What is Your Favorite Book?:
Using Narrative to Teach Theme Development in Persuasive Writing

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“So it is that one story, one set of experiences, can be connected with others; so it is that the law is made.”1

“Writing and reading are not separate, reading is part of writing. A real reader is a writer. A real reader is already on the way to writing.”2

I. INTRODUCTION

The theory of the case, the story behind the application of the facts to the law, often seems abstract and imprecise to students while in law school. As

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2. HÉLÈNE CIXOUS, THREE STEPS ON THE LADDER OF WRITING 21 (Sarah Cornell & Susan Sellers trans., 1993).
part of their curriculum, students analyze particular areas of law, such as offer in contracts, by reading truncated cases without really realizing that the lawyer had developed a theory of the case and a story that humanized the client long before it was published in their case book and, in doing so, persuaded the fact finder to find in her favor. So, when a legal writing, clinical, or another skills faculty member discusses developing the theory of the case, most students cannot imagine how to apply this creative concept, the whole of the story, when they have only been examining the small parts of it. As a result, for some professors, “[c]ase theory is the most challenging concept” that they teach to law students.

The theme, as part of the theory of the case, is where the client’s voice and point of view are present. The theme causes the visceral reaction that allows the reader to be immersed in the story, not just the law at issue. The theme is the answer to “Who cares?” Literature aids a student in developing the client’s point of view because by having had that familiar experience of being a reader of books, they are able to identify with those big themes—love, hate, revenge, fate—and better develop a theme that comports with their client’s point of view in a legal brief. They understand that to be the client’s voice, they must first develop a theme.

Similar to the ways that other writing skills are taught, students must be taught how to develop a story. Consider what some of our favorite writers have done with murderers, alcoholics, cheaters, and liars.

How much more of a challenge it is to attempt what Dostoyevsky accomplished in Crime and Punishment. We might not automatically expect to empathize with Raskolnikov, a student who brutally kills two old women. So what an achievement it represents not only to make us care about him but also to find ourselves hoping, just as he does, that he can be redeemed.

3. See William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 57 (2007) [hereinafter Carnegie Report] (describing the Socratic Method and noting that “[t]he skill of thinking like a lawyer is first learned without the benefit of actual clients, and the typical form in which the case books present cases may even suggest something misleading about the roles lawyers play, more often casting them as distanced planners or observers than interacting participants in legal actions”).


Our students are learning to do an even more important task than that of a great novelist; they are making someone care about a real human being, not a fictional character.

Skills professors have the unique ability to connect the legal doctrine to the story because they are teaching students those “real life” skills. But, to make that connection between doctrine and practice, they need to do more than tell students how to do it; they need to show them how to create the story. According to constructivist theory, students are more likely to make this connection when they can connect new information with old information and reformulate it. Novels act as a familiar point of identification for themes and ensure that students are not puzzled by yet another seemingly abstract legal term, but instead they are given an applicable concept that takes a familiar narrative and applies it to the foreign area of law. Literature not only connect students to their past educational experience, but they are also the most recognizable form of narrative and represent a concrete understanding of an abstract concept by showing how to develop a theme.

This article examines three broad points of view present in narrative and shows how, using an in-class technique based on literature (the “literary technique”), students often fail to develop all three voices in legal briefs, which is why the theory of the case is difficult for them to apply. This literary technique allows students to connect their course content with their personal experiences, thereby enhancing their understanding and retention of the material.

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7. Carnegie Report, supra note 3, at 105-06 (legal writing can connect students from the theory to the practice of law).

8. Marcia Canavan, a Legal Skills instructor at Quinnipiac University School of Law, states that when she used literature it made a “huge difference in [her] students’ learning process” because they were not getting “overtaken by fear and anxiety.” Marcia Caravan, Using Literature to Teach Legal Writing, 23 QUINNIPLAC L. REV. 1, 4 (2004). Similarly, University of Michigan Professor James Boyd White teaches his book, THE LEGAL IMAGINATION, “to address questions that arise in the lawyer’s life about how we use language and how we understand the language we are given to use, and I use literature to help illuminate those problems.” Symposium on Law, Literature, and the Humanities: Law, Literature, and The Humanities: Panel Discussion, 63 U. CIN. L. REV. 387, 390 (1994). The lessening of anxiety and approachability to the legal texts may also have a beneficial secondary effect for the professor: better student evaluations. See John R. Dorocak & S.E.C. Purvis, Using Fiction in Courses: Why Not Admit It?, 16 LAW & LITERATURE 65, 68 (2004) (discussing the beneficial uses of fiction in accounting courses and that it may result in a better evaluation for the professor).

9. See Roger C. Schank & Tamara R. Berman, The Pervasive Role of Stories in Knowledge and Action, in NARRATIVE IMPACT: SOCIAL AND COGNITIVE FOUNDATIONS 287, 293 (Melanie C. Green et al. eds., 2002) (“For communication, memory, and learning purposes, stories are likely to be richer, more compelling, and more memorable than the abstracted points we ultimately intend to convey or learn when we converse with others.”); see also Melanie C. Green & Timothy C. Brock, The Role of Transportation in the Persuasiveness of Public Narratives, 79 J. PERSONALITY & SOC. PSYCHOL. 701, 701-02 (2000).
technique helps students to find their client’s voice and draft a persuasive brief by first finding the voices in their favorite narrative texts. Part II defines narrative and its theory, then clarifies the difference between the theme, which is a narrative concept, and the theory of the case, which is a legal concept, and proposes that both of these concepts are inextricably intertwined in legal writing.

Then, Part III examines themes and their use in the theory of the case through analysis of the three points of view in a narrative text: the teller’s, the character’s, and the reader’s. Part III examines each of these points of view separately and illustrates that part of the difficulty in the theory of the case lies in finding the character’s voice, which is where the theme is developed. Students recognize the teller’s point of view and the reader’s point of view because they have had experience being both; however, the character’s voice proves more difficult to recognize and apply in legal writing. Through the use of narrative texts applied in a law school classroom, Part III shows how students are able to identify the character’s point of view by relating that point of view to a familiar narrative text.

Next, Part IV analyzes the success of this literary technique, based on the constructivist model of learning theories and shows why relating a new legal concept to a familiar narrative text aids in teaching the theory of the case. Finally, the Appendix contains a brief explanation of how to employ this exercise in a classroom.

II. THEORY OF THE CASE AND THEMES IN PERSUASIVE WRITING

The narrative, the story of a case, is where the theme lies and develops. Narrative and its study, though a difficult discipline, is something that everyone engages in every day because, at its heart, it is the telling of stories. “We make narratives many times a day, every day of our lives. And we start doing so almost from the moment we begin putting words together. As soon as we

10. Historically, law and literature actually share an entwined past. For instance, in the post-revolutionary period, lawyers represented about “half of the editors and contributors to literary periodicals.” See GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 15 (2000). Further, at the beginning of the twentieth century, John Wigemore reminded lawyers that “it was a lawyer’s duty to read not only within one’s technical specialty but also in the wider world of letters, particularly in those stories he called ‘Legal Novels.’” Richard H. Weisberg, The Legal Speaker and Writer at the New Millennium with an Application to Justice Souter, in LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE, DEC. 6-8, 2001, 173, 175-76 (Marlyn Robinson ed., 2003). Traditional legal novels include the works of “Balzac, Dickens, Dumas, Eliot, Fielding, Hawthorne, Hugo, Scott, Stevenson, Trollope, Twain, and Samuel Warrant.” Id. at 176. Modern legal novels include the works of Melville & Dostoevsky, Kafka, Camus, and the pop-culture thrillers of John Grisham. Id.
follow a subject with a verb, there is a good chance we are engaged in narrative discourse.”

Some theorists call it the most common form of knowledge because it is the most innate of human traits. Narrative is the concrete, non-abstract way that readers experience a set of events—it is the story form.

Similarly, most people innately know what a theme is, though a person may not be readily able to define it because it is not the concrete retelling of events, but the concept that underlies those events. According to the Dictionary of Narratology, the theme is the “doctrine or ideological context of a text; the (philosophical, moral, political) views advanced by that text.” And, the Handbook to Literature defines the theme as the “central idea . . . [in] poetry, fiction, and drama it is the abstract concept that is made concrete through representation in person, action, and image.” Essentially, the theme unifies all the elements of a text to express a common idea or emotion. In persuasive brief writing, a theme resonates with a reader because it is familiar and ties all the complex analysis into an emotional trigger.

While practicing attorneys rarely discuss the “theme,” it always exists as part of the theory of the case.

