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GIDEON'S LEGACY: TAKING PEDAGOGICAL INSPIRATION FROM THE BRIEFS THAT MADE HISTORY*

*Elizabeth Berenguer Megale ***

If one were to make up a list of the most significant cases of the last century decided by the Supreme Court, I think *Gideon* would be on such a list. Such a list would be headed by *Brown v. Board of Education*, I think for most people. And *Bush v. Gore* would be on such a list. But there is no doubt that *Gideon* would be on such a list. And I say it would be on such a list for two reasons. First, because it affirms a principle which is fundamental to a democratic society, to a free society, that no person should be convicted and sent to jail unless he has the assistance of a lawyer at his side. And secondly, it was important in establishing the principle that the Bill of Rights, this particular provision of the Bill of Rights, does extend to the states, and therefore it expanded this vital and significant right.

–Abe Krash¹

I. INTRODUCTION

It has been fifty years since the United States Supreme Court recognized the fundamental right to counsel in state criminal prosecutions.² Prior to the decision in

* This article was included as assigned reading for Law and Literature, taught by Anthony Baker, Professor of Law, at Atlanta's John Marshall School of Law during the spring of 2013. In addition, the author lectured in Professor Baker's class on the topic of "Law and Fairness" using this article, *Gideon's Trumpet*, and Clarence Darrow's *Address to the Prisoners in the Cook County Jail* on March 19, 2013. On March 20, 2013, this article was presented as a part of a scholarly exchange at Atlanta's John Marshall School of Law.

** Associate Professor of Law and Director of Legal Skills & Professionalism, Savannah Law School. BBA, JD, Mercer University School of Law. This author wishes to thank Assistant Clinical Professor Christine Cerniglia Brown for encouraging me to put pen to paper and inspiring the title and approach of this piece. Many additional thanks are owed to Professor Lucille Jewel and Associate Dean Rose Anne Nespica for providing valuable comments and suggestions on various drafts of this article. My gratitude also goes to Professor Anthony Baker and Associate Dean for Scholarship Jeffrey Van Detta, both of Atlanta's John Marshall School of Law, for the opportunity to advance discourse on the topic of Law and Fairness and to present this article to both students and faculty of the law school.

1. Symposium, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 149 (2004) (Abe Krash presenting).

2. "March 18, 2013 will be the 50th Anniversary of the Supreme Court decision in the landmark case of *Gideon v. Wainwright*. While the name Gideon has become synonymous with the right to effective assistance of counsel, the promise of Gideon has yet to be fulfilled." Standing Comm. on Legal Aid & Indigent Defendants,

Gideon v. Wainwright,³ state courts were required to appoint counsel to defendants only in capital cases⁴ or those criminal prosecutions presenting special circumstances.⁵ So, for defendants who were not facing a capital charge or bearing some other special circumstance, legal representation was not guaranteed by the Constitution.

Such was the case in the Bay County, Florida, courthouse when Clarence Earl Gideon faced trial for breaking and entering a poolroom with the intent to commit a misdemeanor, a crime punishable by up to five years in prison.⁶ He requested an attorney represent him at trial, to which the judge replied:

Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.⁷

Gideon at 50: Commemorating the 50th Anniversary of Gideon v. Wainwright, ABA, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/gideon_at_50.html (last visited March 19, 2013).

3. 372 U.S. 335 (1963).

4. In 1963,

[t]here was a fundamental distinction between [the right to counsel] in federal courts and in the state courts. In the federal courts, it had been established that an accused person who is indigent is entitled in every case to the appointment of a lawyer. That principle was confirmed by a decision written by Justice Black shortly after he was appointed to the Supreme Court in 1938, in a case called *Johnson v. Zerbst*. In the state courts, the situation was altogether different. In a state criminal proceeding for a capital offense—that is, for an offense involving the death penalty—it had been established that if a person was indigent, the state was obliged to provide a lawyer for him. But in every other case, in all other felony criminal prosecutions, there was no right to counsel as a matter of constitutional law.

Symposium, *supra* note 1, at 136–37 (Abe Krash presenting); *see also* *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948); *Bute v. Illinois*, 333 U.S. 640, 674 (1948).

5. The Court described special circumstances as follows:

Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. . . . Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

Betts v. Brady, 316 U.S. 455, 462 (1942) (internal footnotes omitted); *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. *Gideon*, 372 U.S. at 336–37.

7. *Id.* at 337.

Gideon simply replied, "The United States Supreme Court says I am entitled to be represented by Counsel."⁸

At the time, the rule as announced in *Betts v. Brady* governed cases involving the appointment of counsel to represent defendants charged with crimes.⁹ The rule required courts to determine whether a defendant presented a special circumstance such that appointment of counsel was necessary to ensure a fair and just trial.¹⁰ Over time, courts developed a set of factors to aid in determining whether such special circumstances existed. Those factors were:

1. Gravity of the offense, i.e., whether capital or non-capital.¹¹
2. Complexity of the charge against the defendant.¹²
3. Ignorance.¹³
4. Illiteracy or lack of education.¹⁴
5. Extreme youth or lack of experience.¹⁵
6. Familiarity with court procedure.¹⁶
7. Feeble-mindedness or insanity.
8. Inability to understand the English language.¹⁷
9. Prejudicial conduct shown by trial judge, prosecuting attorney or public defender.¹⁸
10. Plea of guilty by co-defendant within hearing of jury.¹⁹

The unfortunate reality for Clarence Earl Gideon was that, at the time, he was not a unique defendant experiencing a special circumstance—he was all too common.²⁰ Because Gideon did not present a special circumstance and was not being tried for a capital offense, the trial court denied his request under the authority of the rule articulated in *Betts v. Brady*.²¹ Gideon was ultimately convicted by a jury and sentenced to five years in prison.²²

8. *Id.*

9. *Id.* at 337–38.

10. *See Betts*, 316 U.S. at 462.

11. *Williams v. Kaiser*, 323 U.S. 471 (1945); *Tomkins v. Missouri*, 323 U.S. 485 (1945); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

12. *Rice v. Olson*, 324 U.S. 786 (1945); *DeMeerleer v. Michigan*, 329 U.S. 663 (1947); *McNeal v. Culver*, 365 U.S. 109 (1961); *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956).

13. *Smith v. O'Grady*, 312 U.S. 329 (1941); *Tomkins v. Missouri*, 323 U.S. 485 (1945).

14. *Carnley v. Cochran*, 369 U.S. 506 (1962); *Cash v. Culver*, 358 U.S. 633 (1959).

15. *Wade v. Mayo*, 334 U.S. 672 (1948); *Uveges*, 335 U.S. at 437; *Moore v. Michigan*, 355 U.S. 155 (1957).

16. *Wade*, 334 U.S. at 672; *McNeal*, 365 U.S. at 109.

17. *Palmer v. Ashe*, 342 U.S. 134 (1952); *Massey v. Moore*, 348 U.S. 105 (1954).

18. *Marino v. Ragen*, 332 U.S. 561 (1948).

19. *White v. Ragen*, 324 U.S. 760 (1945); *Townsend v. Burke*, 334 U.S. 736 (1948); *Hawk v. Olson*, 326 U.S. 271 (1945); *Reynolds v. Cochran*, 365 U.S. 525 (1961); *Gibbs v. Burke*, 337 U.S. 773 (1949); Brief for the Respondent at 41 *Gideon v. Cochran*, 135 So. 2d 746 (1961) (No. 155), 1963 WL 105476 at 41 [hereinafter Respondent Brief] (quoting the list of factors used to determine whether special circumstances exist).

20. Brief for Petitioner at 13, *Gideon v. Cochran*, 135 So. 2d 746 (1961) (No. 155), 1962 WL 115120 at 13 [hereinafter Petitioner Brief].

21. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

22. *Id.*

From his prison cell, Gideon began the tedious process of appealing his case until it reached the United States Supreme Court.²³ The Court appointed Abe Fortas²⁴ to represent him in the appeal to determine the question “[s]hould this Court’s holding in *Betts v. Brady* be reconsidered?”²⁵ The brief filed by Mr. Fortas employs techniques contrary to commonly accepted persuasive tools as it depersonalizes Gideon, relies heavily on secondary sources, and emphasizes the arguments advanced are contrary to well-established principles of law governing the issue.²⁶ Yet, the Court held in favor of Gideon and overruled its prior holding in *Betts v. Brady*, effectively abolishing the special circumstances rule for appointment of counsel in criminal cases.²⁷

Scholars have speculated why the Court chose Gideon’s case to overrule the longstanding rule from *Betts v. Brady* and what legacy that decision has created.²⁸ Though interesting, that discussion is beyond the scope of this analysis on the rhetorical lessons gleaned from the briefs filed by the parties.²⁹ This article is limited to studying the pedagogical treasures found within the party briefs.³⁰ The goal is to provide a method of examining the briefs to teach students advanced principles of appellate advocacy and more complex styles of legal analysis because, regardless of the Court’s receptivity to abolishing the special circumstances test, the *Gideon* briefs played a critical role in history.³¹

In teaching the basics of legal writing, professors give students a number of tools useful for reasoning, analysis, and argumentation. Basic legal writing can often be broken down into a formula, or a series of formulas, relatively easy for a

23. Petitioner Brief, *supra* note 20, at 3–5.

24. “At the time that Abe Fortas was appointed to represent Gideon he was . . . one of the premier lawyers in Washington. Indeed, . . . measured by any standard, Abe Fortas was one of the best lawyers of his generation.” Symposium, *supra* note 1, at 137 (Abe Krash presenting).

25. Petitioner Brief, *supra* note 20, at 5 (emphasis added) (internal citations omitted).

26. “Fortas was an absolute genius at propounding innumerable questions and problems to [his clerks], . . . [but] Fortas himself was the author of the brief.” Symposium, *supra* note 1, at 138 (Abe Krash presenting).

27. *Gideon*, 372 U.S. at 345.

28. Some speculated that

[t]he Supreme Court was clearly waiting for a case of just the sort that *Gideon* presented. It wanted a case where there were no special circumstances, in which it could consider [solely the issue of] the right to counsel. I think the Court had become frustrated by the endless stream of cases presenting special circumstances issues and the Gideon petition was plucked out—I’m sure pursuant to the instructions of the Chief Justice to one of the law clerks—plucked out because it presented precisely the situation where there was a question as to the right to counsel without regard to special circumstances.

