

6Classical rhetoricians would refer to this as an “appeal to pathos.”
judging, several preliminary questions need to be examined. First, are judges actually influenced by pathos-based appeals? And second, 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, or “narrative reasoning” as some have described it, work because they allow the reader to imagine for themselves how the protagonist might be feeling, and relate that feeling to the reader’s own experiences.

This article focuses on the question of whether appellate judges are actually influenced by the stories of the litigants that 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 weaving a pathos-based appeal in the form of a story 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 or not appellate judges find story argumentation persuasive; Part III will present the results of the study. In Part IV, I deal with 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;


8Anthony G. Amsterdam & Jerome Bruner, MINDING THE LAW 30-31 (Harvard Univ. Press 2000) 30-31 (arguing that humans are predisposed to use narrative structure to construct meaning out of the events of every day life); Michael J. Higdon, Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative, [forthcoming in ??], at [manuscript pp. 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).
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 responses within the reader or listener that can open the
pathway to persuasion.

I. The DNA Model for Persuasive Writing

Stories have gotten a bum rap. Most people think of “stories” as entertaining works
of fiction,\textsuperscript{9} lies or falsehoods.\textsuperscript{10} 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 learn to tell stories to each other.\textsuperscript{11} 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 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 that emotional appeal has any place in appellate

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\textsuperscript{9}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. [sic] 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

\textsuperscript{10}“6: fib, lie falsehood.” \textit{Id}.

\textsuperscript{11}Storyteller Kendall Haven claims that stories even predate language. Kendall Haven, \textit{Story
advocacy. The rule of law, they may claim, requires logical arguments, clearly and neutrally applied. For example, Justice Antonin Scalia and Professor 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.” 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.” Senior Judge Ruggero J. Aldisert writes that a brief is “nothing more or less than an expanded categorical syllogism . . .”

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

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12 Some United States Senators apparently agree; see supra notes 3-4 (comments of Sens. Jeff Sessions and Orrin Hatch).


14 Id. at 41. To be fair, Scalia and 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 heartstring. It can have a nasty backlash.

15 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 bureaucratese.” Id. at 165. He also devotes a few paragraphs advising lawyers to “tell a story in the facts sections of briefs.” Id. at 168.
My claim in this article (as I have made elsewhere16), is that logic alone is not the best method of persuasion. Rather, a sound legal argument combined with a strong story will be more persuasive than the bare legal argument standing alone. At the trial level, this is certainly true. As Prof. 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.17

The image of a “double helix” DNA molecule provides a useful analogy with which to visualize the persuasive process. In order to insure that decisions are based upon neutral principles, evenly and predictably applied to any set of facts, the law requires a strictly


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.

logical component; call that the “logos strand” of the double helix. But pure logic is insufficient in many types of decisionmaking, even at the appellate level. For example, sometimes the legislature enacts a statute which gives the courts wide discretion to decide cases, because the possible range of human conduct which might fall within the scope of the statute is too vast for a legislative body to anticipate. In other situations, the courts have developed (either as part of the common law or in response to a broad grant of discretion in interpreting statutory or constitutional law) balancing tests, which require judges to weigh various factors before rendering judgment. In these situations, logic alone is insufficient. (How much “weight” does a judge give to the privacy interest of a criminal defendant in determining the reasonableness of a search of his home, for example?) In such cases, it seems that another form of reasoning must join with the purely logical application of rules in order 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.” This becomes the second strand of the DNA

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18 The law abounds with examples of subjective tests that require consideration of more than just logical data. 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). Likewise, employment discrimination cases 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 note 4. For one more example, while the Sherman Antitrust Act criminalizes the act of “monopoliz[ing]” or “attem[pt]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).