In preparing a case for trial a lawyer creates a double helix of norms. One strand is dominated by narrative and the other by informal logical inference or argument. Narrative is the story of events, actors, backgrounds, actions, and motives organically related to express a moral-political significance, a human meaning. As one might hear it in the beginning of an opening statement, “This is a case about loyalty and betrayal.” “This is a case about keeping promises.” “This is a case about a very wealthy man’s abuse of an employee.” Argument is a logical pattern of propositions, in this case leading to assent to a final proposition (a “legal element”) that

12. Narration is “the quintessential form of customary knowledge” Id. (quoting Jean Francois Lyotard, The Postmodern Condition: a Report on Knowledge 10 THEORY AND HISTORY OF LITERATURE 19 (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979)).
must be proven or disproved. It is this double helix of narrative and argument that a lawyer calls “my theory of the case.”

By developing themes in a persuasive brief, a lawyer leaves the reader, typically the judge, with an impression of the case. Readers may

[F]orget details, but they retain impressions. Your themes... trigger the favorable images and emotional responses that are essential to persuasive presentation of your case. Themes are the words and phrases that summarize your theory of the case. Themes connect facts of the case to the moral lessons of life and jurors’ lifetime experiences.

The theme is that part of the case that reverberates with the reader because it reveals well-known, familiar, and intriguing story lines, such as love, greed, and revenge. “It has no independent legal weight, but rather gives persuasive force to your legal arguments” because it is the function by which the reader remembers the details.

To develop a theme in a brief, the writer must effectively tell the client’s story, which, for the attorney, means truly adopting the client’s point of view. Many law students are not able to see the case from a client’s point of view; they only see how the facts and the law apply and stop short of constructing the narrative. Further, while in school, most students have not yet had the experience of working with a client: meeting with a client or reviewing documents to get facts and then developing those facts into a coherent story. So, students have not yet learned how to take another person’s events, foreign and different from their own, and create a compelling narrative in addition to doing the legal research and analysis of those facts.

17. MAUET, supra note 5, at 9.
18. See id. (other “good themes come from the Bible, Aesop’s fables, famous speeches, historical events, classic novels, and common sayings”); see also STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 9 (3d ed. 2004) (“The most compelling themes appeal to shared values, civic virtues, or common motivations.”).
19. LUBET, supra note 18.
20. See MAUET, supra note 5, at 9 (“Jurors may forget the details, but they should never forget the themes.”).
21. Clients are likewise often surprised by the lack of attention their story receives. According to one study, many litigants would not have even filed suit if they had realized that they would have had such a small chance to tell their own story. See William M. O’Barr & John M. Conley, Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives, in 5 LANGUAGE IN THE JUDICIAL PROCESS, LAW, SOCIETY, AND POLICY 97, 102.
That is why theme is not distinct from the more commonly developed theory of the case, but it is an integral part of developing a sound case theory. The theory of the case is

“[T]he basic underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole.” Case theory is not simply a statement of the applicable law or of the facts that support this legal interpretation, but rather it is the “basic concept around which everything else revolves.”

The theme shows the reader the emotional justification for the legal analysis. For instance, as a defense in a murder case, the theory of the case may be that a defendant did not satisfy all the elements of murder because mitigating factors exist; therefore, the lesser offense of manslaughter is appropriate. This theory shows the legal argument, how the facts apply to the law. The theme, though, hits the case’s emotional aspects by presenting the information in a story form that the reader can understand. In the murder example, the theme would be:

this was a man on the edge who had learned that he was losing his kids, losing his sight and losing his job and then he snapped when the attorney he trusted betrayed him.

(Judith N. Levi & Anne Graffam Walker eds., 1990). For instance, witnesses are not allowed to tell their story in a narrative because they are hindered by the rules of hearsay, such as repeating what another person said about the events (hearsay) or stating what someone else believes (speculation). See id.

22. Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. 485, 492 (1994) (footnotes omitted) (quoting James W. McElhaney, Trial Notebook 78 (3d ed. 1994)); see also Carnegie Report, supra note 3, at 122-23 (one student described case theory as “‗legalizing the [client’s] story,’ meaning by this that serving the client requires turning the client’s narrative of difficulty into a viable strategy for obtaining a legal remedy”) (alteration in original). Mauet writes that:

A sound case theory must satisfy several requirements. It must be legally sufficient and establish a prima facie case under the controlling substantive law.

It must be consistent with both the undisputed facts and with your side’s version of the disputed facts. It must also be consistent with the jury’s perception of how life works.

MAUET, supra note 5, (stating that the jurors will choose the better theory as “their story of what probably happened, and then see if the actual evidence is consistent with it”); BURNS, supra note 16, at 37 (“The theory of the case is thus a simple, plausible, coherent, legally sufficient narrative that can easily be integrated with a moral theme.”).

23. In a contracts case, for example, your theory will account for all of the facts surrounding the formation and breach of the contract, as well as the relevant law, say, of specific performance. Your theory will explain why a particular verdict is compelled by the law. Your theme will strengthen your theory by underscoring
“Just as your theory must appeal to logic, your theme must appeal to moral force.”

In other words, a judicial reader may not be able to remember or apply all the elements of criminal law, but he understands the idea of a man who was at his end of his rope and reacted poorly by engaging in a criminal act. The theme answers the question of “who cares” about this person by showing the reader a justification for the actions. The difficult part for law students is identifying how to develop the client’s point of view; however, using literature in the skills classroom helps students identify the client’s point of view for the brief, the narrative text that lawyers create for clients.

III. THE THREE VOICES OF NARRATIVE IN BRIEFS

Like fiction writers, lawyers are always telling another person’s story. But, lawyers do not have the luxury of creating the character or determining the character’s actions; lawyers must work with the facts that the client gives them and the relevant law.

The imagination of the lawyer is more than a capacity for pretending or for perceiving; it is also a power that organizes what is seen and claims a meaning for it. The lawyer must constantly be ready to express things in an original way, to make an imaginatively organized statement, to speak in a way that meets the occasion and says what it calls for.

Because legal writers are constrained by the law and facts, and their job as an advocate is to convince, not just tell a story, they must exercise even greater organization, creative thinking, and exact expression than a fiction writer.

Therefore, literature, the most familiar narrative to students, is a perfect medium to teach them the skills of persuasion because to write well, students must first read well. Even as technical writers, legal writers need to first be

why entering that verdict is the right thing to do. Perhaps your theme will be, “The defendant would rather try to make money than live up to a promise.” Or, you might try, “This defendant tried to sell some property, and keep it too.” Whatever the theme, you will want to introduce it during your opening statement, reinforce it during direct and cross examinations, and drive it home during your final argument.

LUBET, supra note 18, at 9-10.
24. LUBET, supra note 18.
25. WHITE, supra note 1, at 209.
26. PROSE, supra note 6, at 2-3 (“Long before the idea of a writer’s conference was a glimmer in anyone’s eye, writers learned by reading the work of their predecessors,” such as Ovid, Homer, and Montaigne); see also id. at 268 (“If we want to write, it makes sense to
critical readers to understand how their word choices, sentence structures, organization, and theories will have an effect on their judicial readers, and even their opponents. By reading good writing, a student sees what good writing looks like, sounds like, reads like, and feels like. As Francine Prose described,

In the ongoing process of becoming a writer, I read and re-read the authors I most loved. I read for pleasure, first, but also more analytically, conscious of style, of diction, of how sentences were formed and information was being conveyed, how the writer was structuring a plot, creating characters, employing detail and dialogue.  

While Prose is describing her own evolution as a fiction writer, the type of reading that she engaged in is similar to what a lawyer must also do to better construct a brief.  

A legal writer, similar to Prose, must also be able to understand those elements of style, diction, sentence structure, and plot development so that she can not only engage in the analysis of the law, but also explain the client’s story and persuade a judge.

In addition to showing students what good writing looks like, books are also an excellent method to show students the complex analytical process that read—and to read like a writer. If we wanted to grow roses, we would want to visit rose gardens and try to see them the way a rose gardener would.

27. Lawyers can and should humanize their writing by reading things that are not related to law alone. See WILLIAM ZINSSER, ON WRITING WELL: THE CLASSIC GUIDE TO WRITING NON-FICTION 168 (25th Anniversary ed. 2001) (relying on George Orwell’s translation of Ecclesiastes into institutional jargon and reminding anyone that writes as part of his job that we “only have to remember that readers identify with people”); see also Weisberg, supra note 10, at 176 (“The disjunction between our favorite reading and our everyday writing has become too great. Seemingly coerced by ingrained speech habits to avoid clear self-expression, we feel constantly the anxiety of influence, the call to creativity, and even beauty denied by the tortured habits of professional writing. No wonder lawyers are so unhappy!”).

28. See PROSE, supra note 6, at 3.

29. See Paul Gewirtz, Narrative and Rhetoric in the Law, in LAW’S STORIES 2, 4 (Peter Brooks & Paul Gewirtz eds., 1996) (“Both law and literature attempt to shape reality through language, use distinctive methods and forms to do so, and require interpretation[s] . . . .”).