Symposium, *supra* note 1, at 137 (Abe Krash presenting); see also ANTHONY LEWIS, GIDEON’S TRUMPET 29–30 (Random House 1964); Milton Greenberg, *Book Review of Gideon’s Trumpet*, 42 U. DET. L.J. 520, 521 (1964–1965).

29. One “strategy for cultivating individual voice [in students] is the practice of close, rhetorical reading of specimens of writing produced for professional legal contexts.” Andrea McCardle, *Teaching Writing in Clinical, Layering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 514 (2005–2006).

30. “[H]ow the distinguished attorney, Abe Fortas, appointed by the Supreme Court to argue Gideon’s cause, planned and executed the strategy necessary for a great constitutional victory is a particularly intriguing lesson in the science and art of advocacy.” Greenberg, *supra* note 28, at 521.

31. *Id.*; Symposium, *supra* note 1, at 140–41 (Abe Krash presenting).

student to master.³² In fact, a student can usually produce a solid legal analysis by simply combining some of the basic tools of legal writing and following the formula.³³ Following a formula does not encourage creativity, however, and a formula is incapable of effectively challenging existing law (*i.e.*, categories) or advocating for change.³⁴ In other words, it does not encourage students to think outside the box (or category) or to take a more proactive approach to the law and facts.³⁵ Effective lawyers should know how to take appropriate risks with the law and to develop, chisel, and construct sophisticated analyses with strategic goals in mind.³⁶ This process of developing, chiseling, and constructing affects our categorical acceptance of established legal principles and rules. As a result, it can be a powerful tool in an attorney's arsenal.³⁷

Students often feel paralyzed by literal words on a page or the undisputed facts of a case. They struggle to see outside the established categories of law, even to express the underlying reasoning, much less to recontextualize the analytical process.³⁸ The goal of the legal writing professor should be to train students to embrace a transformative approach where legal language and facts are innovatively

32. Some common organizational paradigms include: CRuPAC, TREAT, CRExAC, CREAC, and IRAC. See, e.g., Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 129 (2008); Anita Schnee, *Logical Reasoning "Obviously"*, 3 J. LEGAL WRITING INST. 105, 120 (1997); Terrill Pollman & Judith M. Stinson, *Irlafarc! Surveying the Language of Legal Writing*, 56 ME. L. REV. 239, 257 (2004). Other basic tools include rule-based reasoning, analogical reasoning, and counteranalogical reasoning. See LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 5–6 (5th ed. Aspen 2010). These tools require students to identify a rule as stated in a case or cases and then apply that rule by comparing or contrasting the facts to a hypothetical fact pattern to determine the rule's applicability. See also Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEG. STUDIES FORUM 7, 9–10 (1996) [hereinafter Edwards, *Dialectic*].

33. Chestek, *supra* note 32, at 129–30.

34. See, e.g., *id.* at 129; Schnee, *supra* note 32, at 105.

35. Thinking outside the box is precisely what Abe Fortas did in drafting the brief for Gideon. His principle problem was how to get the justices

to subscribe to the doctrine that a state must appoint a lawyer[.] Fortas had a very significant insight into that issue. He said, if you are concerned about issues of federalism, if you are sensitive to issues of federalism, to issues of states' rights—he said to such a Justice—you then should oppose the special circumstances rule. Why? Because, Fortas pointed out, in every case where a person is convicted in a state court, that individual would then go to a federal court and file a petition for habeas corpus, and the federal judge would then sit in judgment on what a state court did—that is, the federal court would review what the state court did under this vague, special circumstances standard. As Fortas pointed out, it was ad hoc and ex post facto review, and he asked: What could be more of an irritant to a state court judge than to have his judgments continuously reviewed under that kind of a standard? It was a very significant insight.

Symposium, *supra* note 1, at 139 (Abe Krash presenting). Fortas saw the problem through a different lens, through a different category.

36. “[N]arrative reasoning and other forms of legal reasoning must function together, complementing and constraining each other The process of jurisgenesis arises from both dialectic and analogical processes in order that law may play its role in human living, which is likewise both dialectic and analogical.” Edwards, *Dialectic*, *supra* note 32, at 28; see also MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 1–7 (Aspen 2002); Chestek, *supra* note 32, at 129.

37. “[F]amiliarity insulates habitual ways of thinking from inspections that might find them senseless, needless, and unserviceable . . . [but a] powerful trick of the human sciences is to decontextualize the obvious and then recontextualize it in a new way.” ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 2, 4 (Harvard Univ. Press 2000).

38. Schnee, *supra* note 32, at 105.

cast to propel the analysis. In other words, we should be teaching students how to win cases.³⁹ To this end, advanced legal reasoning techniques can and should be introduced early in law school, even in the basic first year legal writing courses.

The purpose of this article is to provide guidelines for studying a master brief, like the petitioner brief filed in *Gideon v. Wainwright*, as a demonstration of advanced techniques in legal reasoning and persuasion. Specific lessons are offered on how to use the briefs as an illustration to teach persuasive writing. Section II below gives a *brief* history and explanation of rhetoric and other persuasive tools. Note the emphasis on the word “brief” in the previous sentence, as this article is not intended to be a comprehensive analysis of rhetoric, storytelling techniques, or any other persuasive or literary tool. Rather, this article seeks to describe the tools of persuasion in sufficient detail to give the reader context for the pedagogical lessons to be explained in Section III of the article. Section III provides guidelines for class discussion of the *Gideon* briefs, along with several specific lessons a professor could use in the classroom to connect a persuasive skill with the underlying rhetorical or cognitive theory. Finally, the article concludes by recognizing that at times, traditional persuasive tools are not appropriate in a given case and understanding the power of those tools is essential for students. It cautions against becoming trapped by generic persuasive techniques (like using the client’s name and the opposing party’s designation) and encourages professors to devote more time to lessons on rhetorical and cognitive theories so students walk away with a better understanding of why the tools work and when to use them. The *Gideon* briefs are used throughout this article because they are a bountiful source of pedagogical inspiration. They show students how even the underdog can make an innovative argument to recontextualize a legal issue and persuade the United States Supreme Court to overrule itself.

II. RHETORIC AND TRADITIONAL NOTIONS OF PERSUASION

A lawyer’s primary job as a litigator is to persuade the court for the benefit of the client using the lawyer’s principal tool—legal reasoning.⁴⁰ The process of legal reasoning shares similarities with the game of chess because effective legal reasoning requires crafting and implementing strategic arguments to advance a particular position.⁴¹ A foundation built on strategy is the starting point for any legal argument.⁴² Lawyers must strategize to advance sound legal arguments that the court is willing to accept. Sound legal arguments are grounded in the

39. Brian J. Foley & Ruth Anne Robbins, *Fiction 101*, 462 RUTGERS L.J. 459, 463 (2001).

40. SMITH, *supra* note 36, at 1–7.

41. See, e.g., Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 697 (1987); Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ASS’N LEGAL WRITING DIRECTORS 32, 32 (2008).

42. PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* 11 (Carolina Academic Press 1986).

rhetorical⁴³ principles of *logos*, *ethos*, and *pathos*. Weaving these principles and arguments together into a compelling legal story is an effective and advanced method of persuasive reasoning.⁴⁴

Classical rhetorical concepts of *logos*, *pathos*, and *ethos* have a more comprehensive application to legal reasoning when applied through the lens of cognitive theory.⁴⁵ Cognitive theory establishes the mind's dependent relationship upon the body and physical experience.⁴⁶ This principle explains why the common response to an inquiry about the taste of a mystery meat (like alligator or shark) is: "It tastes like chicken."⁴⁷ Nearly everyone has an idea of what chicken tastes like, so when a person asks what another type of meat tastes like, the individual responding gives a frame of reference, or category, that is familiar and can be readily understood based on a general life experience.⁴⁸

A person's ability to reason and formulate thoughts and concepts is grounded in physical experiences within the world, and these experiences influence a person's willingness and ability to accept any given legal argument.⁴⁹ This is so because the mind is shaped by patterns of perception and action such that the mind creates categories and labels as a response to experiences.⁵⁰ Categories, thus, assist in attributing meaning to the world and also aid individuals in navigating and participating in it.⁵¹

Human beings tend to take for granted that the world is experienced through categories, so even though categories can be useful in many ways, including risk-avoidance,⁵² they can also become entrenched in practice leading to abuses of power and closed-mindedness.⁵³ Still, this cognitive concept of categorizing and

43. "In classical terms, rhetoric referred to 'the use of language for *persuasive* purposes.'" SMITH, *supra* note 36, at 77 (quoting EDWARD P. J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 15 (4th ed. 1999) (emphasis added by Smith)).

44. "[R]hetoric reminds us that in 'hard cases,' the legal language rarely 'fits' and the legal rules rarely compel the result." Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 *LEGAL WRITING: J. LEGAL WRITING INST.* 3, 10 (2010).

45. *E.g.*, Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 *WASHBURN L.J.* 275, 277–83 (2011) [hereinafter Berger, *Lady/Tiger*]; STEVEN L. WINTER, *A CLEARING IN THE FOREST* 2–3 (University of Chicago Press 2001); AMSTERDAM & BRUNER, *supra* note 37, at 1–18.

46. Robert A. Wilson & Lucia Foglia, *Embodied Cognition*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, (Edward N. Zalta ed., 2011), available at <http://plato.stanford.edu/archives/fall2011/entries/embodied-cognition/> or <http://plato.stanford.edu/entries/embodied-cognition/>.

47. Categories function to promote mental economy, pragmatic utility, reference group relevance, communal power, personal gratification, and risk regulation. AMSTERDAM & BRUNER, *supra* note 37, at 21–26.

48. *Id.*

49. *Id.* at 9.

50. "When you inquire where categories come from, you quickly recognize that they are almost never constructed arbitrarily. Typically they are extracted from some larger-scale, more encompassing way of looking at things—either from some *theory* about the world or from a *narrative* about the human condition and its vicissitudes." *Id.* at 11–12 (emphasis in original).

51. "Categories are ubiquitous and inescapable in the use of mind. Nobody can do without them—not lawyers or judges, Hottentot farmers or school children, not even iconoclasts. Categories are badges of our sociopolitical allegiances, the tools of our mental life, the organizers of our perception." *Id.* at 19.

52. *Id.* at 21–26.