19 See, e.g., Pickering v. Board of Education, 391 U.S. 563 (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).

20 Others have referred to this type of reasoning as “narrative rationality” (Rideout, supra note 17) or “narrative reasoning;” Edwards, supra note 7, at 9-10. Edwards describes “narrative reasoning” as
molecule. My hypothesis is that a brief which relies purely on a logos-based argument will be lifeless, just as a single strand of the DNA molecule is incomplete. Weaving in a solid story-based argument will bring the brief to life.\textsuperscript{21}

Unfortunately, current legal scholarship is somewhat ambivalent about this claim. Many scholars and practitioners agree that briefs should tell a story.\textsuperscript{22} However, judges “evaluat[ing] a litigant’s story against cultural narratives and the moral values and themes these narratives encode.” \textit{Id.} at 11.

I choose the term “story reasoning” because it helps to distinguish “story” from non-story “information-based narratives” (see infra note 31 and accompanying discussion); however, my concept of “story reasoning” is co-extensive with the concepts of “narrative rationality” or “narrative reasoning” described above.

\textsuperscript{21}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 which 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.) Sullivan et al., \textsc{Educating Lawyers: Preparation for the Profession of Law} (John Wiley & Sons, Inc. 2007), at [Kindle location 427].

don’t unanimously agree. Some judges suggest that the key to persuasion is good logical argumentation;\textsuperscript{23} others admit that telling a good story is also helpful (although most suggest that the “story” is told only in the fact section).\textsuperscript{24}

II. \textbf{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.”\textsuperscript{25} Several other studies focused on what judges think of the quality of the briefs they read.\textsuperscript{26} But no studies have attempted to systematically measure the effect of story reasoning on a judge’s thought process.

\textsuperscript{23}See supra notes 13 and 15 and accompanying text.

\textsuperscript{24}Aldisert, supra note 15, at 168; Jacques L. Wiener, \textit{Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit}, 70 TUL. L. REV. 187 (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, \textit{19 Tips From 19 Years on the Appellate Bench}, 1 J. APP. PRACTICE AND 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, \textit{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, \textit{except} as it applies to a particular set of facts.”)

\textsuperscript{25}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, \textit{Judges on Briefing: A National Survey}, 8 SCRIBES J. LEG. WRITING 1 (2002).

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, 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) 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. The definition that I used for this study is one crafted by professional storyteller Kendall Haven:  

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27I 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 note 15, at 5.

28The instructions sent to all participants said only that “This study is an attempt to measure empirically what technique or techniques might lead to more persuasive writing.” Instructions to participants (copy on file with the author).

29One typical “definition” is that “a story has a beginning, a middle, and an end.” Haven, supra note 11, at 12. But that definition is far too simplistic. By that definition, the sentence “I went to the

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**Story: n.:** A detailed, character-based narration of a character's struggles to overcome obstacles and reach an important goal.\(^\text{30}\)

Haven contrasts “stories” with “information-based narratives,” which he defines as narratives which “provide just the new essential information and assume the reader has adequate banks of relevant topical prior knowledge to create context and meaning . . .”.\(^\text{31}\)

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 in order 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.\(^\text{32}\)

This 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.\(^\text{33}\) Justice Antonin Scalia and Prof. Bryan Garner urge caution in including “sympathetic facts that are legally irrelevant.”\(^\text{34}\) Many appellate court rules require the statement of facts section of an

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\(^\text{30}\) Haven, *supra* note 11, at 79.

\(^\text{31}\) *Id.* 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.

\(^\text{32}\) Haven, *supra* note 11, at 15.

\(^\text{33}\) Aldisert, *supra* note 15, at 25-28 and 234-235 (collecting comments from appellate judges emphasizing concision); Scalia, *supra* note 13, at 23-25; see also Kosse & ButleRichie, *supra* note 26, at 85 (noting that their survey of state and federal judges, and other groups, revealed that judges ranking clarity and concision as the two most essential elements of good legal writing).

\(^\text{34}\) Scalia & Garner, *supra* note 13, at 94.
appellate brief to include “relevant facts,” perhaps excluding by implication legally irrelevant facts. 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 which are legally irrelevant, yet necessary for the reader to completely understand what is going on. 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?

B. The test briefs

For my study, I attempted to write two “information-based narratives,” 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.