30. Other instructors have used movies, music, and art to enhance their instruction and teach persuasive skills; books still require the students to exercise and develop more analytical skills opposed to the linear and visual theme of a movie, for instance, which can be absorbed in about two hours. See generally Elyse Pepper, The Case for “Thinking Like a Filmmaker”: Using Lars von Trier’s Dogville as a Model for Writing a Statement of Facts, 14 LEGAL WRITING: J. LEGAL WRITING INST. 171, 182-83 (2008) (film engages law students by being visual); James Parry Eyster, Lawyer as Artist: Using Significant Moments and
the law requires. When reading a book, a reader must constantly interpret what she is reading and hold onto all the ideas arising out of a story. Most books do not have linear timelines or simplistic stories, but a complex sequence of events. Like books, briefs require this type of complex analysis, such as the ability to maneuver and manipulate multiple ideas amongst a variety of facts and hold an entire fact pattern at the same time as engaging in the legal analysis.

Literature is the most common type of narrative text, but narrative covers a broad spectrum of texts, such as folk tales, mythology, and romance. “By definition narrative art requires a story and a story-teller. In the relationship between the teller and the tale, and that other relationship between the teller and the audience, lies the essence of narrative art.” Legal briefs are narrative texts because they have a storyteller (the lawyer) that tells a story (the client’s facts) to an audience (the judge). The relationship between the client’s story, the attorney’s retelling of the story, and the judge’s reading of the story is a similar experience that literary readers have when reading a more traditional type of narrative text, such as a novel, which is part of the reason why books are so instrumental in teaching students how to become good legal writers.

Viewed broadly, in a narrative text, three identified points of view exist: the teller’s, the character’s, and the reader’s.
Point of view is the physical place or ideological situation or practical life-orientation to which narrative events stand in relation. . . . Point of view does not mean expression; it only means the perspective in terms of which the expression is made. The perspective and the expression need not be lodged in the same person.35

This distinction is essential in brief writing because while a lawyer constructs and creates a brief, he is only the medium for the client’s story. The character’s point of view (the client) and the teller’s point of view (the attorney’s) must be the same in a legal brief to have the desired effect on the reader’s point of view (the judge’s).

A lawyer is always present by the nature of his having to recount the facts on behalf of another, but he is never a character in the tale, only the medium of expression for the client.36 Ultimately, when writing a brief, a lawyer’s job is to disappear. “In English fiction Henry James and James Joyce both adopted this as an aim, having imbibed the notion from a reading of Flaubert’s letters, where it is written—and more than once—that the author should be in his work like God in the universe: everywhere present but nowhere apparent.”37

Brief writers are essentially “implied authors”38 who have “no voice, no direct means of communication.”39 In theory, an implied author “occupies a distinct.

35. Seymour Chatman, Story and Discourse: Narrative Structure in Fiction and Film 153 (1978) (emphasis omitted); see also Binder & Weisberg, supra note 10, at 215 (“Perception and association are psychological functions, dramatized by point of view. By contrast, narrative voice increasingly presents a speaker conscious of performing in front of an audience.”).

36. See Chatman, supra note 35, at 154 (“When we speak of ‘expression,’ we pass from point of view, which is only a perspective or stance, to the province of narrative voice, the medium through which perception, conception, and everything else are communicated.”).

37. Scholes, supra note 32, at 268. “[V]oice is always outside, in the discourse. From A Portrait of the Artist as a Young Man: ‘A few moments [later] he found himself on the stage amid the garish gas and the dim scenery.’ The perceptual point of view is Stephen’s, but the voice is the narrator’s.” Chatman, supra note 35, at 154. This is also identified as the omnipresent point of view, which is another type of point of view used as a narrative. See Scholes, supra note 32, at 272 (“Omniscience includes the related god-like attribute of omnipresence.”); see also Harmon & Holman, supra note 15, at 361 (when the author “is capable of knowing, seeing, and telling” whatever he wishes in the story, and exercises this freedom at will).

38. Wayne Booth first coined this term to discuss and analyze the ideological and moral stances of a narrative text without having to refer directly to a biographical author. BAL, supra note 34.

39. Abbott, supra note 11, at 235 (“Neither the real author nor the narrator, the
position on the side of the sender since he connects to the author, but in practice he amounts to a construction by the receiver (the reader), who makes use of the message (the text) in order to arrive at this construction.\textsuperscript{40} Here lies the confusion for the legal writer. A legal writer must tell the client’s story to convince a judicial reader to find in the client’s favor at the same time that the writer imparts her point of view as the teller on the text. Part of using literature in the classroom, particularly in the literary technique, is to help students identify the three points of view and then, as the storytellers, show them how to merge their identity with the character’s point of view to create the relationship with the reader and affect the reader’s point of view. Considering narrative through these three points of view helps to explain why students struggle so much with persuasive writing initially and why using the literary technique to develop a theme may help a student.

A. The Character’s Point of View

Using books in a skills class helps students to understand the “who cares?” factor. A judge is persuaded when a lawyer makes him care about the client’s story and shows him why the outcome of a particular case matters.\textsuperscript{41} In order to figure out how to show the judge why he should care, a legal writer needs to do more than analyze every fact and each bit of law; she also needs to think about the client that she is representing.\textsuperscript{42} By teaching students to develop the theme early in their legal education and at the same time as their analytical implied author is the idea of the author constructed by the reader as she or he reads the narrative.”); CHATMAN, supra note 35, at 148 (an implied author “instructs us silently, through the design of the whole, with all the voices, by all the means it has chosen to let us learn”).

40. HERMAN & VERVAECK, supra note 13, at 17.

41. “Richard Weisberg asserts that judges are more likely to achieve justice if they eschew the cold abstractions of conventional legal doctrine and instead render the concrete human story underlying a legal dispute.” Binder & Weisberg, supra note 10, at 236, (referencing RICHARD H. WEISBERG, POETICS, AND OTHER STRATEGIES OF LAW AND LITERATURE 251 (1992)); see also Richard Hyland, Essay, A Defense of Legal Writing, 134 U. PA. L. REV. 599, 605 (1986) (distinguishing between a lawyer and a non-lawyer: “the lawyer sees only abstract fact situations to be subsumed under general rules”); Philip N. Meyer, Vignettes from a Narrative Primer, 12 LEGAL WRITING: J. LEGAL WRITING INST. 229, 261 (2006) (“This seems especially true in the creation of compelling legal narratives, in which the plot must be carefully developed in relation to the articulation of an underlying theme, capturing the imagination, emotion, or intellect of the skeptical judicial reader.”).

42. See Carnegie Report, supra note 3, at 54 (Law students learn to live in the “legal landscape,” meaning that they are distancing themselves from the messy situations of actual clients so that they are able to “think like a lawyer” and develop good legal argument skills).
development, they learn to develop a client’s “voice,” or as in narrative, the character’s point of view.

Legal analysis calls for a sorting out of the relevant facts; however, students cannot view their client’s facts in the same one-dimensional fashion that often occurs when reading a case; otherwise, their briefs become flat and unpersuasive, and an inaccurate representation of the character’s point of view.

You might say that the application of the legal rule converts life into a little story, a narrative made up of the elements of the crime or cause of action, and this story tells us all we need to know about the person involved – either he did it, or he did not, and everything else is irrelevant. The question, “Who is this man?” is answered by telling us what he has done on a single occasion . . . rather than by telling us who he is or what he has done in his lifetime. We never hear his own voice. When this way of talking about people by reducing them to their roles in single transactions is compared with other possibilities, it seems even at its best to be nothing more than a cliché, a cheapening of thought and feeling. This is a sort of writing used elsewhere mainly for jokes.  

But, using literature as a representative narrative focuses students on the complexity of a person’s story instead of looking at a single action that a person takes.  

Take, for example, a problem that students grappled with when they were asked to argue that their client, a man who had shot and killed a patent attorney,

43. White, supra note 1, at 114; see also Kenneth D. Chestek, The Plot Thickens: The Appellate Brief as Story, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 130-31 (2008) (“I contend that a persuasive appellate brief should bring people—the client (whether human or institutional) – more conspicuously into the picture . . . when we write about our clients’ conflicts, in an effort to resolve them, we need to keep the clients in the story.”); see generally Miller, supra note 22 (asking for a more client centered approach to give a voice back to the client). Similarly, the writer Francine Prose declared that she did not publish a story that she liked until she figured out “who was listening” to the protagonist and then she developed the protagonist’s voice. See Prose, supra note 6, at 85.

44. To help students understand the problem with identifying a client by a sole event, consider asking them: “What if you were only identified by your LSAT score? Not the volunteer service that you completed, your work history, your grades, the caliber of school that you went to, but just that single test.” A student’s voice would not accurately be the score she receives on one test. In order to hear a client’s voice, students must learn to step back from what appears to be the client’s only identifying fact. Many students miss the whole picture by concentrating on a single fact. See also White, supra note 1, at 166-67 (discussing voice with respect to an institutional voice, grades, a political party affiliation, and sororities).
should be charged with manslaughter, the lesser included offense of murder.\textsuperscript{45} In that case, the client had paid the attorney a $5,000 retainer, which represented all of his savings, to research a patent. When he found out that he was going to lose visitation rights to his children because he had lost his job and could not afford the child support, he called the attorney to check on the patent. On the phone, the attorney told him that “there was prior art” and “to get over it.” The client then took his gun from the house, went to the attorney’s office, smuggled the gun in, and told that attorney, “You took my life away,” and shot him. While most attorneys recognize the complexity of the story given, not just the shooting, students could not see past the shooting to find events or facts that would help the client explain his version of events. Most students simply stated “he killed him, that’s all there is to it.” Students could not get over the hump of that single action to identify the client’s point of view.