53. It has been noted that

cultures seem to have been and continue to be enormously tenacious in holding onto and passing on their traditional theories, narrative forms, and normative system.

labeling may be developed to strengthen the logos, pathos, and ethos qualities of one's argument. An advocate must be mindful that lawyers are not immune from creating categories. In fact the law itself is comprised of categories: It is a set of "external criteria that offer[s] some assurance of a result that is reasoned, fair, functional, and consistent with moral values and meanings."⁵⁴ A lawyer may become controlled or limited by categories in the form of bias and prejudice. Recognizing that as a potential weakness is a basic step in thinking like a lawyer. In other words, attorneys are trained to question pre-conceived notions so that they can overcome categories that cease to serve a legitimate purpose.⁵⁵ Beyond that, lawyers should recognize the potential for bias and prejudice in judges and others because they, as humans, have created categories through their life experiences.⁵⁶ Finally, to the extent certain categories can be anticipated, attorneys can insulate against the prejudicial impact by redefining the categories and framing legal premises in a fashion that the reader is likely to accept, or at least not instantly reject.⁵⁷

Categories Are Never Final . . . [B]oth minds and cultures change under conducive conditions. When those conditions come about, categories crumble; Supreme Courts render landmark decisions; paradigm shifts (in the fashionable terminology) happen; all of us manage to suddenly see things differently—even when it hurts. And categories, together with other canons and conventions of any culture, are perpetually under threat of excavation or sapping by those at its fringes, by those less privileged, by the culture's parodists, its playwrights, its comics. . . . [C]ategories are made, not found. . . . Neither habit nor culture has the final word on how we categorize things in our worlds.⁵⁸

Emphasizing the skill of categorization across the writing curriculum has the potential to produce increasingly sophisticated legal writers who recognize and seize upon opportunities to categorize effectively. Categorization has the power to

....

Once we put a creature, thing, or situation in a category, we will attribute to it the features of that category and fail to see the features of it that don't fit. We will miss the opportunities that might have existed in all the alternative categories we did *not* use. We will see distinctions where there may be no differences and ignore differences because we fail to see distinctions.

AMSTERDAM & BRUNER, *supra* note 37, at 40, 49.

54. Edwards, *Dialectic*, *supra* note 32, at 9. "Law is created by evaluating the litigant's story against something outside itself—perhaps a rule, a line of authorities, a set of norms or policies." *Id.*

55. AMSTERDAM & BRUNER, *supra* note 37, at 19–53.

56. *Id.* at 19.

57. One can challenge categories by attacking their historicity, reframing the category from a different perspective, or narrowing or broadening the category. Edwards, *Dialectic*, *supra* note 32, at 13; *see also* Kathryn Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. L. Rev. 411, 418 (2006).

58. AMSTERDAM & BRUNER, *supra* note 37, at 37.

support sophisticated argument structures (logos) or educe subtle emotional resonance (pathos); it is also essential to establishing credibility (ethos). After all, successfully challenging and changing categories is how lawyers effect change in the law.

A. Logos

Kristin Robbins-Tiscione and Michael Smith are two leading scholars who have recognized the enduring utility of Aristotle's rhetorical framework (logos, pathos, and ethos) and applied these concepts to legal analysis.⁵⁹ Logos is the bedrock skill premised upon deductive logic as exemplified by the legal syllogism.⁶⁰ The legal syllogism is comprised of a major premise, a minor premise, and a conclusion.⁶¹ The major premise represents the starting point for any legal argument, and the parties must agree on the veracity of the major premise for the argument to be valid.⁶² If the parties do not agree, the argument will fail.⁶³ The minor premise corresponds to the particular facts of a case, and it must be expressed in a manner that logically connects it to the major premise.⁶⁴ The conclusion, of course, flows logically from well-crafted major and minor premises.⁶⁵

A legal premise can be derived from a number of sources such as empirical evidence, evaluative judgment, hypothesis asserted for the purpose of disproving, or explicit or implicit authority.⁶⁶ Life experience governs whether a person is willing to accept a proposed premise.⁶⁷ The categories established within the person's subconscious affect the ability to understand and accept the value of the source supporting the premise.⁶⁸ In the same way, a person may be willing to reject a previously accepted premise if the person begins to understand the premise from a new perspective, thereby causing a break in the connection with the prior life experience. This process effectively forces the person to create a new cognitive category vis-à-vis the premise.⁶⁹ Some ways to cause that break, or effect the change in category, include redefining terms, disproving facts, questioning the

59. SMITH, *supra* note 36, at 77–252; KRISTEN KONRAD ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* 1–211 (West 2009).

60. “[T]he primary process of persuasion employed in legal writing is logos.” SMITH, *supra* note 36, at 94.

61. The common example is: All men are mortal. Socrates is a man. Therefore, Socrates is mortal. ROBBINS-TISCIONE, *supra* note 59, at 117–20.

62. “Empirical research on human behavior and decisionmaking provides some evidence that argument chains are more likely to persuade readers if the first links of the chain are well-settled or widely accepted premises.” Stanchi, *supra* note 57, at 418; *see also* ROBBINS-TISCIONE, *supra* note 59, at 115; SCHLAG & SKOVER, *supra* note 42, at 11.

63. ROBBINS-TISCIONE, *supra* note 59, at 149; SCHLAG & SKOVER, *supra* note 42, at 11.

64. ROBBINS-TISCIONE, *supra* note 59, at 151.

65. *Id.* at 150–53.

66. SCHLAG & SKOVER, *supra* note 42, at 11–13; *see also* ROBBINS-TISCIONE, *supra* note 59, at 137–49.

67. SCHLAG & SKOVER, *supra* note 42, at 11–13.

68. AMSTERDAM & BRUNER, *supra* note 37, at 27–28.

69. *Id.*

foundation or judgment of the authority, and illustrating the lack of normative content, among others.⁷⁰

B. Pathos

Pathos arguments include those arguments that appeal to a person's emotions.⁷¹ It has been said that "[t]he law is reason unaffected by desire."⁷² Yet, humans are in fact influenced by their emotions, and attorneys and judges cannot escape that essence of humanity.⁷³ Thus, an attorney who employs emotional appeals can advocate more effectively.⁷⁴ The key to effective pathos arguments, though, is exercising appropriate restraint and recognizing that some emotions, such as hostility toward the court, are never appropriate for an attorney to assert.⁷⁵ Pathos arguments are intended to make the reader desire a particular result, rather than simply understand it.⁷⁶

Pathos arguments can be expressed in one of two ways: emotional substance or medium mood control.⁷⁷ Emotional substance arguments, as the name suggests, are those arguments that evoke emotions such as love, sadness, anger, jealousy, or fear, among others.⁷⁸ Emotional substance arguments may appear through the characterization of the facts used in the minor premise of the legal syllogism, or they may be asserted as separate persuasive points to strengthen the impact of logos arguments.⁷⁹ Medium mood control refers to the tool, or medium, through which the message is communicated and its effect on the person receiving the message.⁸⁰ It recognizes that the way an argument is made will influence the reader.⁸¹ A legal writer can attempt to please the reader's senses by employing a

70. SCHLAG & SKOVER, *supra* note 42, at 13–30.

71. *See generally* HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (Foundation Press, 4th ed. 1999).

72. ARISTOTLE, *POLITICS* 140 (Benjamin Jowett trans., Oxford Press 1963) (circa 350 B.C.E.).

73. AMSTERDAM & BRUNER, *supra* note 37, at 10–12.

74. "I suggest that an appellate brief writer who overlooks the emotional appeal of her case does so at her client's great peril." Chestek, *supra* note 32, at 135.

75. Helen Shapo wrote:

Many people believe that emotion is inappropriate for a lawyer, at least for certain types of argument. But an appeal to emotion can be proper and effective, if it is restrained. You can evoke sympathy for your client's suffering, anger at the defendant's cruelty, or respect for the values of fairness and justice. An emotion that is inappropriate is hostility towards the opposing counsel and parties. Most important, you should convey your conviction for the merits of your client's case, and positive feelings towards your client. You want to make the judge, even an appellate judge, care who wins the case.

SHAPO ET AL., *supra* note 71, at 278.

76. SMITH, *supra* note 36, at 96.

77. *Id.* at 82.

78. *Id.* at 83.

79. "'Emotional substance' arguments in legal writing typically involve arguments that focus on the *facts* of a client's case." *Id.* at 96.

80. "Classical rhetoricians have long recognized that if the medium used to communicate a message can entertain or otherwise please the audience, the audience will be more receptive to the substance of the message." *Id.* at 83.

81. "Classical rhetoricians have long recognized that writers whose style captivates and charms their readers will have an advantage over writers whose style irritates or bores their readers." *Id.* at 98.

sound organizational style and using simple language that is easy to understand.⁸² Legal writers should also avoid obnoxious, rude, and vulgar language.⁸³ Finally, the use of literary tools such as metaphor⁸⁴ and simile⁸⁵ may produce “rhetorical flair” that will captivate the reader in a positive way.⁸⁶

C. Ethos

The final rhetorical principle is ethos, which refers to credibility.⁸⁷ Two separate considerations arise with regard to ethos—the credibility of the person making the argument and the credibility of the argument itself.⁸⁸ A person’s credibility can be established externally, such as through reputation in the community, or it can be established through the legal document itself.⁸⁹ An advocate evinces personal credibility and credibility in argument by demonstrating three characteristics: intelligence, moral character,⁹⁰ and good will.⁹¹ Related to these three traits are notions of honesty, candor toward the tribunal, passion, conviction, confidence, honor, nobility, courtesy, dignity, professionalism, analysis, organization, and thoroughness, among others.⁹² By deliberately employing these techniques, an advocate will appear more credible.

82. SMITH, *supra* note 36, at 98.

83. *Id.*

84. Defining metaphor is difficult because of its versatility. Metaphors

are commonly regarded as having three characteristics. First, they involve language that makes a *comparison* between two things. Second, while the language involves a comparison, it *does not include explicit words of comparison*. . . . The third characteristic of metaphor is that the comparison is *figurative* or *symbolic*, not literal.

Id. at 179–80.

85. Similes, like metaphors “make *figurative comparisons* between two things,” but they include specific words of comparison. *Id.* at 183.

86. *Id.* at 98.

87. “[P]ersuasive discourse depends as much on the advocate’s character and credibility (*ethos*) as it does on the logic of the argument or the emotional content of the case.” Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 104 (1994).