Since one of my hypotheses for this study was that stories would have more impact in a case where the law was 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

35See, e.g., F. R. App. P. 28(a)(7); In. R. App. P. 46 (A)(6) (requiring the Statement of the Facts to “describe the facts relevant to the issues presented for review”); In re Michael G., 311 N.W.2d 600 (Wis. 1981) (in a state with a rule identical to F.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).

36Profs. Ruth Anne Robbins and Richard Neumann provided very helpful comments on the test briefs.
Supreme Court precedent), while the county had a much harder case to make (seeking to overturn that long-settled principle of law).\textsuperscript{37}

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 of free speech); 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 the county had then sought to levy a fine as specified in the remedial provisions of Proposition 3. While the store’s and the county’s briefs varied some of the sentence structures and sequencing of the facts in order to put more emphasis on the facts each side felt were more helpful to their sides, the end result was two statements of fact that 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

\textsuperscript{37}Some may dispute that this scenario is really a “hard case” at all, since the rules of \textit{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 local residents of Old Orleans, seem to have a valid interest in preserving the character of their home town, but have to fight an uphill battle against well-financed adversaries.
that was lost when the controversy arose. 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.

Note that this description, while delivered in facially neutral language (i.e. 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. 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.

38Amsterdam and 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 and Bruner, supra note 8, 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 note 16, at 147.

39Respondent brief 2 at 3. (All four briefs can be downloaded from SSRN at this link: http://papers.ssrn.com/abstract=1421900.)

40Does this excerpt conjure up an image of a town that you know of?

41Likewise, the brief for the hardware store creates 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 of the two largest companies, Home Depot and Lowe’s. In order to remain price competitive in the home improvement
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.\(^{42}\)

In terms of plot development,\(^{43}\) this constitutes the “complicating incident” that upsets the pre-existing condition of stasis and gives rise to the conflict which 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 it believed would satisfy the goals of both parties).

Conversely, the hardware store is subtly portrayed negatively, as “rejecting” the reasonable 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.

Petitioner brief 2, at 1. 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.

\(^{42}\)Respondent Brief 2, at 3-4.

\(^{43}\)See Chestek, supra note 16, at 147-150.
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 left to imagine the scene that the writer intends to portray.44

The “story” briefs thus provided a great deal more context about how the controversy arose (each clients’ “struggles”), and what each client 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.”45 While most appellate brief writing texts recommend choosing a clear theme, in practice much of this advice translates

44Likewise, the hardware store subtly attempted, in its brief, to portray itself as the “reasonable” party in the dispute, and the town as officious intermeddlers. After describing its business model in the language quoted in footnote 41 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 in to 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.

Petitioner brief 2, at. 1-2.

45See Chestek, supra note 16, at 146-47.
to “present a clear legal theory.” For example, Justice Scalia and Prof. 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,”46 but they also recommend strongly that the advocate “think syllogistically.”47 Prof. Mary Beth Beazley’s widely-adopted text on appellate advocacy includes an entire chapter on finding the logical, legal core of your case using the analogy of the “Six Degrees of Kevin Bacon” game.48

Scalia and Garner’s formulation suggests that the “theory of the case” and the “theme” are synonyms, or at least closely related. However, analyzing persuasion according to the double-helix “DNA model,” perhaps they are 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 your client’s favor can be described as the “theme” of your 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.”

The theme of a story brief should therefore evoke an emotional response from the reader; it should explain the motivations of the characters, and give the reader a reason to


47Id. at 41. Scalia and 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.

48Mary Beth Beazley, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 163-68 (Aspen 2d ed. 2006), Chapter 10, at 163-168. Her “six degrees of separation” exercise is a wonderful tool for helping a legal writer stay on a logical track, but as noted above, the logos strand is only one part of what I consider a complete persuasive argument.
respect and “root for” those characters.\textsuperscript{49} Thus, in addition to a solid legal theory (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.