Being able to understand the client’s point of view requires a lawyer to apply themes that are familiar\textsuperscript{47} and develop a story that is complete by relying on more than a single action to represent a person. The identified theme does not need to be uniquely creative, but something that is identifiable to an average reader, such as the types of themes that are often found in literature. For example,

A “betrayal story” as an articulation of theme seems flat and generic. It merely identifies a stock script from a generic bag of story themes. Nevertheless, the identification and articulation of a theme, or a controlling idea, often enables a lawyer more carefully and systematically to plot the story; gradually a more sophisticated and particularized narrative theme evolves.\textsuperscript{48}

With respect to legal briefs, without the character’s point of view, a writer has no story and without the writer, the character has no real “voice.” And, when the teller, the legal writer, is able to develop this theme, the teller is able


\textsuperscript{46}. An effective way of presenting this to the students is to frame it in a way that is familiar to their current experience, for instance: “So, how would you, as a student feel, if you had called me multiple times about the C you received on your paper and I did not return your calls.”

\textsuperscript{47}. “For example, many post-conviction relief briefs on behalf of condemned inmates are about betrayal—typically betrayal of defendant by the system and the actors within it—and the failure of the system to operate effectively.” Meyer, \textit{supra} note 41, at 260.

\textsuperscript{48}. \textit{Id.} at 260-61.
to better create the relationship with the reader that influences the reader’s point of view.\(^49\) Before addressing the teller’s point of view, it is necessary to first understand the reader’s point of view.

**B. The Reader’s Point of View**

The reader’s point of view is different from the teller’s and the character’s because readers have the unique experience of stepping out of their world and leaving it behind while they are in the act of reading. The writer and literary critic Hélène Cixous describes reading as a violent act because a reader leaves behind all the other aspects of her life to concentrate on the text and essentially “kills” part of her reality to read.\(^50\) Good readers become good writers because a good reader knows what it feels like to be lured into a work, to identify with a book, what it takes to make a person step away from her work, become immersed in a text, and unquestionably listen to the story.\(^51\)

In the field of psychology, this phenomenon is called transportation.\(^52\) Transportation occurs when the reader disconnects from the world around her to focus on the text on two levels: physical and psychological. At the physical level, the reader mimics what Cixous describes, the reader may not notice

49. Even though a reader must interpret the theme, the analogical reasoning, and recall similar stories, nonetheless, “when an appropriate theme is identified, it does have a major influence on the comprehension and memory of story events.” Arthur C. Graesser, Brent Olde, & Bianca Klettke, *How Does the Mind Construct and Represent Stories?, in Narrative Impact: Social and Cognitive Foundations*, supra note 9, at 229, 236.

50. *Cixous, supra note 2, at 20-21.*

51. In the *Three Steps on the Ladder of Writing*, Cixous compares the act of writing to Edgar Allen Poe’s story “Oval Portrait,” which is about a painter who painted the beautiful woman that he married; he became consumed by the act of painting and then realized that she had died while he was painting her. *Id.* at 27-29.

It is a kind of allegory for what happens in creation. It is mythical, it might also be considered a cliché. It is not, because in the course of reading we have ourselves become the painter. We too have followed and started painting and forgetting and erasing the narrator in particular, which is very strange.

*Id.* at 29; see also *Binder & Weisberg, supra note 10*, at 205 (“For all the creativity that reading is said to entail, the pleasure of reading narrative is partly the pleasure of giving up control, of regressing into childlike credulity and wonder.”); Keith Oatley, *Emotions and the Story Worlds of Fiction, in Narrative Impact: Social and Cognitive Foundations*, supra note 9 at 40, 41 (showing the reader is “swept emotionally into the experience described by the author”) (citing Josephine R. Hilgard, *Personality and Hypnosis: A Study of Imaginative Involvement* (1979)).

people entering the room, doors closing, or noises that would normally catch her attention.\textsuperscript{53} At the psychological level, the reader becomes less aware of the real-world facts that would normally contradict facts in the story because the reader has become so immersed in the story.\textsuperscript{54} “Transportation is a convergent mental process, a focusing of attention, that may occur in response to either fiction or nonfiction. The components of transportation include emotional reactions, mental imagery, a loss of access to real-world information; the resulting transportation may be a mechanism for narrative-based belief change.”\textsuperscript{55}

When a legal writer understands the reader’s point of view, she can then better transport a judicial reader into her client’s story because she has had the experience of being immersed in a work herself.\textsuperscript{56} By using literature in a legal writing classroom, the professor shows students how to identify their own experiences of transportation in another narrative text. Once a student has identified her own experience of transportation—of being sucked into a story, despite how unfamiliar it is—students are able to better understand that a judicial reader must also have that experience to be persuaded by a brief. Therefore, the literary technique first asks students to identify their favorite book and explain the book in class. When students talk about these books, they show that they have been absorbed in another person’s story and that the story affected them in some way.\textsuperscript{57} The student, as a novice legal writer, is then

\textsuperscript{53} Green & Brock, supra note 9, at 702.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 703.
\textsuperscript{56} “Genre fiction is put together using techniques that allow the reader . . . to disappear into the story, to experience the emotions that are intended by the writer.” Id. at 703 (quoting Keith Oatley & Mitra Gholamain, Emotions and Identification: Connections Between Readers and Fiction, in EMOTION AND THE ARTS 274 (Mette Hjort & Sue Laver eds., 1997)).
\textsuperscript{57} In response to “What is your favorite book about,” students have responded with a vast array of books and reasons, many that, by their nature are foreign concepts and experiences for the reader. Here are some representative samples: The Kite Runner, by Khaled Hosseini (“This book is truly moving and very relevant to what is going on in the world, [it’s] shocking . . . . Mainly it is about a young man who grew up in the Middle East and his journey back to his childhood.”); The Challenge: Hamdan v. Rumsfeld and the Fight over Presidential Power, by Jonathan Mahler ( “The book was about Guantanamo bay prisoners, the legal and military tribunals, and how hard it was to bring the system to light.”); Without Remorse, by Tom Clancy (“It was a real page turner . . . . I read the first chapter and had to keep reading.”); Catcher in the Rye, by J.D. Salinger (“A book about angst, teenage confusion. It is realistic and plain.”); To Kill a Mockingbird, by Harper Lee (“This book is about racism, as seen through a child’s eye.”); East of Eden, by John Steinbeck (“It was the first book that I read that intertwined three stories. It was sad, tragic, and happy. It was also
better able to understand what she needs to create; that she needs to create a similar experience for the judicial reader. By using a familiar text, students have a better grasp on the effect that their words should have on the judicial reader.

Further, a lawyer that is able to create these stories is also better able to inhibit the judicial reader from closely reading her brief because she will have psychologically transported the judicial reader. The following analogy uses the genre of thrillers to show how this transportation blocks a reader’s own imagination.

When one reads a thriller one wants no more than to be transported. To open such a book is to mount a vehicle, like a Disneyland roller coaster, and take a ride. You get on at the beginning and, apart from a little cardiac consternation, you are the same person when you get off at the end. The Disney Corporation’s claim that their theme parks are worlds of the imagination is somewhat disingenuous. There has been extraordinary imagination, but it is the imagination of the Disney designers and engineers. So elaborate are the effects, so carefully laid are the rails through space mountain or underwater fastness, that the opportunity for imagination on the part of the visitor is correspondingly reduced.

Similarly, great lawyers understand that they need to combat the judge’s imagination and the opponent’s analysis and presentation of facts, but students have not had the experience or the time to develop this skill. Therefore, after teaching students the fundamentals of analysis, skills professors should take

written in a way that made me not want to put it down.”); **Color of Water**, by James McBride (“It’s about a bi-racial son of a Jewish lady. In the story, his life goes back and forth between present day and past.”) This student expressed feeling a lot of empathy with the main character because he “was college-educated, in a small town, and one of the few black families,” which was similar to his own experience.); **Robber Bride**, by Margaret Atwood (“The story is about three friends, who are all female . . . . There are a lot of themes about gender. And, each woman has a part of her personality that you can relate to.”); **The Road**, by Cormac McCarthy (“The book is about a father and son in a post apocalyptic world, walking down the road. The depth of the character lays in simple phrasing and simple actions.”). The student responses are on file with the author.