88. SMITH, *supra* note 36, at 84.

89. *Id.* at 102.

90. *Id.* at 102. Good moral character is typified by truthfulness, candor, zeal, respect, and professionalism. *Id.* at 103–04. Truthfulness is demonstrated in an argument when the advocate explains the facts and the law “accurately and honestly.” *Id.* at 104. Candor is demonstrated when an advocate informs the judge about legally-relevant facts that are damaging, reveals adverse controlling authority, and concedes points that can be conceded. *Id.* at 110–12. Zeal is demonstrated by making substantial efforts during all phases of the case and using “affirmative and confident language.” *Id.* at 122. Respect can be demonstrated by simply submitting a neat and error-free document. *Id.* Professionalism means more than just avoiding unethical and immoral conduct—it requires affirmative action by the attorney to abide by controlling “professional standards.” *Id.*

91. *Id.* at 103.

92. *Id.* at 103–28.

D. Narrative Reasoning and Legal Storytelling

The legal storytelling movement has gained significant traction in recent years.⁹³ Stories are compelling to humans because they fit into how we understand the world around us; they help us to define the categories of the human subconscious.⁹⁴ Human beings are trained from birth to think of the world in terms of stories.⁹⁵ In fact our history, in many ways, has been passed down through story.⁹⁶ In the context of the law, narratives are inextricably intertwined with abstract rules of law.⁹⁷ “Rules restrain narratives; narratives restrain rules. Each needs the insight of the other.”⁹⁸

Similar to categories, narrative stories (or schemas) “function as cognitive ‘shortcuts’ that transform unfamiliar situations into events that are within an individual’s range of experience.”⁹⁹ Legal storytelling, therefore, is useful in reinforcing existing categories and establishing the veracity of legal arguments firmly rooted in logos, ethos, and pathos.¹⁰⁰ If left unrecognized, existing categories (or schemas) can also pave a path for bias and prejudice in a case that may

93. Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and In a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 257 (2009).

94. Berger, *Lady/Tiger*, *supra* note 45, at 275.

95. “Starting at infancy, human beings learn by interacting with and experiencing the world around them.” SMITH, *supra* note 36, at 260. “[N]arratives are an inherent way for humans to structure and understand human experience.” Sheppard, *supra* note 93, at 257.

96. Epics, like BEOWULF and DON QUIXOTE, and fairy tales are stories that have been passed down to teach lessons to society, evoke certain emotions, and train new members in the expectations and lore of culture. Sheppard, *supra* note 93, at 262. “[C]ultures seem to have been and continue to be enormously tenacious in holding onto and passing on their traditional theories, narrative forms, and normative system.” AMSTERDAM & BRUNER, *supra* note 37, at 40.

[S]torytelling [is] central to our ability to make sense out of a series of chronological events that we otherwise would experience as discrete and lacking in coherence and consistency. Stories also make it easier for us to communicate our experiences, help us predict what will happen, and sketch out what we will need to do when we find ourselves entangled in a typical plight.

Berger, *Lady/Tiger*, *supra* note 45, at 281.

97. Edwards, *Dialectic*, *supra* note 32, at 9.

98. *Id.* “Rules are not narratives, but they are in significant part codified explications of the points of narratives, some of which are explicit and some of which form a silent sub-text of legal doctrine.” *Id.* at 22.

99. Sheppard, *supra* note 93, at 259. In addition,

[n]arratives are more complex, precisely because they involve some violation of a script and so must also embed or imply the violated script. Narratives do not simply reflect expectations; they confront expectations with dangers and obstacles. They are about the Troubles people encounter while following scripts. So they introduce categories of unexpected outcomes (like comedies and tragedies) and categories of what precipitates trouble and of what redresses trouble.

AMSTERDAM & BRUNER, *supra* note 37, at 46.

100. Berger, *Lady/Tiger*, *supra* note 45, at 277–78. The characters in a narrative move from “an anterior steady state . . . [through trouble] . . . to either a restoration of the old steady state or the establishment of a new one.” AMSTERDAM & BRUNER, *supra* note 37, at 46.

naturally evoke a negative story.¹⁰¹ To that end, storytelling can be used to shift a pre-established category and force the reader to see a given set of facts through a new lens.¹⁰² Lawyers must be aware of schemas and should identify the potential schemas within the context of their cases to both advance positive schemas and to protect against negative ones. Additionally, they must be intentional in the way they tell their clients' stories to evoke those positive schemas, or categories, for the benefit of clients.

Good stories must be plausible, readable, and "evoke an emotional response from the reader."¹⁰³ Additionally, stories share basic elements: point of view, voice, style, setting, character, conflict, plot, and theme.¹⁰⁴ The conventions of formal legal writing typically limit an advocate's ability to write from many different points of view;¹⁰⁵ in fact, a lawyer is almost always confined to telling the client's story from the limited third person point of view.¹⁰⁶ Since "readers often root for the character they identify with or like or know, it is [usually] best to tell the story through the client's [point of view]."¹⁰⁷ Similarly, voice and style are largely dictated by the demands of professional legal writing, so an advocate may not have much license for creativity in these areas.¹⁰⁸ Other elements of legal stories, however, do provide a canvas for creativity within the boundaries of the law and the facts of a particular case.¹⁰⁹

The setting of a legal story provides the factual and legal context for the reader, along with any relevant physical and historical context.¹¹⁰ Understanding the power

101. "It will be extremely difficult for the individual to deviate from what the story has taught him or her about the world and how it operates once the 'biasing effects' of the stock story are triggered." Sheppard, *supra* note 93, at 263.

102. Berger, *Lady/Tiger*, *supra* note 45, at 280–83.

103. Chestek, *supra* note 32, at 134.

104. Foley & Robbins, *supra* note 39, at 466; Chestek, *supra* note 32, at 137; Sheppard, *supra* note 93, at 268.

105. In fiction writing, a story may be told in first person, third person omniscient, or limited third person.

The brief writer . . . must write in the third person [to preserve credibility] . . . [b]ut it is still important for the legal writer to think carefully about point of view. Every contested matter contains several possible stories. Opposing counsel will certainly attempt to get the court to see the case from their client's point of view. If the lawyer can paint a much more credible and sympathetic picture for the court, then she will have the upper hand in persuading the court.

Chestek, *supra* note 32, at 145; Sheppard, *supra* note 93, at 269.

106. Foley & Robbins, *supra* note 39, at 466; Sheppard, *supra* note 93, at 269.

107. Foley & Robbins, *supra* note 39, at 479. Often times, the differing factual perspectives between majority and dissenting opinions is illuminating. For example, in studying the opinion in *Betts v. Brady*, Justice Black, who dissented in the case, described Betts as "a farm hand, out of a job and on relief." Black thought it clear from Betts's "examination of witnesses that he was a man of little education." Justice Roberts, who wrote the opinion of the Court, viewed Mr. Betts very differently: "[T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and [able] to take care of his own interests on the trial of [an alibi defense]. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure."

Symposium, *supra* note 1, at 142 (Yale Kamisar presenting) (quoting *Betts v. Brady*, 316 U.S. 455, 472, 474 (1942) (J. Black, dissenting)).

108. Foley & Robbins, *supra* note 39, at 466; Sheppard, *supra* note 93, at 269.

109. Foley & Robbins, *supra* note 39, at 466; Sheppard, *supra* note 93, at 270–83.

110. Chestek, *supra* note 32, at 139; Sheppard, *supra* note 93, at 279.

of pre-existing categories is useful to understanding the impact that certain facts and law will have on the legal story being told. The facts and law are immutable to the legal story and an advocate cannot simply eliminate or disregard facts inconsistent with the story;¹¹¹

[r]ather, if facts exist in the record that do not seem to “fit” with the lawyer’s version of events or the protagonist’s character, the lawyer must find a way to explain those facts away, minimize the importance of those facts, or juxtapose those facts with other more favorable facts to lessen the harm those facts may do.¹¹²

In other words, the lawyer must redefine the category to overcome the negative impact of the unfavorable facts or law. To the extent the advocate identifies negative facts, the advocate must redefine the categories framing those facts so that the reader can accept as logical the advocate’s conclusion of the story.

With respect to character development, every story must have a protagonist and an antagonist.¹¹³ The advocate may choose to identify a “bad guy” and a “good guy,” or the advocate may summarily reject this categorization and define the characters in some other way (e.g., victim/abuser and guardian/infant).¹¹⁴ Many characters fit into a pre-established archetypal category such as: champion, child, trickster, mentor, king, victim, or demon.¹¹⁵ A reified idea (a principal or policy) may also be a character in a story.¹¹⁶ Categories assist humans in understanding the characteristics and behaviors associated with archetypal characters.¹¹⁷ To the extent a character’s behavior is inconsistent with the corresponding archetype, the reader will have difficulty accepting either the facts as presented or identifying a character as a given archetype.¹¹⁸ For example, if a character is identified as a mentor, but

111. Chestek, *supra* note 32, at 140.

The setting binds the authors of both the appellant’s and appellee’s briefs, yet both authors are attempting to tell stories that are fundamentally opposed to each other. As a result, each author must carefully select which details to call to the reader’s attention and arrange them to evoke the response that the author wants.

Id.; Sheppard, *supra* note 93, at 279–80.

112. Sheppard, *supra* note 93, at 280; Chestek, *supra* note 32, at 140.

113. Sheppard, *supra* note 93, at 275.

A variety of characters exist in any story, but the most important characters are the protagonist and the antagonist. The protagonist is the main character of the story. The protagonist is the person or institution you want the reader to empathize with and cheer on. On the other hand . . . [t]he antagonist is the protagonist’s nemesis or the entity against whom the protagonist struggles.

Id.

114. Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 775–82 (2006).

115. *Id.*; Chestek, *supra* note 32, at 142–44; Sheppard, *supra* note 93, at 275.

116. Foley & Robbins, *supra* note 39, at 473; Sheppard, *supra* note 93, at 275–76.

117. *Id.*

118. AMSTERDAM & BRUNER, *supra* note 37, at 43.

then the character acts in a deceitful way or intentionally harms the mentee, the reader will either reject the characterization of the person as a mentor or disbelieve the story of deceit entirely.