In thinking about the theme for the story briefs, I used the concept of “deep frames” described by cognitive scientist George Lakoff. Lakoff describes a “deep frame” as “moral and political principles that are so deep they are part of your very identity. . . . Deep frames are the ones that structure how you view the world.”\textsuperscript{50} 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 this case the idea is that “freedom” is good and is something all people long for.\textsuperscript{51} Deep frames work at an almost unconscious level, and often can trump facts.\textsuperscript{52}

\textsuperscript{49}Prof. 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 suggests various archetypal roles that the clients could fulfill. Ruth Anne Robbins, \textit{Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey}, 29 \textit{Seattle L. Rev.} 767 (2006).

\textsuperscript{50}George Lakoff, \textit{Whose Freedom? The Battle over America's Most Important Idea} 12 (Farrar, Straus and Giroux 2006) at 12.

\textsuperscript{51}Id. at 14.

\textsuperscript{52}“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, \textit{supra} note 50, at 13. As just one possible 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 Forum, \textit{Some Americans Still Link Hussein to 9/11} (published on September 9, 2006), \texttt{http://www.angus-reid.com/polls/view/13081} (last viewed on August 16, 2009). This 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.
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 interference. 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 in order 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 attempts to adhere to the two definitions described above. For example, all four briefs used the same neutral Statement of the Issue. 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

Prof. 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 note 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.

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. I am happy to receive comments anybody may have as to whether the briefs actually isolated the “story” variable in the way I have attempted to do.
logos brief on that side of the case. 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. In an effort 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. Initially, 175 participants signed up for the study.

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54 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.

55 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 Judge’s 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.

2008 Persuasion Study announcement [copy on file with the author].
My research assistant then randomly assigned each participant to review a pair of briefs for the Petitioner or the Respondent.\textsuperscript{56}

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

\begin{table}[h]
\centering
\caption{Survey Participants}
\begin{tabular}{ll}
\hline
Category & Number participating \\
\hline
Appellate judges & 13 \\
Appellate law clerks & 12 \\
Appellate court staff attorneys & 8 \\
Appellate practitioners & 37 \\
Law professors & 25 \\
\hline
TOTAL & 95 \\
\hline
\end{tabular}
\end{table}

The online survey gathered some basic demographic information about the participants (including gender, the job held by the respondent, 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.\textsuperscript{57}

A. The Survey questions

The heart of the online survey was a series of simple questions. First, respondents were asked, “Which of the two briefs you read was more persuasive for the position being

\footnotesize{\textsuperscript{56}}Since 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 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1421494.

\footnotesize{\textsuperscript{57}}The study was actually designed as a “double blind” study, in that I did not identify myself to participants as the principal investigator. Participants were recruited through a SurveyMonkey website which identified me only as a “professor at a major Midwestern university.”
advocated?” They 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.58

All participants were sent, by e-mail, the logos and the story briefs on a randomly-assigned side of the case. At first, this may seem like an odd choice, since judges are not typically asked to review two briefs on the same side of a single case. They 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. Since 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.

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.

II. Survey results

In some respects, the data revealed what I expected; however, 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 surprised to learn that this preference appeared to become stronger the longer a particular respondent 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

<table>
<thead>
<tr>
<th>Brief</th>
<th>More persuasive (n)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Logos brief</td>
<td>29</td>
<td>30.5%</td>
</tr>
<tr>
<td>Story brief</td>
<td>61</td>
<td>64.2%</td>
</tr>
<tr>
<td>Neither</td>
<td>5</td>
<td>5.3%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>95</td>
<td>100%</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Brief</th>
<th>More persuasive (n)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent briefs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Logos brief</td>
<td>16</td>
<td>33.3%</td>
</tr>
<tr>
<td>Story brief</td>
<td>30</td>
<td>62.5%</td>
</tr>
<tr>
<td>Neither</td>
<td>2</td>
<td>4.2%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>48</td>
<td>100%</td>
</tr>
</tbody>
</table>

| Petitioner briefs |                   |     |
| Logos brief       | 13                  | 27.7% |
| Story brief       | 31                  | 66.0% |
| Neither           | 3                   | 6.4%  |
| TOTAL             | 47                  | 100%  |
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 statistically significant difference between the Respondent briefs and the Petitioner briefs. Story seems to work in all cases, not just hard ones.