58. See Green & Brock, supra note 9, at 702; see also Escalas, supra note 52 (“[T]ransportation leads to persuasion through reduced negative cognitive responding, the realism of the experience, and strong affective responses.”); see also Caravan, supra note 8, at 11 (in Russian Formalism, “discourse reorganizes stories to give them certain inflection and intention. The idea is that writings are present to have a desired effect on the reader”) (footnote omitted).

59. Oatley, supra note 51.
them to that next step, the one in which they become the writer that persuades the judicial reader by controlling the story for the reader. It is in this step that they identify the reader’s point of view.

The literary critic Cixous does not distinguish between reading and writing because they elicit the same violent result: a writer cannot focus on the banal activities that subsume her life at the same time she is writing because a writer becomes consumed by creating the reader’s world. She must focus on her word choice and on what she is saying so that she uses the appropriate language to have a desired effect on the reader to effectuate transportation. In brief writing, the teller’s point of view is what serves as the means for the character’s point of view to affect and alter the reader’s point of view.

C. The Teller’s Point of View

By using literature to first find the theme in a familiar form of narrative, students have an easier time stepping back and developing the teller’s point of view in a persuasive brief. In the teller’s point of view, the writer is bridging the gap between the character’s and the reader’s point of view by combining the two essential parts to brief writing: the analytical legal part and the storytelling part.

Might it not be suggested that the central act of the legal mind, of judge and lawyer alike, is this conversion of the raw material of life—of the actual experiences of people and the thousands of ways they can be talked about—into a story that will claim to tell the truth in legal terms? To do this, one must master both sorts of discourse (both narrative and analysis) and put them to work, at the same time and despite their inconsistencies, in the service of a larger enterprise.

Storytelling is a natural narrative form for most students and, therefore, an effective tool for training them to become better writers and storytellers. Stories are not outside the bounds of the rules and regulations of law, but another way for lawyers to learn how to use the techniques of narrative to persuade the judge. So, the development of a story “is not a parlor trick used

60. CIXOUS, supra note 2, at 19-21.

61. WHITE, supra note 1, at 243.

62. This article focuses on using literature, specifically novels, to teach students how theme building is an invaluably persuasive tool. This type of theme writing falls into a movement called Applied Legal Storytelling. Applied Legal Storytelling focuses less on a theoretical analysis of law and literature, and more on storytelling as a practical (and highly
to draw attention away from the logic of the law. It is part of the logic itself.\textsuperscript{63}
Fiction and storytelling techniques are another part of the skills professor’s tool kit to properly prepare her students for the eventual practice of law. Students should not be using literature to learn to write like novelists,\textsuperscript{64} instead, instructors should use this technique to help students identify their point of view as the storyteller to further develop the missing link in their persuasive writing: the application of the theme (the character’s point of view), which is what will bridge the difference between the judge’s experiences (the reader’s point of view) and how the lawyer wants the judge to decide in his client’s favor (the teller’s point of view).

As identified by Schols and Phelan, the legal writer really takes the position of \textit{histor}. “[\textit{H}]istor is the narrator as inquirer, constructing a narrative


63. Robbins, \textit{supra} note 62, at 769. In Green and Brock’s study on narrative and persuasion, they found that “[h]ighly transported participants showed beliefs more consonant with story conclusions as well as more positive evaluations of the story protagonists. Becoming involved in a narrative world seemed to have measurable consequences.” Green & Brock, \textit{supra} note 9, at 707 (also showing that this effect occurred equally on fictional and factual narrative).

Legal trials involve the recounting of human events, which must be understood in a particular way before a judge or jury can arrive at decision. One of the struggles of a trial lawyer is to provide a structure for that understanding that will lead to a favorable result. And, narratives, as it turns out, offer a compelling structure, most probably because narratives are a natural mode for understanding human experience.


64. \textit{See}, \textit{e.g.}, Hyland, \textit{supra} note 41, at 620 (“Out of sentimentalism, for example, some lawyers write statements of facts ‘like a novelist,’ in order to win the judge’s sympathy. Yet the pity in the tale vanishes when judges attempt to subsume the facts under a rule of law and are left on their own to discover which facts are legally relevant.”).
on the basis of such evidence as he has been able to accumulate. This type of narrative point of view is akin to the legal writer’s because the *histor* is

> [E]ntitled not only to present the facts as he has established them but to comment on them, to draw parallels, to moralize, to generalize, to tell the reader what to think and even to suggest what he should do. History from its beginning was closely allied with rhetoric, and the ancient *histor* knew that one of the first tasks of a speaker was to convince the audience of his authority and competence to deal with the subject at hand.

In this way, the teller’s point of view is particularly difficult because it is rooted in both the application of the law to the facts and the story. While the idea of using literature to develop themes in briefs may initially seem contrary to dispassionate legal analysis, it aids students in identifying the different points of view and applying them in a brief. Therefore, this ability to create a legal story is not a contradiction, but a necessary skill.

Part of a student’s difficulty with identifying and implementing the theme in a legal brief is that legal writers are not only creating their own independent legal analysis, but are also adding to already existent texts. For instance, when a judge reads the parties’ briefs, he takes the cited, precedential law and interprets those cases as applied to the facts in the case before him to reach a decision. By doing that, he does something that most writers do not do; the judge creates another written text that directly applies the previous texts to a new set of facts, creating a completely new text from the old ones. When

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65. *Scholes, Phelan, & Kellogg*, supra note 32, at 265. “The *histor* is not a character in narrative, but he is not exactly the author himself, either.” *Id.* at 265-66 (examples of narrator as *histor* are Tom Jones, The Red and the Black, Vanity Fair, and War and Peace).

66. *Id.* at 266.

67. “Even though law is allegedly about something other than stories, i.e. ‘logic’ and ‘reasoning,’ stories nevertheless are there to guide the logic and reasoning.” Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium, 14 Legal Writing: J. Legal Writing Inst.* 3, 6 (2008).

68. Ronald Dworkin compares judicial opinions to chain novels. We can find an even more fruitful comparison between literature and law . . . by constructing an artificial genre of literature that we might call the chain novel. In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task modes the complexity of deciding a hard case under law as integrity.
writing briefs, lawyers engage in the same activity; they read the precedent cases and apply them to new facts, their client’s facts, to create a document that will persuade the judge. Students, however, struggle to create the new text because they have not yet identified their point of view as the storyteller. They do not yet have a reference point for how to create the new text and, in many of their classes, they have been focused primarily on understanding the multiple parts of a case orally, without the benefit of applying it in writing and holistically to a client’s fact pattern.

While “narrative theory provides the writer with a useful large-scale organizational schema,” it also “forces the writer to focus on the human elements.” And, in the case of legal briefs, lawyers create the relationship with the reader or judge by the act of being a storyteller at the same time that they create a relationship with the client by being the client’s voice. The teller’s voice is created when an attorney learns to bridge these two relationships and acts as a medium for the client’s expression (the tale) to the judge (the audience). It is here that all three points of view intersect and, by identifying and applying the theme early on in her legal education, the legal writer drafts a full narrative and turns a legal brief into a persuasive document.

IV. NARRATIVE AS A TEACHING TOOL: THE CONSTRUCTIVIST VIEWPOINT

By delving into literature and connecting it with legal analysis, students unconsciously identify the three points of view existent in narrative and are able to better understand how to write a persuasive brief. They are able to make this connection because they are relating a familiar skill from their past education with a new skill from their current education, which is the basis of

RONALD DWORKIN, LAW’S EMPIRE 229 (1986); see also POSNER, supra note 62, at 259 n. 72 (criticizing Dworkin’s analogy as misleading because if the author in Chapter 1 went the wrong direction, in later chapters, judges can “discard” it or change it to reflect current conditions and suggests that it may be more like the publication of a serial Victorian novel).

69. The Carnegie Report describes the law student experience of discussing and analyzing precedent case law in class: “Again and again in our observations, at the end of the hour we would be struck by the single-minded focus on the close reading of texts, analytical reasoning, and a discourse of rapid exchanges and responses . . . .” Carnegie Report, supra note 3, at 50. Further, teaching students to look holistically at the cases may “perhaps, encourage us in law schools to attend more fully than we do to the more artistic, less scientific processes of interpreting texts as a whole and applying practical wisdom to legal disputes in order to help us make good judgments about particular situations.” Philip C. Kissam, Disturbing Images: Literature in a Jurisprudence Course, 22 LEGAL STUD. F. 329, 342-43 (1998).