Developing a character is far more than just personalizing the client by using the client's name and depersonalizing the opposing party by using the party designation.¹¹⁹ Character development must connect the client and the client's life circumstance in some way with the judge. This can often prove difficult, especially if the client comes from a vastly different walk of life.¹²⁰ The use of archetypal characters can aid a writer in accessing favorable categories established in the subconscious of the reader. If a client is entirely unlikeable, however, the advocate must redefine the archetype to shift the category through which the client's character is seen. This helps to overcome any inherent prejudice or bias which may exist subconsciously in the mind of the judge. Redefining the archetype may be accomplished by simply organizing the facts in such a way that the client's story unfolds to create empathy with the judge.¹²¹

This technique of redefining the archetype can sometimes be observed in movies where a particularly evil character is portrayed as a victim prior to becoming evil. The movie *Sleepers* provides a good example of character redefinition through category.¹²² Two "bad guys" enter a restaurant and shoot and kill a patron in cold blood.¹²³ This scene, standing alone, portrays the two men as purely evil. Prior to the scene, however, the backstory is developed to show that, as children, these boys were sent to a juvenile facility where they were repeatedly sexually abused over a period of time.¹²⁴ The person they shot and killed in the restaurant was one of their abusers.¹²⁵ By telling the backstory first, the viewer reacts with empathy and understanding to the shooting, even though the facts of the murder itself have not changed. The character's backstory has changed the category through which the viewer interprets the killing scene: the viewer empathizes with the victim children who have now grown into troubled adults

[C]ategory placements are often made by assimilating the thing-to-be-categorized to a *prototype* rather than by comparing its observed attributes with a checklist of definitional components. So, jurors deciding whether a defendant is guilty or innocent of murder might well respond not only to the legal elements of the crime of murder as defined in the judge's instructions, but also to their prototype of what a "murderer" looks like.

Id.

119. See Foley & Robbins, *supra* note 39, at 466; Sheppard, *supra* note 93, at 276–78. This obvious technique of "persuasion" is rampant in first year writing when students are still struggling to understand what exactly it means to "personalize" the client. The technique is so obvious that it typically has the reverse effect in practice making the advocate less persuasive because the technique seems petty.

120. "In general, the reader must like the character and agree with, or at least understand, the character's goal. The more the reader understands and likes the character, the more the reader will root for him." Foley & Robbins, *supra* note 39, at 468; Sheppard, *supra* note 93, at 276.

121. "A large part of telling an effective story is the *order* in which the writer presents information. What a reader knows, and when he knows it, affects how he views the material." Foley & Robbins, *supra* note 39, at 475.

122. *SLEEPERS* (Warner Bros. 1996).

123. *Id.*

124. *Id.*

125. *Id.*

causing the viewer to desire a favorable resolution for the men—the audience roots for the underdog.¹²⁶

Similarly, when the judge can feel sympathy toward a client or otherwise personally identify with the plight of the client, the judge will have a difficult time ruling unfavorably.¹²⁷ Often in the context of criminal cases, the only way to connect the judge with the client is by employing a reified idea, such as the Fourth Amendment or Due Process, in place of the defendant.¹²⁸ To effectively advocate for the client, the attorney must consciously develop the client's character through the lens of cognitive theory.

Conflict is another element of storytelling that can be understood through pre-established categories. Conflict is an obvious component of any lawsuit, but the advocate must further categorize it so that the judge can “relate the lawsuit to the client's goals and needs.”¹²⁹ Some common conflicts found in literature are: “person versus person, person versus self, person versus society, person versus machine, person versus nature, person versus God, and God versus everyone.”¹³⁰ Defining conflict enriches pathos arguments in that it dictates “how a reader will want the conflict resolved.”¹³¹ Related to conflict is the story-telling element of plot, which can also be categorized: overcoming the monster, rags to riches, the quest, voyage and return, comedy, tragedy, rebirth, rebellion against the one, and the detective story.¹³² Organization of the conflict and plot into readily identifiable categories can be a powerful tool in the arsenal of the advocate.¹³³

To the extent the judge identifies with the conflict and plot, the judge will be led to reach a conclusion consistent with the dictates of the pre-established category.¹³⁴ For example, if the conflict is defined as person versus self, and the plot is “overcoming the monster,” where a prior version of the self is the monster, the judge might be very sympathetic to the plight of the client.¹³⁵ Actual facts might present a person who suffered from addiction and went on a crime spree as a result of that addiction. By the time of trial for the crime spree, however, the person had overcome the “monster” of addiction. The pre-established category of overcoming the monster and winning against a prior “evil” self tends to compel a more sympathetic judgment in favor of the client.¹³⁶ Like with other categories, however, the advocate must be mindful of the tendency for categories to trigger

126. *Id.* Use of this movie is more fully developed in Section III below as a lesson on character development.

127. Foley & Robbins, *supra* note 39, at 473; Sheppard, *supra* note 93, at 276.

128. Foley & Robbins, *supra* note 39, at 473; Sheppard, *supra* note 93, at 276.

129. Foley & Robbins, *supra* note 39, at 470; *see also* Stanchi, *supra* note 57, at 434–40.

130. Sheppard, *supra* note 93, at 270; Foley & Robbins, *supra* note 39, at 469.

131. “How [a] writer defines the conflict goes a long way toward how a reader will want the conflict resolved.” Foley & Robbins, *supra* note 39, at 470.

132. Sheppard, *supra* note 93, at 283.

133. “What we are really talking about is the rhetorical skill of ‘issue framing.’ Whether a particular legal or non-legal argument prevails often depends on how the arguer frames the issue. Lawyers do not learn this skill in the general sense, but in the limited context of framing *legal* issues.” Foley & Robbins, *supra* note 39, at 470.

134. *See id.* at 474.

135. *Id.*

136. *Id.*

inherent bias or prejudice in the reader. To the extent conflict or plot development will trigger a negative category, the advocate must redefine the category more favorably to achieve the desired result.¹³⁷ The conflict and plot must be resolved in a plausible manner.¹³⁸

Finally, with regard to theme, categories are also essential because the facts and law must be categorized in a way that the reader is willing to accept. Theme equates with the theory of the case and functions to tie together the conflict, plot, and other elements to embrace favorable facts. In addition, it explains unfavorable facts, and instills conviction in the reader as to why the case should be decided in a particular way.¹³⁹ It boils everything down to a central point, and the category embracing that central point must be one the reader also embraces. Theme nestles in directly with the legal syllogism in that it directly addresses the major and minor premises supporting the desired conclusion. Therefore, the theme must evince a favorable categorization of the story as a whole in order for the reader to accept not only the theme, but also the entire legal argument itself.¹⁴⁰ Like with all other categories, the advocate may exploit favorable categories or may be required to insulate against unfavorable categories. To the extent a theme evokes an unfavorable response in the reader, it is imperative the advocate shift the category or theme to prevent the unfavorable response. To win a case, the advocate must tell a good story, one in which “the reader cares about the characters throughout their conflicts, and that the resolution ‘fits’ the character and the conflict.”¹⁴¹

E. Practical Application of Rhetoric and Storytelling Techniques

Scholars who have studied the power of narrative reasoning have concluded that readers are persuaded by stories when the reader can personally identify with the story through the reader's own experience.¹⁴² This conclusion makes sense in light of cognitive theory.¹⁴³ Erwin Chemerinsky (perhaps unwittingly) endorsed this conclusion when he claimed that “the best predictor of whether the U.S. Supreme Court finds a violation of the Fourth Amendment is whether the justices could imagine it happening to them.”¹⁴⁴ Despite Scalia's vehement assertion that

137. “[Y]our client wins, either by being restored to status quo *ante* or by being placed in a new, satisfying condition, consistent with the theme of the narrative.” Chestek, *supra* note 32, at 150.

138. “The key to a happy ending for your client is to propose a resolution that fits the description of the character and conflict in the facts section of the brief.” Foley & Robbins, *supra* note 39, at 472; Chestek, *supra* note 32, at 150.

139. Foley & Robbins, *supra* note 39, at 470; Sheppard, *supra* note 93, at 274.

140. Foley & Robbins, *supra* note 39, at 463–65; *see* Sheppard, *supra* note 93, at 274.

141. Foley & Robbins, *supra* note 39, at 467.

142. “A person is basically the protagonist in the story that is his or her own life. And much of what we learn is learned by chronologically experiencing related events that build on each other.” SMITH, *supra* note 36, at 260.

143. “[C]ognitive theory indicates that the human brain does not effectively process abstract rules. According to cognitive psychologists, humans understand concepts expressed in the form of ‘stories’ or ‘narratives’ better than they understand concepts explained as abstract principles.” *Id.* at 259; *see also* Chestek, *supra* note 32, at 136; Sheppard, *supra* note 93, at 274; Berger, *Lady/Tiger*, *supra* note 45, at 280–82.

144. Erwin Chemerinsky, *The Court and the Fourth Amendment*, THE NAT'L. L.J. (May 7, 2012).

Justices make purely rational,¹⁴⁵ logical decisions independent of emotions, cognitive psychology teaches us that humans are incapable of understanding anything without filtering it through the lens of their independent life experiences.¹⁴⁶ Therefore, advocates can do more than just play upon the inherent prejudices, biases, and emotions of judges.¹⁴⁷ Because categories are never final, an advocate can always embrace the potential to redefine the existing bias, prejudice, or emotion of the judge deciding the case.¹⁴⁸

The ability of humans to change the way we see and understand the world around us is the key to understanding how to change the law.¹⁴⁹ Sometimes the rule of law is simply contrary to the client's position (as occurred in the *Gideon* case), but those clients can, and sometimes do, win.¹⁵⁰ How does this victory occur? When the law does not support the facts, the advocate is unable to advance a strong *logos* argument because one of two events will occur: either (1) the legal syllogism will not logically flow; or (2) the parties will not agree on the major premise. In such a case, the *logos* argument is much harder to make. Regardless, courts at times are willing to reconsider precedent (i.e., the major premise). Such reconsideration, though, requires a new legal rule that causes the syllogism to flow logically.¹⁵¹ In other words, the parties must agree on a new major premise. Redefining legal categories is the catalyst for prompting the creation of a new rule of law (or major premise). When a court considers overturning precedent, one side often relies heavily on the *logos* argument for retention of the rule while the other relies heavily on *pathos* arguments to show why the rule is outdated, unfair, or otherwise should be extinguished.¹⁵² *Ethos* is of course critical to advancing any argument.¹⁵³ Legal storytelling is an effective method for redefining categories.¹⁵⁴

145. "Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions." ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE* 32 (Thomson/West 2008); see also Chestek, *supra* note 32, at 135.