A. **Differences by job function**

One of the main purposes of this study was to determine, if possible, whether stories persuaded the only people who matter in resolving disputes: 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 more statistically significant 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**

<table>
<thead>
<tr>
<th>Brief</th>
<th>“Readers”</th>
<th>“Writers”</th>
<th>Law Profs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Logos</td>
<td>12</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Story</td>
<td>19</td>
<td>27</td>
<td>15</td>
</tr>
<tr>
<td>Neither</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>33</td>
<td>37</td>
<td>25</td>
</tr>
</tbody>
</table>

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>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Logos</td>
<td>4 30.8%</td>
<td>6 50.0%</td>
<td>2 25.0%</td>
<td>8 21.6%</td>
<td>9 36.0%</td>
</tr>
<tr>
<td>Story</td>
<td>7 53.8%</td>
<td>6 50.0%</td>
<td>6 75.0%</td>
<td>27 73.0%</td>
<td>15 60.0%</td>
</tr>
<tr>
<td>Neither</td>
<td>2 15.4%</td>
<td>0 0.0%</td>
<td>0 0.0%</td>
<td>2 5.4%</td>
<td>1 4.0%</td>
</tr>
<tr>
<td>Total</td>
<td>13</td>
<td>12</td>
<td>8</td>
<td>37</td>
<td>25</td>
</tr>
</tbody>
</table>

The most interesting difference revealed in Table 5 is the wide discrepancy between law clerks and other “readers” as to how important the logos brief was to them. I will explore this finding in more detail in part V-B, below.59

A. 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 respondents? It appears that gender made absolutely no difference; both men and women reacted to the briefs in virtually identical ways. Table 6 analyzes all respondents by gender.

Table 6  
Gender differences

<table>
<thead>
<tr>
<th>Brief</th>
<th>More persuasive (n)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male respondents (n = 56)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Logos brief</td>
<td>17</td>
<td>30.4%</td>
</tr>
<tr>
<td>Story brief</td>
<td>36</td>
<td>64.3%</td>
</tr>
<tr>
<td>Neither</td>
<td>3</td>
<td>5.4%</td>
</tr>
<tr>
<td>Female respondents (n = 39)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Logos brief</td>
<td>12</td>
<td>30.8%</td>
</tr>
<tr>
<td>Story brief</td>
<td>25</td>
<td>64.1%</td>
</tr>
<tr>
<td>Neither</td>
<td>2</td>
<td>5.2%</td>
</tr>
</tbody>
</table>

A. **Job longevity**

One of the demographic questions asked respondents how long they had held their current job. I was curious to see if respondents 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 amount of time each respondent had held his or her current job.

Table 7  
Responses by Experience in Job

<table>
<thead>
<tr>
<th>Brief</th>
<th>0-4 yrs.</th>
<th>5-9 yrs.</th>
<th>10-14 yrs.</th>
<th>15-19 yrs.</th>
<th>20-24 yrs.</th>
<th>25+ yrs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Logos</td>
<td>11</td>
<td>45.8%</td>
<td>5</td>
<td>33.3%</td>
<td>4</td>
<td>26.7%</td>
</tr>
<tr>
<td>Story</td>
<td>13</td>
<td>54.2%</td>
<td>9</td>
<td>90.0%</td>
<td>9</td>
<td>90.0%</td>
</tr>
<tr>
<td>Neither</td>
<td>0</td>
<td>0.0%</td>
<td>1</td>
<td>6.7%</td>
<td>2</td>
<td>13.3%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>24</td>
<td>15</td>
<td>15</td>
<td>10</td>
<td>17</td>
<td>14</td>
</tr>
</tbody>
</table>

-27-
Grouping the two ends of the spectrum together reveals an interesting pattern:

Table 8  
Responses by Experience Groups

<table>
<thead>
<tr>
<th>Brief</th>
<th>More persuasive (n)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-9 years’ experience (n = 39)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Logos brief</td>
<td>16</td>
<td>41.0%</td>
</tr>
<tr>
<td>Story brief</td>
<td>22</td>
<td>56.4%</td>
</tr>
<tr>
<td>Neither</td>
<td>1</td>
<td>2.6%</td>
</tr>
<tr>
<td>15+ years’ experience (n = 41)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Logos brief</td>
<td>9</td>
<td>22.0%</td>
</tr>
<tr>
<td>Story brief</td>
<td>30</td>
<td>73.2%</td>
</tr>
<tr>
<td>Neither</td>
<td>2</td>
<td>4.9%</td>
</tr>
</tbody>
</table>

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

I. **How reliable is 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?**

The first question one might legitimately ask about this study is whether the test briefs really measured 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 threads).

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 story behind the passage of the legislation and the push to put the company in a certain place changes the complexion of the entire case.
- [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 pre-disposed 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 provided better context to decide the case. I found that helpful.
- [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.
- Overall, I thought [the “story” brief] was better because it told the client’s story.

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 admit it could be a matter of preference, but I got bored in [the “story” brief]. It just started sounding like the same thing over and over and the argument was lost in the 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 “logos” brief] read smoother as it focused on the legal question. [The “story” brief] lost focus and lost me at times.

• 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-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.

The most common theme throughout these 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. Thus, 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?

Once again, analyzing this question is complex and perhaps not susceptible of 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.\footnote{See supra notes 30-31 and accompanying text.}

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.

\begin{table}[h]
\centering
\caption{Average Overall Brief Scores}
\begin{tabular}{lccc}
\hline
Brief & Petitioner & Respondent & Both \\
\hline
Logos & 3.44 & 2.65 & 3.05 \\
Story & 4.10 & 3.34 & 3.73 \\
Diff. & 0.66 & 0.69 & 0.68 \\
\hline
\end{tabular}
\end{table}

As this table demonstrates, the average difference in score between the logos and story briefs was less than a single point, regardless of whether the briefs being scored were the Petitioner or Respondent pair.\footnote{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 \textit{stare decisis} were more persuasive than the briefs seeking to overturn long-standing precedent. This seems to bear out my fear, \textit{supra} page 22, that asking the participants to score a pair of briefs on opposite sides of the case would have injected the merits of the controversy as an uncontrolled variable.}

\footnote{See supra notes 30-31 and accompanying text.}
It is also instructive to examine individual responses to each pair of briefs. I examined each survey response and calculated the absolute value of the difference in scores between the two briefs the respondent read. By doing so, I sought to determine the strength of each respondent’s reaction to the briefs. Since 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 respondent was reviewing the Petitioner or Respondent pair. This indicates that most respondents felt the two briefs were fairly even, and their preferences for one or the other were not strong.\footnote{Only one respondent 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 respondents rated the difference between the two briefs as either zero or 1.}

While none of this proves that the test instrument was unbiased, the consistency of the differences between 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.

A. Was the respondent sample representative?

Since the study relied on self-selected volunteers, another possible objection might be that the pool of respondents was unrepresentative. If it 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 sample.
universe. And, in this case, it is difficult to know much about that universe. Since 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” comprised of 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 10:
Table 10
Demographic makeup of U.S. appellate courts\(^63\)

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

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.

\(^{63}\)The “regions” described below were based upon combinations of the geographic coverage of the various circuits of the United States Courts of Appeals.
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, since the data strongly suggests that gender does not matter, this variance likely did not produce any bias in the results.

The regional breakdown of the respondents likewise was unrepresentative of the total universe. Seven of the 13 judicial respondents were from Region 3, representing 53.8% of all respondents (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 Judge’s 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.)

\[64\text{See supra Table 6 and accompanying text.}\]
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. Since 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 or not.

I. Some preliminary conclusions

So what do the data reveal?