70. Chestek, supra note 43, at 162.

71. See Caravan, supra note 8, at 3 (stating that she was able to reach all of her students through literature because “they had read books or plays or short stories at some
constructivism learning theory. The skill is not so difficult that students cannot grasp it, but if they are not being shown its relation to their past educational experience in their doctrinal classes, their skills classes, or on the job, they may be lacking a very effective tool in their advocacy kit.73

A. Constructivist Theory Applied to the Literary Technique

Under the constructivist theory of education, using familiar narratives to teach students the unfamiliar concept of the theory of the case is an effective way to teach the client’s point of view. Constructivism is a theory of learning point in their education, all I was doing was using this past experience to help introduce a new and completely foreign concept. The students were able to transition to a new field of study in a way that was familiar and comfortable.”). For instance, in one of my classes, I called on a student who had expressed to me how frustrated she had felt in my class, in doing the writing, and also in law school; she had recommended Jude the Obscure by Thomas Hardy. When I asked her what this book was about, in summary, she told me it was “about a young country boy who has a dream of becoming a scholar, he falls in love with a beautiful girl, she ends up being awful, he falls in love with his cousin, and everyone dies because you don’t fall in love with your cousin.” She described this book in a very common sense terms that every person in the class understood, even if someone had not read the book. She was able to participate in the class in a meaningful way because she was talking about a story that was familiar to her as the reader and then could relate to the legal discussions in class better.

72. Years ago, attorneys only needed to be able to “think like lawyers,” and then they received mentoring and training on the job from the senior attorneys and partners. Today, most students will never experience that kind of training. They will be expected to have all the necessary skills to start working as an attorney on day one. More and more, firms and agencies are relying on schools to teach young lawyers how to practice, and those students who do not learn it in school, may not get it in practice and it may be reflected in their reviews and the types of assignments that they receive. See, e.g., Stephen J. Friedman, Why Can’t Law Students Be More Like Lawyers?, 37 U. Tol. L. Rev. 81, 84-85 (2005) (discussing the “great pressure to make young lawyers productive as quickly as possible” and that “on-the-job training is neither economically feasible nor efficient enough to bridge the gap between the state of knowledge and skills of a new lawyer and the needs of the firm”).

73. See Carnegie Report, supra note 3, at 53 (“[I]t is important, therefore that instructors also give students experience with fuller accounts of cases in which students can grasp the different meaning of ‘facts’ from opposing points of view.”).

74. Three major learning theories exist: behaviorism, cognitivism, and constructivism. Michael Hunter Schwartz, Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 San Diego L. Rev. 347, 365 (2001). For a thorough explanation of the three theories and their applications in law school studies, see generally id., and for an application in legal writing, see generally Susan E. Thrower, Teaching Legal Writing Through Subject-Matter Specialties: A Reconceptualization of Writing Across the Curriculum, 13 Legal Writing: J. Legal Writing Inst. 3 (2007). It is difficult to apply all of the learning theories because they are numerous, often changing, and sometimes conflicting. Pamela Lysaght & Christina D. Lockwood, Writing-Across-The-Law-
that explains why students retain and understand certain information. Constructivism is similar to post-modern thinking because learning and knowledge are constructed by a person based on her own individual experiences and it is based on the belief that “knowledge is always knowledge that a person constructs.” Constructivist thinking is not new. The theory is in opposition to those educational practices that require students to memorize and restate information, while leaving them unable to explain the meaning of the memorized information and the concepts behind it. Fundamentally, constructivism focuses on understanding the acquired knowledge rather than the actual knowledge acquired.

While constructivists believe that “learning occurs in the mind . . . they do not believe that students assimilate instruction intact. Instead, constructivists believe that learners create knowledge from their own interpretation of instruction in light of their experiences and social environment in which they learn.” Constructivists have four general principles. First, learners construct their own knowledge, meaning that they figure out their understanding of the material based on their previous experiences. Second, new learning is not part of an isolated, separate process, but instead, it depends on what students currently understand. So, constructivists recommend

_School-Curriculum: Theoretical Justifications, Curricular Implications, 2 J. ASS’N LEGAL WRITING DIRECTORS 73, 77 (2004). Therefore, this article only analyzes the constructivist theory, which is the only learning theory applicable to this literary technique._

75. Schwartz, _supra_ note 74, at 379-80.
76. Lysaght & Lockwood, _supra_ note 74, at 90.
78. Lysaght & Lockwood, _supra_ note 74, at 90; _see also_ Schwartz, _supra_ note 74, at 380 (“Constructivists do not believe instructors transmit knowledge of ‘the real world’; rather, they believe the learner continually constructs and reconstructs her own images of what the world is ‘like’ from her experiences and her interpretations of those experiences.”).
79. Multiple elements exist to different underlying principles for constructivist learning theories. For instance, Schwartz indicates that there are three important factors. _See_ Schwartz, _supra_ note 74, at 380 (“[P]ractice in real settings (experience), the opportunity to develop personal interpretations of experiences (construction of meaning by the learner), and the opportunity to negotiate meaning (collaboration).”); another factor to consider in constructivist learning theory is reflection. “Reflection is a deliberate, self-conscious analysis of life experience. [It] can be either individual or collective. In either case, reflection is key to constructing knowledge.” Gagnon & Collay, _supra_ note 77, at xiv. All the principles rely on the same basis for the factors. Though the exact number of factors may differ, this article does not focus on the four main principles enunciated in the text.
80. Lysaght & Lockwood, _supra_ note 74, at 90-91.
81. _Id._ at 91.
presenting the information in different formats using different senses to make ideas more meaningful to a student’s current understanding. Third, students need to interact socially during the learning process so that the teacher can provide feedback to the student; students can then see how their ideas relate to their peers, and it allows them to continue to relate the new information to their current understanding. Finally, students should learn using problem-based instruction, with real world tasks, so that they form a new understanding that will allow them to solve problems they will eventually face. Constructivists maintain that:

[Students actively construct their own knowledge; teachers don’t just transfer knowledge to students. They make personal meaning for themselves, discuss social meaning in peer groups, decide on shared meaning with other students in class, and then reflect on the standard meaning as they consider their thinking and learning with a teacher.]

Good examples of constructivist learning environments are the performing arts and athletics because those instructors must continually work in conjunction with what students already know, then must work with those students to teach them new skills, and, finally, the students must be able to implement the skills on their own—they cannot have someone else do it for them. Consider a ballet dancer: she must have some basic understanding of the instruction, then, based on how she already performed, an instructor adjusts her motion and teaches her new positions. That ballet student must implement what the teacher told her—by trying the new positions herself—to learn them. Many skills classrooms already use constructivist principles by using problems based in real-world cases, requiring students to engage in research and develop written work product, and continually giving feedback on drafts of student work and graded papers. Using literature as a basis for explaining the

82. Id.
83. Id.
84. Id. at 92.
85. See Gagnon & Collay, supra note 77, at xiii (comparing constructivist teaching to choreography because the teacher acts as the choreographer).
86. Id. at xiv.
87. See id. (“[T]eachers who explored what students knew, engaged students in learning, expected students to think for themselves, and supported students as they made meaning of their learning.”).
88. See generally Schwartz, supra note 74; Thrower, supra note 74.
theory of the case is another example of implementing the constructivist viewpoint and why it is so effective for students.

In the literary technique, students are first required to name and explain a book that they particularly enjoyed. So, they are already pulling from their own past experience—not something new and unfamiliar, but something that comes from their own understanding. Because students explain this book to their peers during a class, they are getting the cultural reference from both them and the instructor, and they are able to test their understanding and check it amongst their peer group for validity. As various books are discussed by different students, each student assimilates a new narrative with his or her own favorite book. Often, students will have also read another student’s book and it is yet another way of linking their prior experience to their current educational experience. Constructivists support this type of understanding and validation amongst students because “[s]uch collaboration ‘enables insights and solutions to arise synergistically that otherwise would not come about.’ It also challenges learners to think beyond themselves, and share cultural knowledge. It further allows learners both to refine their own ideas and to measure the quality of those ideas.” Students no longer feel like they are in an educational vacuum while in law school, but are able to connect their past learning experiences through the use of narrative.

89. Regardless of student’s past experiences, they will have experience with narrative.

The narratives of the world are numberless, . . . [a]ble to be carried by articulated language, spoken or written, fixed or moving images, gestures, and the ordered mixture of all these substances; narrative is present in myth, legend, fable, tale, novella, epic, history, tragedy, drama, comedy, mime, painting . . . stained-glass windows, cinema, comics, news items, conversation. Moreover, under this almost infinite diversity of forms, narrative is present in every age, in every place, in every society . . . . All classes, all human groups, have their narratives, enjoyment of which is very often shared by men with different, even opposing, cultural background. Caring nothing for the division between good and bad literature, narrative is international, transhistorical, transcultural: it is simply there, like life itself.

89. Schwartz, supra note 74, at 381 (footnotes omitted).

91. It is seeing the particular instance in light of the principle, so that the principle itself may take on a new or nuanced meaning that it might have in connection with a different situation. Awareness of narrative and context bring the principles alive while also giving conceptual nuance to their meaning. In this way, clinical experiences can qualify and expand students’ comprehension of legal principles, potentially providing crucial insight for the students’ progress toward mature legal judgment.