146. "[M]ost of our category systems are inherited . . . from our culture These categories direct attention to what a culture deems important for one reason or another, often quite local." AMSTERDAM & BRUNER, *supra* note 37, at 27. Even Justice Scalia on some level recognizes that humans are affected by emotions, biases, and prejudices, though he disagrees that an advocate can do anything but "play upon them, if [the advocate] happen[s] to know what they are." SCALIA & GARNER, *supra* note 145, at xxiii.

147. Chestek, *supra* note 32, at 130–31.

148. Edwards relates that:

If a law-creator sees a legal dispute from a particular narrative perspective, that narrative will play its role in law creation, whether or not the story is historically accurate; whether or not it is the narrative best able to make sense of the facts; and whether or not it is shared by those to whom the newly-made law will apply.

Edwards, *Dialectic*, *supra* note 32, at 13; see also AMSTERDAM & BRUNER, *supra* note 37, at 37.

149. "[J]udges are people too, and a good story can have an impact on the court, especially if the rule of law (or its application) is ambiguous or unclear." Chestek, *supra* note 32, at 136 (citing MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 259 (Aspen L. & Bus. 2002)).

150. Throughout history "voices on the margins of the law or the legal system have used narrative techniques to change the story and effect reform." *Id.* at 137 (citing Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 *GEO. L.J.* 1846, 1862–64 (1994)).

151. "[T]he resolution that fits a lawsuit must meet certain standards. Instead of poetic justice, judges seek actual justice." Foley & Robbins, *supra* note 39, at 467.

152. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

153. SCALIA & GARNER, *supra* note 145, at xxiii–iv.

154. AMSTERDAM & BRUNER, *supra* note 37.

It also provides an incentive for the court to reconsider established categories and create new rules that better meet the needs of society while protecting the requirements of the law.¹⁵⁵ None of the techniques presented in this article are hard and fast rules of persuasion; “[t]he lawyer must keep in mind [the] overall goal at all times”¹⁵⁶ and strategically employ only those that are best able to advance the client’s cause.

Convincing the Court to stray from *stare decisis* is no small feat. It demands sophisticated reasoning and careful thought, skills that can be taught through careful study of master briefs and practice of discrete skills. The remainder of this article provides a guide for studying the *Gideon* briefs along with a sampling of lessons students can use to practice discrete skills.

III. THE *GIDEON* BRIEF LESSONS: A GUIDELINE FOR CLASS DISCUSSION AND PRACTICE

As described in the introduction, the *Gideon* case abolished the rule as articulated in *Betts v. Brady* that persons accused of a crime were entitled to free legal counsel only in special circumstances.¹⁵⁷ In advocating for a new rule of law, *Gideon*’s attorney, Abe Fortas (Fortas), employed many sophisticated reasoning techniques. When measured against the respondent brief filed in the same case, it becomes readily apparent just how superior and powerfully sophisticated the reasoning styles are compared to the basic legal reasoning skills most attorneys rely upon day-to-day. The following lessons serve as a guide for classroom discussion of the master briefs and are designed to expose those techniques for the students. Some specific classroom lessons are also detailed and serve to provide students the opportunity to gain practice at recognizing and replicating those same skills in other contexts.

A. Lesson 1: Identifying Logos and the Syllogism

This first lesson is designed to aid students in identifying the legal syllogism. It makes apparent how many underlying syllogisms are required to redefine an existing rule of law.¹⁵⁸ Students must identify the major premise, minor premise, and conclusion in both the petitioner and respondent briefs filed in *Gideon*. The respondent brief provides a more traditional illustration of the legal syllogism, and it looks something like this:

Major Premise: Criminal defendants in state court must establish a special circumstance in order for the court to appoint free legal counsel.

155. “Legal reasoning is incomplete without the soil of narrative from which the reasoning grows and to which it will return.” Edwards, *Dialectic*, *supra* note 32, at 50.

156. Foley & Robbins, *supra* note 39, at 480.

157. *Gideon*, 372 U.S. at 335.

158. Some scholars refer to the tactic of nesting syllogisms as “chaining.” Stanchi, *Science of Persuasion*, *supra* note 57, at 415–17.

Minor Premise: Clarence Earl Gideon is a typical defendant in state court with no special circumstance.

Conclusion: Therefore, the court should not have appointed Clarence Earl Gideon free legal counsel.

The legal syllogism of the petitioner brief, however, is not so readily exposed. As explained in Section II above, the major premise must be redefined when the rule of law is contrary to a client's position. There is no dispute that the *Betts v. Brady* rule was contrary to Gideon's position.¹⁵⁹ The trial court had in fact "gotten it right" when it refused to appoint counsel because Gideon had no special circumstance warranting court-appointed counsel.¹⁶⁰ The result, then, is that many syllogisms had to be established in order to justify redefining the major premise of the overarching syllogism. Often, multiple syllogisms underlie the overarching syllogism in any given case.¹⁶¹ Cases where the advocate must change the major premise, however, demand a higher attention to detail and a certain level of grace to encourage the reader to adopt the underlying premises.

Students will likely struggle to identify the syllogism in the petitioner brief, or, if they readily identify the syllogism, they will struggle to reconcile it with the *Betts v. Brady* precedent. The overarching syllogism looks something like this:

Major Premise:All criminal defendants are entitled to court-appointed legal counsel under the Fifth and Fourteenth Amendments.

Minor Premise: Clarence Earl Gideon is a criminal defendant.

Conclusion: Therefore, Clarence Earl Gideon is entitled to court-appointed legal counsel under the Fifth and Fourteenth Amendments.

This lesson presents an opportunity for students to study why merely asserting a new major premise is likely to fail. Had Fortas simply said, "I don't like the *Betts v. Brady* rule, and it doesn't help my client, so this new rule applies," the Court likely would have laughed him out of the courtroom. This is so even considering that the Court was open to reconsidering *Betts v. Brady* as evidenced by how it defined the legal question: "Should this Court's holding in *Betts v. Brady* be overruled?"¹⁶² Fortas laid out numerous supporting syllogisms to explain not only why the *Betts v. Brady* rule was harmful, but also why it was unconstitutional and contrary to the Court's jurisprudence in other areas.¹⁶³

159. See generally Petitioner Brief, *supra* note 20.

160. *Id.* at 7.

161. See ROBBINS-TISCIONE, *supra* note 59, at 119.

162. Petitioner Brief, *supra* note 20, at 6 (internal citations omitted).

163. See generally *id.* at 10–46.

This lesson works best by doing a refresher (or introduction) to basic rhetoric and focusing on the legal syllogism. Because the respondent brief is easier to manage, the students should work on that one first. In groups of two or three, students can discuss the brief and work on identifying the syllogism. Assuming the students have read the briefs prior to class, this activity should take about ten minutes. The groups should then share their syllogisms with the class and a brief discussion may ensue depending on the results of the syllogism. Chances are, especially if this lesson is a refresher, the students will have constructed syllogisms that are similar to each other and similar to the one noted in the first paragraph of this section.

Next, the students can return to their groups or form new groups to examine the petitioner brief. For this exercise, students will likely need thirty minutes to identify the syllogism. Because of time restraints, this lesson may extend over more than one class period. The results of this part of the exercise are likely to be less uniform. Students may identify the underlying syllogisms rather than the overarching syllogism. The varying results provide an opportunity for robust discussion about how the syllogisms are connected and work to create different categories of thought. The altering of a major premise through the proposal of a new rule of law requires changing the underlying understanding of the law. In other words, it requires a cognitive shift in the basic category that has been historically accepted. Therefore, the writer must establish justifications and provide familiar contextual references in the form of categories that exist in similar or related areas of the law.

Fortas did just that in the petitioner brief when he created new categories through which to interpret the Fourteenth and Sixth Amendments to the U.S. Constitution. First, in a deliberate fashion, the brief detailed the inconsistencies and contradictions inherent in the *Betts v. Brady* rule.¹⁶⁴ For example, he showed that, although the *Betts v. Brady* rule was promulgated out of a sense of federalism and preventing federal intervention in state matters, in practice it had become “a rule which compel[led] continual, unseemly, and improper intervention by the federal courts in state criminal proceedings not on the basis of applying a concrete, fundamental principle but by the corrosive and irritating process of case-by-case review.”¹⁶⁵ He further described the rule as creating friction between state and federal courts and involving “federal supervision over the state courts in its most noxious form. In effect, the federal courts [were] given a roving commission to scrutinize the proceeding in the state court to determine if it [was] ‘shocking to the universal sense of justice.’”¹⁶⁶ Contrary to the accepted belief that *Betts v. Brady* protected federalism,¹⁶⁷ Fortas showed that it violated federalism.

Moreover, the results of the rule in practice were completely inconsistent from case to case, and Fortas attempted to reconcile cases decided under the special

164. Petitioner Brief, *supra* note 20, at 10–46.

165. *Id.* at 12.

166. *Id.* at 33–34.

167. Respondent Brief, *supra* note 19, at 29–35.

circumstances rule, to no avail.¹⁶⁸ The attempt illustrates just how inconsistent the rule in *Betts v. Brady* was in practice because “[n]o standards [had] been delineated . . . with respect to the weight or importance to be assigned to each of the . . . factors” of the special circumstances test.¹⁶⁹ Contrary to the accepted belief that *Betts v. Brady* ensured consistent results,¹⁷⁰ Fortas showed that the rule could not be predictably applied in any circumstance.¹⁷¹

Second, he demonstrated how his proposed rule was consistent not only with the Constitution, but also with human nature by detailing the numerous exceptions the United States Supreme Court had already carved out to the *Betts v. Brady* rule.¹⁷² In federal courts at that time, all criminal defendants were entitled to court-appointed counsel without the need to demonstrate any special circumstance.¹⁷³ Fortas argued that “[t]he parallel development of the right to counsel in the federal courts confirm[ed] the conclusion that an unrepresented defendant cannot adequately advocate his rights.”¹⁷⁴ It would thus be absurd “to urge that the availability of counsel is required in the federal courts in order ‘to insure fundamental human rights of life and liberty,’ but that it is not fundamental if the prosecution occurs in a state courthouse.”¹⁷⁵ Additionally, the Supreme Court had rejected the *Betts v. Brady* rule in capital cases.¹⁷⁶ Fortas argued that the distinction between capital and non-capital cases was unconstitutional because “[t]he due process clause protects against deprivation of ‘liberty’ and ‘property’ as well as

168. Fortas wrote:

[F]or example, in *DeMeerleer v. Michigan* the Court deemed the youth of the accused (seventeen) significant and reversed his conviction, but in *Gayes v. New York* the conviction was not set aside despite the fact that the defendant was “a lad of sixteen” when he was convicted without counsel. In *Qwickshall v. Michigan*, the Court felt it reasonable to presume from the accused’s prior appearances in court that he knew of his right to counsel, and since he made no request for legal aid, his rights were held not infringed. But recently in *Carnley v. Cochran*, the Court felt that a prior criminal record magnified the importance of the assistance of counsel because of its implications in the event the accused takes the witness stand.