A. Overall results

Taking all responses together, the story briefs were found to be more persuasive. While the appellate judges in the sample tended to prefer the story briefs, this result was more pronounced among appellate practitioners. This is not surprising; appellate practitioners are the group that knows the “story” of their clients most intimately, and therefore are the people most likely to want to convey that story through their writing to the court. The data also suggest, however, that advocates be cautious in this endeavor; many of the comments from respondents (especially those from law clerks and judges)

65See supra Table 5. Note also that 75% of the appellate court staff attorneys also rated the story brief as more persuasive.

66Given the relatively small sample size, especially in some groups, it is hard to draw many general conclusions with confidence, of course.
suggested that overly long briefs and “irrelevant details” were distracting and ultimately counterproductive.\(^6^7\)

Gender appears not to matter at all, but experience seems to. The longer a respondent 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 the finding that respondents with less job experience (especially including law clerks) tended to rate the logos brief more highly than more experienced participants. It is interesting to consider why experience matters.

Part of the phenomenon might be explained by the fact that the group of respondents with less than 5 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). A large percentage of the respondents with less than 5 years' experience in their jobs were law clerks, who as a group preferred the logos and story briefs equally. (This was 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

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\(^6^7\)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 as to 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 supra pp. 29-30 (sampling of comments who favored the logos brief).
conclusion through syllogisms, analogies, or other logical processes.\textsuperscript{68} Very few courses in a
typical law school curriculum focus on the more human, emotional content of problem
solving. Law students, in short, are primarily trained in logos,\textsuperscript{69} 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.

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 5 years’ experience” category might have favored the
logos brief at a higher rate than the 15 non-law clerks in that group. However, that proved
not to be the case. The 9 law clerks in that group favored the story brief by a 5-4 margin (a
statistical tie), while the 15 non-law clerks favored the story brief by an 8-7 margin
(likewise a statistical tie).\textsuperscript{70}

\textsuperscript{68}The Carnegie Foundation report on legal education describes the nearly-ubiquitous case method of
instruction 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 note , at [Kindle location 377]. 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
[Kindle location 618].

\textsuperscript{69}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 Brian Jj. Foley, Applied Legal Storytelling, Politics, and Factual Realism, 14 J. 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 Wr*ting: Drafting and A/Effective Personal Statement to Tell a Winning Refugee Story, 14
J. 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.”)

\textsuperscript{70}There were also 3 “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
Comparing the median job experience for each group with the level of support for the logos brief also reveals an interesting pattern. Table 11 lists all five groups, in ascending order of the median experience 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 perfect inversion: the more job experience one has, the less likely one was to find the logos brief more persuasive.71

<table>
<thead>
<tr>
<th>Group</th>
<th>Median exp.</th>
<th>% Favoring Logos</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law clerks</td>
<td>0-4 years</td>
<td>50%</td>
</tr>
<tr>
<td>Law professors</td>
<td>5-9 years</td>
<td>33.3%</td>
</tr>
<tr>
<td>Court staff attorneys</td>
<td>10-14 years</td>
<td>25%</td>
</tr>
<tr>
<td>Appellate judges</td>
<td>15-19 years</td>
<td>30.8%</td>
</tr>
<tr>
<td>Appellate practitioners</td>
<td>20-24 years</td>
<td>21.6%</td>
</tr>
</tbody>
</table>

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.72 As lawyers gain experience, however, the story becomes

71The 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.

72Note that the law professor group gave the logos brief the second highest ranking among all five groups; see supra Table 11.
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 which is interesting, and
which 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 the logical brain.\textsuperscript{73} Perhaps as we mature, we learn to trust our emotional
reasoning processes more.

This, of course, has implications for law school pedagogy, which tends to focus to a
high degree on logical reasoning to the exclusion of emotional reasoning. The traditional
law school curriculum has recently come under close scrutiny due to two separate reports:
the Carnegie Foundation’s 2007 report Educating Lawyers: Preparation for the Profession
of Law,\textsuperscript{74} and the Clinical Legal Education Association’s report that same year, Best
Practices for Legal Education.\textsuperscript{75} Both of these studies, and other commentators,\textsuperscript{76} suggest
that law schools should re-evaluate the traditional focus on legal 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.\textsuperscript{77}

\textsuperscript{73}Jonah Lehrer, \textit{How We Decide} pages 23-24 (2009).