Carnegie Report, supra note 3, at 124.
Of course, students are not aware of the learning process that they are engaging when the literary technique is used in class. For instance, a student that had recommended *Middlesex* as her favorite book stated that it was about a “transgender girl who was misunderstood” and “that it was a story of a girl growing up with the same insecurities” as other girls. She also said that “you can just sort of relate.” This student, like others, while describing this book identified one of the major themes in the book that made it so relatable, a teenager’s insecurity, and also remembered the basics of the story, which is the theme that effectively transported her into the narrator’s story. But, she did not recognize that she was combining a familiar and memorable past narrative experience with a new and necessary law school concept.

Each of the students has a similar experience when describing their book and each describes part of the theme. The instructor, as the person that shows students how their familiar past educational knowledge relates to the new knowledge, needs to show the students how these themes relate to the theme that lawyers develop in a persuasive brief because, similar to their favorite writers, they too will be crafting a story. In this step, students are connecting their past learning to their current learning and they are developing a new understanding based on past experience. Students are first developing their own ideas and understanding of the material before they read the theoretical

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92. *Middlesex* tells the breathtaking story of Calliope Stephanides, and three generations of the Greek-American Stephanides family, who travel from a tiny village overlooking Mount Olympus in Asia Minor to Prohibition-era Detroit, witnessing its glory days as the Motor City, and the race riots of 1967, before they move out to the tree-lined streets of suburban Grosse Point, Michigan. To understand why Calliope is not like other girls, she has to uncover a guilty family secret, and the astonishing genetic history that turns Callie into Cal, one of the most audacious and wondrous narrators in contemporary fiction. Lyrical and thrilling, *Middlesex* is an exhilarating reinvention of the American epic.

JEFFREY EUGENIDES, MIDDLESEX (2002) (description from the back cover).

93. See also Rideout, supra note 63, at 55 (noting his discussions with upper level writing students about what makes narratives persuasive in the law and that “[n]arratives are ‘innate’ ways of understanding and structuring human experience; this makes them inherently persuasive”).

94. See supra note 57 for other students’ identifications of the themes. Typically, students do not remember the names of all the characters, the exact places the story took place, or the exact timeline. Instead, they remember how the book caused them to see a situation in a different light, to listen to the story it told.

95. “The teacher’s role is to guide, facilitate, or coordinate learning rather than dispense information.” GAGNON & COLLAY, supra note 77, at xxi.

96. See supra notes 78 to 85.
explanation of theory of the case, which allows them to better understand it and implement it again.\textsuperscript{97}

By using this technique, students are creating a new understanding of the law and the legal process by relating it back to something that they have already experienced: themes in their favorite books. Then, they are sharing this interaction with the professor and other students. In the classroom, a conversation is constructed, so that they are able to adjust their viewpoint and see where they stand in relation to their peers. By listening to their peers’ own experiences with books, students are able to understand and compare different viewpoints thereby better creating their own new understanding of an abstract concept. By seeing multiple viewpoints of the same book—though not necessarily presented using different formats or sensory skills—students receive new information from a variety of sources, further cementing their new understanding with their old experience.

B. Constructivist Theory as Applied Using Narrative in the “Real World”

One of the primary tenets of constructivist thinking is real-world experience. Part of developing this real-world experience is the interaction with the client and developing that client’s point of view. It is not enough for the student merely to go through the steps of research and apply the facts to the law to get the real-world experience. She must be able to see the case through the character’s point of view and the reader’s point of view to develop the teller’s point of view. Under the basic tenets of constructivist theory, the literary technique allows a student to reference a past, positive learning experience with the new legal skill set and shows them how to apply it to the real world: a persuasive brief.

Teaching storytelling and theme development to students may seem less important compared to the basics of legal theory and analysis, but storytelling is a very powerful tool that many practitioners already recognize\textsuperscript{98} in their cases and that students should learn how to use.\textsuperscript{99} While the legal analysis explains

\textsuperscript{97} “Students work together to develop their own ideas rather than merely accept textbook summaries. When students encounter experts’ theories and explanations in original source material, they are better prepared to critically analyze those ideas.” Gagnon & Collay, supra note 77, at xiv.

\textsuperscript{98} “Moreover, creative practitioners are often more sophisticated about legal storytelling than many legal scholars, who are only beginning to understand and describe the nature of practice as storytelling.” Meyer, supra note 62, at 568.

\textsuperscript{99} In addition to the other clinical skills taught, instructors need to teach persuasion by teaching students how stories work and to teach them how to build a narrative. See Meyer, supra note 41, at 230; see also Posner, supra note 68, at 361 (“[I]nsights as well as the rhetorical devices of literature can be professional assets for lawyers.”); Carnegie Report,
to the judge why the client should win, the effective story motivates the judge to find in the client’s favor.

Thus, perhaps more often than we care to admit, it is narrative that truly does the persuasive work in legal advocacy. If this is so, then it behooves legal writing professors teaching persuasion, law students who will become attorneys, and attorneys litigating cases, to better understand how stories work, and to develop a narrative tool kit supplementing the analytical skills traditionally taught in law school and emphasized in legal writing programs.100

In addition, using the constructivist learning theory also lends itself to affecting the reader. The reader, like students, wants to connect past experiences with new stories—familiarity breeds understanding. Cognitive psychology indicates that when people are confronted with new situations they have a patterned response to the new situation based on the situation’s similarity to past experiences.101 People seek stories out of random events and occurrences in their lives because they want a story to help explain things.102

\textsuperscript{supra} note 3, at 122-23 (“[A]ll the dimensions of legal practice are, at least in principle, involved in developing a theory of the case.”).

100. Meyer, \textsuperscript{supra} note 41, at 230.

101. Cognitive psychology suggests that expertise requires not just knowledge but also skill at picking relevancies, learned largely through experience. We develop patterns of response to recognizable situations and anticipate familiar consequences, and so we situate our actions in a narrative. When faced with a new situation or problem, we use narrative to integrate the unfamiliar into our experience, and so to determine how to ‘go on’ with a practice – to continue its story.

\textsuperscript{BINDER} & \textsuperscript{WEISBERG}, \textsuperscript{supra} note 10, at 232-33; \textit{see also} Donald P. Spence, \textit{Narrative Persuasion}, 6 \textit{Psychoanalysis & Contemporary Thought} 457, 459 (1983) (“If I can show that your life can be reduced to a limited number of significant themes, variously repeated and transformed, then it follows that this account will tend to be more persuasive than a formulation which must invent a new reason for each new piece of behavior.”). In essence, for most people, including the reader of legal briefs, narrative is useful because it “maintains continuity in the midst of change.” \textsuperscript{BINDER} & \textsuperscript{WEISBERG}, \textsuperscript{supra} note 10, at 234; \textit{see also} Graesser, Olde, & Klettke, \textsuperscript{supra} note 49, at 229 (“[N]arrative has a privileged status among the various types of discourse” because the “situations and episodes in narrative have a close correspondence to everyday experiences, so the comprehension mechanisms are much more natural than those recruited during the comprehension of other discourse genres,” such as logical reasoning).

102. The need to tell stories has “deep psychological springs we do not fully comprehend, but the need to make up characters, and to place them in worlds that are parallel to our own or are perhaps as wildly at variance with it, is part of the history of all peoples, cultures, and countries.” \textit{Essentials of the Theory of Fiction}, \textsuperscript{supra} note 34, at 1.
Therefore, theme development should universally be taught to students because when people respond to the theme in the client’s story, then students have mastered one of the most effective pieces of persuasive writing. If a writer does not create an underlying theme for the reader, then the reader will create one for herself because “people apprehending narratable facts that bear on legal questions cannot help but construe those facts according to certain received frames. . . . Without them, one would have to devote all of one’s energy to inventing and maintaining conceptual schemes.”\(^{104}\) If a lawyer fails to present the client’s version of events using a reliable and believable theme, then the judge may apply a theme that is more familiar to him, which may not be beneficial to the client. So, when a writer does develop a theme for the judge, the writer will be more likely to immerse the judge in the client’s story and the judge will review that story less critically, and be more inclined to understand and relate to the client.\(^{105}\) Alan Dershowitz, the well-known lawyer and professor who represented O.J. Simpson and Claus von Bulow at trial, argues that life does not follow a comprehensive story, that events are often coincidental, without meaning, and, therefore, lawyers are doing an injustice by following narrative techniques.\(^{106}\)

103. Because people respond – instinctively and intuitively – to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately integrate into their storytelling the larger picture of their clients’ goals by subtly portraying their individual clients as heroes on a particular life path. This strategy is not merely a device to make the story more interesting, but provides a scaffold to influence the judge at the unconscious level by providing a metaphor for universal themes of struggle and growth. Robbins, supra note 62, at 768-69.

104. Binder & Weisberg, supra note 10, at 233-34. (“When a practical actor encounters an obstacle, it is rational for her to make the smallest adjustment to her beliefs and attitudes possible.”); see also Schank & Berman, supra note 9, at 293 (“The purpose of creating these representations, or scripts and scenes, out of the many cases we encounter, is to lessen the burden of understanding new events. Scripts help us to use our minds efficiently.”).