It is likewise difficult to reconcile *Gryger v. Burke* with *Townsend v. Burke*, both decided on the same day. In *Gryger*, a defendant sentenced to life imprisonment, argued that the state court mistakenly assumed that the applicable statute made the penalty mandatory. In *Townsend*, the defendant contended that the court imposed a sentence under the erroneous impression that defendant’s record included convictions on two charges as to which, in fact, he had been acquitted. In both cases, the defendants, who were unrepresented, claimed that if counsel had been present the mistake would have been corrected. In *Townsend*, this Court concluded that the accused was so disadvantaged by lack of counsel that the conviction could not be permitted to stand, but in *Gryger* the Court affirmed the order denying habeas corpus. It is difficult to perceive why the denial of counsel was deemed prejudicial as a constitutional matter in one case but not in the other.

Petitioner Brief, *supra* note 20, at 37–38 (internal citations omitted).

169. *Id.* at 37.

170. Respondent Brief, *supra* note 19, at 40–41.

171. Petitioner Brief, *supra* note 20, at 36.

172. *Id.* at 22–29.

173. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

174. Petitioner Brief, *supra* note 20, at 18.

175. *Id.* at 20 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

176. *Id.* at 22.

against deprivation of 'life.'"¹⁷⁷ Moreover, in the context of court-martial cases, the capital/non-capital distinction had been rejected, and even states themselves had begun rejecting the capital/non-capital distinction.¹⁷⁸ In this way, Fortas showed how a pre-existing category in a related area (federal law) fit the facts and circumstances of Gideon's case better than the *Betts v. Brady* rule.

Third, Fortas showed how the rule was inconsistent with social, political, and legal trends by demonstrating that all but five states guaranteed or consistently provided the right to counsel in felony cases.¹⁷⁹ In support of his position, he asserted that "[t]he necessity for counsel in a criminal case is too plain for argument."¹⁸⁰ Fortas offered a series of arguments each aimed at illustrating the value of an attorney in a criminal proceeding.¹⁸¹ He concluded this section by

177.

Id.

178.

Id. at 23–24.

179.

Id. at 30.

180.

Petitioner Brief, *supra* note 20, at 13.

181.

Fortas argued:

No individual who is not a trained or experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea, or marshal and present all of the factual and legal considerations which have a bearing upon his defense. Even a trained, experienced criminal lawyer cannot—and will not, if he is sensible—undertake his own defense.

In the absence of counsel an accused person cannot determine whether his arrest is lawful; whether the indictment or information is valid; what, if any, preliminary motions should be filed. He cannot accurately evaluate the implications of a plea to a lesser offense, and he is at a loss in discussions with the prosecuting attorney relating to such a plea.

The indigent, apart from all other considerations, has probably been in jail from the time of arrest because of inability to furnish bail. How can he prepare his case? And how unreal it is to suppose that a layman can conduct a *voir dire* of the petit jury, or cross-examine the prosecution's witnesses, or interpose objections to incompetent and prejudicial testimony. The truth is that "The unrepresented defendant in many cases does not really know what is going on." As this Court pointed out in *Reynolds v. Cochran*, "even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."

In the event of conviction, the unrepresented defendant is further seriously disadvantaged at the sentencing stage

Moreover, it is patent that many constitutional rights are meaningless in the absence of legal assistance. As an eminent State Supreme Court judge has stated: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."

In the past twenty years, this Court has stated a number of principles of constitutional law with respect to state criminal procedure, which have a direct and practical bearing on the conduct of trials. The law of involuntary confessions and searches and seizures as applied to the states, for example, post-dates almost in its entirety the decision in *Betts v. Brady*. Important procedural safeguards cannot be implemented effectively without the assistance of counsel. An uncounseled defendant manifestly cannot be expected, for example, to be a master of the intricacies of the law relating to searches and seizures, e.g., whether a search warrant is required, whether there is "probable cause," whether there has been a waiver, and so on. An inexperienced person cannot possibly appraise the implications of invoking the privilege against self-incrimination or determine whether a statement he wishes to make may constitute a waiver of the privilege. In brief, what is required for the effective assertion of constitutional rights and privileges is "the assistance of a learned gentleman to speak for an unlearned man."

explicitly arguing for recognition of value in the legal profession and, by extension, the judiciary:

“To say that trials without counsel can be fair is to assume either that the defense which counsel might have presented would not have changed the result in the case or that in certain types of cases counsel serves no useful function. The first assumption is hindsight and unprovable. The second, if true, would convict a portion of the bar of taking money under false pretenses in all those ‘simple’ cases where counsel accepts a retainer but apparently cannot influence the result. We cannot with justice keep the existing ‘fight’ theory of criminal law and force the indigent defendant to fight alone. If our vaunted claim of ‘equal justice under law’ is to be more than an idle pretense, the right to have counsel must be extended in practice to all persons accused of crime.”¹⁸²

Each of the techniques Fortas used redefined categories. He illustrated how an existing category (the special circumstances test) was obsolete, and that his proposed rule (appointment of counsel in all criminal prosecutions) better fit not only the *Gideon* facts, but also the facts of any criminal case. He established that his rule advanced constitutional principles in two ways: (1) it protected individual due process rights, and (2) it protected states’ rights to be free from undue intrusion by the federal government.¹⁸³ He also showed how his proposed rule was more consistent with judicial and state trends.¹⁸⁴ The proposed rule also laid a path for the Court to reject the traditional *Betts v. Brady* category because it could not accomplish its purported purpose of balancing individual and state interests. Additionally, Fortas asserted the value of the legal profession and thus intimately connected with the personal values of the judiciary. Throughout the argument Fortas demonstrated that another category of law was available in lieu of the special circumstances test, and it was a category the Court was willing to accept because the Court was familiar with the category in other contexts.¹⁸⁵

By contrast, the respondent brief embraced the *Betts v. Brady* special circumstances test wholeheartedly.¹⁸⁶ As part of the lesson, the professor should walk the students through a comparison of the two briefs. The respondent brief relied on relatively simple tactics of legal reasoning; in fact, it did not go much beyond simple rule-based reasoning. The respondent brief first addressed how

Id. at 13–18 (internal footnotes and citations omitted).

182. *Id.* at 27–28 (quoting WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 234–35 (1955)).

183. *Id.* at 10–35.

184. *Id.* at 36–43.

185. It is commonly accepted that “when a sufficient number of contradictions accumulate within a paradigm of knowledge, the paradigm is abandoned in favour of a new one.” Peter Goodrich, *The Antinomies of Legal Theory: An Introductory Survey*, 3 *LEGAL STUDIES* 1, 1 (March 1983) (citing THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 89, 92 (Chicago 1973)).

186. See Respondent Brief, *supra* note 19.

Gideon did not satisfy the special circumstances test as required by *Betts v. Brady*.¹⁸⁷ It also asserted he received a fair trial.¹⁸⁸ Only as a final argument did the respondent brief address the question the Court wanted answered: Whether the ruling in *Betts v. Brady* should be overturned?¹⁸⁹ The respondent brief focused on a historical argument about how court appointment of counsel has never been the standard.¹⁹⁰ Rather, the respondent brief argued that the Sixth Amendment was intended to permit a person to retain counsel if desired.¹⁹¹ Notably, the respondent brief failed to directly address the petitioner's argument that such an interpretation ensures more justice for the wealthy while depriving the less-privileged of equal access to the protections of the law. The respondent brief blindly adhered to a "firmly" established category without examining whether the category even remained viable. The brief also failed to address the arguments promulgated by the petitioner that supported extinguishing the category.¹⁹² The problem with this approach is that "over-reliance on *rule-based reasoning*, and neglecting other forms of reasoning, creates a risk that the human aspects of the case will be overlooked."¹⁹³

Additionally, the respondent brief misread *Johnson v. Zerbst* as being a case grounded in criminal procedure rather than in history and the Constitution.¹⁹⁴ It treated the holding as imposing a mere regulatory or procedural rule in federal criminal cases rather than recognizing it as a fundamental rule protecting an important constitutional right.¹⁹⁵ The respondent, though recognizing that a new category was created when the Court in *Johnson v. Zerbst* "placed a construction on the Sixth Amendment which was broader than that theretofore commonly understood in the light of the history of Anglo-Saxon criminal procedure," refused to accept the new category.¹⁹⁶ Instead, the respondent focused the argument on returning to the old, historical mindset that "[i]t has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel."¹⁹⁷ This categorization of *Johnson* is in stark contrast to the petitioner's interpretation of the plain language of the *Johnson* opinion where the Court reasoned "[i]f the accused is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his

187. *Id.* at 11–14.

188. *Id.* at 18–22.

189. *Id.* at 22–56.

190. *Id.* at 22–29.

191. *Id.* at 24–25.

192. The respondent appeared to fall victim to a common problem found in appellate briefs. Although "many lawyers generally are good at correctly identifying the legal issues, . . . they often fail to make the best arguments in support of their clients' positions[, and] they also often fail to adequately refute opposing arguments." Chestek, *supra* note 32, at 134 n.23 (citing Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257, 267 (2002)).

193. *Id.* at 130 n.12.

194. Respondent Brief, *supra* note 19, at 25–26.

195. *Id.*

196. *Id.* at 27.

197. *Id.* at 27 (quoting *Salyor v. Sanford*, 99 F.2d 605, 607 (1938)).

liberty.”¹⁹⁸ So, the way in which the two parties categorized the *Johnson* decision is another area ripe for classroom discussion.