\textsuperscript{74}Carnegie Foundation, supra note 21.

\textsuperscript{75}Roy Stuckey, \textit{et al.}, \textit{Best Practices for Legal Education: A Vision and a Road Map} page
(Clinical Legal Education Association 2007).

\textsuperscript{76}See, e.g. Kathryn Stanchi, \textit{Step Away from the Case Book: A Call for Balance and Integration in
Law School Pedagogy}, 43 HARV. C.R.-C.L. L. REV. 611 (2008); David I. C. Thomson, \textit{Law School 2.0:
Legal Education for a Digital Age} 22 (Lexis Nexis 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.’”)

\textsuperscript{77}See generally Thomson, \textit{id}. The emergence of the Applied Legal Storytelling conferences, described
in note 79, \textit{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. \textit{See}
Ruth Anne Robbins, \textit{An Introduction to Applied Storytelling and to This Symposium}, 14 J. LEG.
WRITING 3 (2008); Foley, supra note 69.
A. Where do we go from here?

The lesson of my study seems to be that judges are not 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. However, I leave a fuller exploration of that subject to others.

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 decisionmaking at the beginning of this article suggests, this is a matter of some controversy: some seem to believe

78See generally Damasio, supra note 5.

79The examination of the role of stories in legal reasoning has recently gained significant scholarly attention. 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 and Clark Law School, Portland, OR, 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, Prof. 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 (2006); Stanchi, Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy, 60 RUTGERS L. REV. 381 (2008); Stanchi, The Persuasive Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader that We Are Right [forthcoming in ?? Journal]; see also Ruth Anne Robbins and Steve Johansen, This is your Brain on Stories (Presentation to Applied Legal Storytelling Conference, Lewis and Clark Law School, July 23, 2009) (copy of Powerpoint presentation on file with the author).
that the law is all about logic and rules, and would therefore 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. 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. In order to preserve uniformity, consistency and fairness, judges should disregard the “story,” they may claim, 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 only go so far; some judicial decisions require a very fact-specific inquiry. (For example, virtually all rules of “law"

80 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 LAW & CONTEMP. PROBS. 263, 266 (1996) (quoting Aristotle, NICOMACHEAN ETHICS 1129019-25 (Terence Irwin trans., 1985)).

81 Indeed, even 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 any one 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.


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
which require the application of a balancing test require judges to weigh different factors, a process which does not lend itself well to formulaic and rigid “logical” rules.) 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 obstacles and reach an important goal.”82 There is nothing political 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.83

Kendall Haven, who authored the definition of “story” that I have used here, contends that the principal benefits of a “good story” is that it commands the listener’s (or reader’s) attention.84 (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

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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.


82See supra note 30 and accompanying text.

83“Story is a way of structuring information, a system of informational elements that most effectively create the essential context and relevance that engages receivers and enhance memory and the creation of meaning.” Haven, supra note 11, at 15 [emphasis in original].

84Id. at 8.
that helps listeners remember a story longer than they would remember a less-structured narrative.\textsuperscript{85} It also improves logical thinking.\textsuperscript{86} 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.\textsuperscript{87} Stories rely on such facts. The writer’s goal in an appellate brief is to persuade. Persuasion is best when it comes from within. You 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 you will. If, however, this is done too overtly, the reader will see what the writer is up to, will feel manipulated, and will resist. As Scalia and Garner suggest, that can provoke “a nasty backlash” against the writer.\textsuperscript{88}

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 of persuasion) without being so obvious that the reader’s natural defenses are triggered. Stories are natural; they are the

\textsuperscript{85}Id. at 69-72.

\textsuperscript{86}Id. at 98-104.

\textsuperscript{87}Scalia & Garner, supra note 13, at 32 and 94.

\textsuperscript{88}Id. at 32.
way all human have communicated and learned for thousands of years. And, as my study suggests, they work.

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