105. See Green & Brock, supra note 9, at 702 (“Transported readers may be less likely to disbelieve or counter argue story claims, and thus their beliefs may be influenced.”).

106. “Events are often simply meaningless, irrelevant to what comes next; events can be out of sequence, random, purely accidental, without purpose. If our universe and its inhabitants are governed by rules of chaos, randomness, and purposelessness, then many of the stories – if they can even be called stories – will often lack meaning.” Alan M. Dershowitz, Life Is Not a Dramatic Narrative, in LAW’S STORIES, supra note 29, at 99, 100. Likewise, Green and Brock’s study indicates that “once a reader is rolling along with a compelling narrative, the source has diminishing influence. In this fashion, the belief position implied by the story might be adopted regardless of whether they corresponded with reality.” Green & Brock, supra note 9, at 719. However, they also contrasted rhetoric, in which the argument’s credibility is affected by source, with narrative, in which the reader
He argues that “[h]uman beings always try to impose order and meaning on random chaos, both to understand and to control the forces that determine their destiny. This desperate attempt to derive purpose from purposelessness will often distort reality.” However, the point in using narrative and storytelling techniques is not to distort reality, but to do exactly what he criticizes—to create a cohesive understanding out of events and facts that appear to be random or chaotic. If a writer does not construct the narrative for the reader, if an attorney fails to create a story for the judge, then the reader will create his own story, one that makes sense to him, and one that may not lead to the writer’s intended conclusion, to impose order on the chaos that he sees.

Using storytelling techniques is another way of showing the judge how things happened. In storytelling, the reader does not have to go through the arduous task of trying to figure out how all the facts connect or fit together in the larger scheme because she sees the story unfold in the narrative. The writer needs to create a theme to control what the judge hears and sees within the bounds of the law. Contrary to Dershowitz’s opinion, “[n]arrative persuasion in the law is obviously not unbounded storytelling; narratives are constrained by and shaped to fit legal rules, legal cultural assumptions, and the conventions of legal writing practice.” Developing a cohesive and believable theme as part of the client’s story is part of persuading the judge, within the bounds of the law.

According to Dershowitz’s critique of narrative techniques, the jury may end up believing the story rather than the empirical evidence offered at trial. He referenced “Chekov’s Canon,” in which Anton Chekov wrote, “If in the first chapter you say that a gun hung on the wall, in the second or third chapter it must without fail be discharged.” Relying on Chekov’s Canon, could be more easily taken advantage of by a less credible source. Id.

107. Dershowitz, supra note 106, at 100; see also Daniel A. Farber & Suzanna Sherry, Legal Storytelling and Constitutional Law: The Medium and The Message, in Law’s STORIES, supra note 29, at 37, 43 (“The new storytellers believe that stories have a persuasive power that transcends rational argument.”).


109. Meyer, supra note 41, at 230-31; see, e.g., Fed. R. Evid. 801-807 (federal hearsay rules that prohibit statements other than those made by the declarant at trial, as offered to prove the truth of the matter asserted, unless the testimony falls within one of the exceptions).

110. Dershowitz, supra note 106, at 100 (quoting ANTON TCHEKHOV, LITERARY AND THEATRICAL REMINISCENCES 23 (S.S. Kotelyansky ed. & trans., 1965)); see also ESSENTIALS OF THE THEORY OF FICTION, supra note 34, at 11 (“But we do not find characters to be well
Dershowitz explained that an attorney representing a defendant who took a life insurance policy out ten days before his partner was gunned down used this theory to convince the jury that that trial was not a made for TV movie in which the story finished neatly.\textsuperscript{111} Instead, the defense attorney explained to the jury that some things are just coincidental. He asked the jurors how many of them had taken out a life insurance policy on someone and what people would have thought if that person had just happened to die after they had taken out that policy.\textsuperscript{112} Dershowitz used this story to show that the randomness of evidence is sometimes just random. But, instead, this story actually reveals how effectively a good theme can persuade because it showed that the attorney’s effective narrative can help the reader accept the randomness and coincidence of events as a reasonable explanation. In other words, the narrative conveyed a believable story.

While the defense attorney’s story did not fit neatly into the world, it did develop a theme that altered the jury’s thinking on the facts that had been presented to it by guiding the jury’s thought process. The defense attorney created a compelling, reasonable theme to show that the chance occurrence of death and an insurance policy were not beyond the realm of possibility, which forced the jury to identify with his client; anyone of them could have had this random event occur.\textsuperscript{113} The point here is that storytelling, as applied, is not intended to warp the legal system, but to work within the bounds of the legal system and offer another tool to the litigator to effectively represent his client by making those cognitive connections for the judge or the jury.

V. CONCLUSION

“The idea of a story is familiar to most students, but law school rarely taps into students’ intuitive sense of a meaningful story.”\textsuperscript{114} The literary technique described in this Article uses students’ favorite books to connect to positive, familiar experiences in their prior education and to identify the three points of view that they should build to effectively persuade a judge. Though the theory of the case is an essential part of a practicing attorney’s skill set, it is probably portrayed and developed unless something early in the novel has prepared us for what happens later. In this way novels are highly predictable and predetermined in ways unlike the randomness we all experience when living in a contingent world.”\textsuperscript{115}

111. Dershowitz, supra note 107, at 99-100.
112. Id. at 100.
113. See Binder & Weisberg, supra note 10, at 263-64 (explaining a defense lawyer’s need to destroy the narrative to succeed, balanced with an equal need to construct his own narrative, such as creating a believable alibi relating to reasonable doubt, the presumption of innocence, and other typical defense alibis).
114. Miller, supra note 4, at 303.
one of the more abstract skills taught because it requires students to take another leap in their legal education and to be more than the close readers that they are, but also to be those writers who can transport and convince another reader.

This technique may not help all students all the time, but it is yet another tool to better prepare them for the reality and expectations of legal practice. Perhaps, given the animosity many of our students feel towards writing, and the fact that it is a large part of legal practice, effectively teaching students to become better readers and writers may turn them into happier attorneys.115 They will have more control over the documents they create, they will have more ways to understand the writing process and persuasiveness, and they will see that the reading that they do everyday can be part of a satisfying job, not just a brief that they have to grind out and wait to be torn apart by a senior partner.116

115. “Fewer than a third of practitioners confess to professional happiness these days. . . . Some attribute this to overwork, others to that strange combination of adversarial energy and existential uncertainty that characterizes the American lawyer. I prefer to ascribe our collective melancholia to bad writing habits.” Weisberg, supra note 10, at 177 (stating that a connection exists between low self-esteem and bad writing).

116. The ideals of social justice and human dignity represented by law . . . are masked by more immediate concerns and desires. Students who have lost control of time and who are not given imaginative encouragement are unlikely to pursue the connection between the fundamental ideals that brought them to law and what they will do as lawyers. Elkins, supra note 27, at 22.
APPENDIX

Following is a brief explanation of the literary technique explained so that instructors may replicate it in their classrooms. For further instruction, you may download the mp3 file at http://law.marquette.edu/central/Conference.html, which details the in-class use and representative responses from students.

Prior to Class: Preparation

First, instructors should post a message for all students. A sample message is below.

Dear Class,

For an exercise that we will be doing in class next week, please post a reply to this message with your favorite book or a book that you would recommend to a friend. It does not matter if your book is fiction or non-fiction, as long as it is something you enjoyed reading. I’ll start by listing a book that I would recommend: The Brief and Wondrous Life of Oscar Wao by Junot Diaz.

Professor Becker

During Class: Using the Exercise

Instructor should ask students: “What is your favorite book?” or “Why did you name this book your favorite book?” Then, instructors should start a conversation about the book: Ask for character’s names, dates, places. Instructors should take brief notes so that they can relate the student’s explanations to one another. Then, instructors should connect the theme with the practice of law and developing the theory of the case by explaining that a theme transports the judge into a client’s case and causes him to feel sympathy for the client. Legal briefs are replete with complex facts, such as dates, weights, locations, phrases, and technical terminology. And, the theme aids judicial readers to remember the story behind the analysis and facts, just as they remembered their author’s theme. Finally, the instructor should show students, through past examples or in-class examples, how to employ theme in the statement of facts, point headings, word choice, and organization.
Instructors should use an example from a short story, essay, or passage to enforce the concept of the client’s point of view. An example would be this section from David Sedaris’s essay *April in Paris*:

By this point there was no denying my emotional attachment. There were nights that first summer when I’d get out of bed at 3:00 a.m. and wander into my office with a flashlight. Everyone would be wide awake, but it was always April that I singled out. If I thought about her a hundred times a day, it seemed only fair that she thought about me as well. My name, my face: I didn’t expect these things to register, but in the way that a body feels the warmth of the sun, I fully imagined that she sensed my presence, and missed it when I was away.117

Finally, the instructor should show something from a judge’s viewpoint that re-enforces and reconnects the lesson. A good example is the Honorable Dolores K. Sloviter video clip called “A Good Brief Draws You In” from Bryan Garner’s website.118

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