The respondent’s argument regarding whether *Betts v. Brady* should be overruled boils down to six major points:

1. The English common law provided the right to *retain* counsel in misdemeanors but no right to counsel in felony cases.
2. The Sixth Amendment as originally intended guaranteed the right to retain counsel, not the right to have counsel appointed in cases of indigency.
3. The construction given the Sixth Amendment by this Court in *Johnson v. Zerbst* was the outgrowth of a practice which had become common in the federal court system.
4. The decision in *Johnson v. Zerbst* to some extent constituted an exercise by this Court of its supervisory and rulemaking powers over the inferior federal courts.
5. This Court’s opinion in *Johnson v. Zerbst* did not contemplate that automatic appointment of counsel could be required as a requisite of due process of law.
6. Appointment of counsel has been included in the concept of due process to the extent that such appointment is essential to the substance of a hearing, and to that extent only.¹⁹⁹

However, the final point failed to consider the arguments raised in the petitioner’s brief that all criminal matters are sufficiently complex to warrant counsel. According to the petitioner, an attorney can always make a difference. The petitioner recognized value in the legal profession, and by extension the judiciary, while the respondent’s brief devalued the legal profession. In so doing, the respondent’s brief accessed a negative category since judges would not want to be associated with a valueless profession. The petitioner’s brief, on the other hand, defined a category to which judges would want to adhere: a profession that can always make a difference in a criminal case when liberty, property, and life are at stake.

Additionally, the respondent categorized the special circumstances rule as a clear and consistent standard for determining the right to counsel.²⁰⁰ This argument failed to address the fact that the rule as applied had produced inconsistent results since its inception.²⁰¹ Furthermore, the respondent brief did not adequately address constitutional issues. With regard to individual due process, it dismissed the state and legal trends almost immediately by simply asserting that an emerging trend among states does not mean a constitutional right exists.²⁰² With regard to the

198. Petitioner Brief, *supra* note 20, at 18–19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)).

199. Respondent Brief, *supra* note 19, at 28–29.

200. *Id.* at 40.

201. *Id.* at 40–45.

202. *Id.* at 7.

federalism issue, the respondent did not adequately address the supervisory argument raised in the petitioner brief. The respondent embraced the existing category that the *Betts v. Brady* rule preserved the state's rights to choose whether to appoint counsel, but it failed to consider that the rule permitted federal courts to review state actions on a case-by-case basis.²⁰³ The respondent brief also did not address the petitioner's categorization that this type of case-by-case federal review of state action was more violative of federalism than a blanket rule requiring appointment of counsel in all criminal cases.²⁰⁴

Compared to the petitioner's brief, the respondent's brief provides a vivid example of an argument that embraces existing categories without questioning their value and function; on the other hand, the petitioner's approach dissects the category itself as well as the impact of the special circumstances rule and proposes a replacement aimed at correcting the problems created by the one in existence. The government attorney may have underestimated the Court's desire to overrule *Betts v. Brady*, or perhaps he was resigned to the inevitability of the Court adopting a new rule. Either way, the contrast in the two arguments with regard to sophistication and level of analysis is stark. It illustrates the point made by scholars of rhetoric that courts need more than just logos, or a justification, for ruling a particular way. Courts need pathos arguments so that they *want* to rule in a certain way: the respondent had the logos argument, but Fortas tapped into how the Court *wanted* to rule. In terms of logos arguments, the petitioner had a harder task because the foundation had to be rebuilt after destroying the existing categories established by the *Betts v. Brady* rule.

These briefs serve as a good illustration that a court will redefine the issue or legal question in an infinite number of ways until it finds a category that is consistent with both the facts and desired outcomes. Hence, no attorney should become complacent in designing legal arguments, even when the rule of law seems to be clearly on point. Relying solely on logos and rule-based reasoning leaves an attorney vulnerable, particularly when the pathos arguments are compelling on the opposing side of the case. Working through the syllogism of the briefs and a comparison of the briefs together as a class can illustrate these lessons to students and encourage students to think outside the box in their own work.

B. Lesson 2: Identifying Pathos

Pathos lessons can be addressed over multiple class periods. A relatively simple pathos lesson involves studying the emotional appeals of the petitioner and respondent briefs. Part of the conversation should also focus on missed opportunities to advance pathos arguments. For example, the petitioner's brief includes large amounts of material quoted directly from the record in its summary of the statement of the case.²⁰⁵ Additionally, the brief refers to the facts.²⁰⁶ The

203. *Id.* at 12.

204. Respondent Brief, *supra* note 19, at 1-5.

205. Petitioner Brief, *supra* note 20, at 1-5.

206. Fortas wrote:

brief even included some important arguments regarding court-martial cases²⁰⁷ through an appendix rather than incorporating the specific facts concerning the denial of the request for counsel into the argument.²⁰⁸ Students should consider whether there were any lost opportunities to incorporate pathos through facts or whether the exclusion of the particular facts effectively advanced the petitioner's goal of demonstrating that Gideon was ordinary and had no special circumstance. This is a lesson in counterintuition. Generally, legal writing professors teach students to personalize their clients and tell their client's story in order to most effectively advocate for the client. This lesson illustrates that "personalizing the client" does not always require telling the client's factual story. Gideon's factual story was not really the issue in this case—the issue, his real story, was a constitutional one experienced by all criminal defendants. By eliminating Gideon's particular facts from the argument, Gideon's attorney was able to focus the Court's attention on the larger implications of the decision. In fact, focusing precisely on Gideon's facts may well have undermined the arguments advanced by Fortas in this case because it would have subconsciously encouraged the Court to employ the special circumstances analysis. By confining Gideon's story to an appendix, the Court was discouraged from considering the details of Gideon's case and forced to face the failures of the *Betts v. Brady* rule directly.

The briefs can also be studied for the overall emotional impression upon the reader. Students should study the specific language used by the briefs when considering the emotions evoked through the arguments. Emotional words and literary tools, such as metaphor and simile, should be identified by the students and then analyzed to determine the impact of the language. This lesson should occur after the professor has provided a detailed explanation of literary tools, and students should have had an opportunity to identify metaphors and similes in more familiar contexts.²⁰⁹ Once students are familiar with the literary tools, they will be able to work effectively on this assignment. This exercise works best if students work individually for a period of time (approximately 30 minutes) on a portion of the brief(s) to identify metaphors, similes, or any other literary tool the professor wishes to assign. Thereafter, students should be permitted to discuss their findings in small groups, and the professor should wrap up the class by highlighting some of

In Appendix B to this Brief we analyze the specific points that demonstrate that Gideon did not receive the benefits and protection which would presumably have been afforded him by counsel. We believe that those constitute a vivid demonstration of the fact that he was deprived of his due process rights under the Fourteenth Amendment: that he did not have a fair trial in the constitutional sense. But it is our opinion that these points are not peculiar to Gideon's case. We believe, *mutatis mutandis*, these points are present in every criminal prosecution.

Id. at 13.

207. Fortas wrote: "In view of the importance of the court-martial cases to this particular issue, we discuss the cases at more length in Appendix C, *infra*." *Id.* at 23.

208. Respondent Brief, *supra* note 19, at 23.

209. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2008), offers numerous lessons on metaphors and similes.

the more obscure metaphors and allowing the groups to offer one or two examples discussed by the group.

Some examples of emotional language and literary tools found in the petitioner brief are:

1. "The 'special circumstances' rule involves federal supervision over state courts in a most **obnoxious** form: *ad hoc* and *post facto*."²¹⁰
2. "The absence of counsel is responsible in large measure for the **flood** of habeas corpus petitions in the federal courts which create state-federal **friction** and constitute a burden on the federal system."²¹¹
3. "The *post facto* nature of *Betts v. Brady* means that prisoners **languish** in jail, sometimes for many years, before their rights are vindicated."²¹²
4. "In short, we believe that the circumstances of this case are no more 'special' than in other criminal cases—**unless we are to draw a line between tweedledee and tweedledum**."²¹³
5. "We believe that these constitute a **vivid** demonstration of the fact that he was deprived of his due process rights under the Fourteenth Amendment: that he did not have a fair trial in the constitutional sense."²¹⁴
6. "We cannot with justice keep the existing '**fight**' theory of criminal law and force the indigent defendant to fight alone."²¹⁵

To be sure, literary techniques and emotional language are not overemployed in the petitioner brief. Rather, they are used strategically for emphasis to provide persuasive impact. On the other hand, the respondent brief is notably devoid of literary tools. In fact, much of the brief consists of "case briefing" with very little legal analysis. In the first section the respondent describes *Powell v. Alabama*,²¹⁶ *Betts v. Brady*,²¹⁷ *Gallegos v. Nebraska*,²¹⁸ *Bute v. Illinois*,²¹⁹ *Quicksall v. Michigan*,²²⁰ *Carter v. Illinois*,²²¹ and *Gryger v. Burk*,²²² but the brief does not provide any rule synthesis or otherwise explain the special circumstances test in any sort of detail.²²³ Then, the respondent "applies" the test by merely asserting that Gideon had not alleged any special circumstances.²²⁴ The brief does not cite back to the record, and it never even explains what *would* be a special

210. Petitioner Brief, *supra* note 20, at 9 (emphasis added).

211. *Id.* (emphasis added).

212. *Id.* (emphasis added).

213. *Id.* at 13 (emphasis added).

214. *Id.* (emphasis added).

215. *Id.* at 28 (emphasis added).

216. 287 U.S. 45 (1932).

217. 316 U.S. 455 (1942).

218. 342 U.S. 55 (1951).

219. 333 U.S. 640 (1948).

220. 339 U.S. 660 (1950).

221. 329 U.S. 173 (1946).

222. 334 U.S. 728 (1948).

223. See Respondent Brief, *supra* note 19, at 11–14.

224. *Id.* at 14.

circumstance, at least not in any detail.²²⁵ Moreover, the brief employs only rule-based reasoning and does not attempt analogical, counter-analogical, policy-based, or narrative reasoning in this first section. Therefore, even though the facts of precedent cases and their holdings have been included in the rule explanation, no explicit connections are made between the *Gideon* facts and those precedent cases in the application section.²²⁶

As far as the overall emotional impact, there is little that creates or provokes emotion in the reader. The writer does use the word “power” at least twenty-eight times in the brief.²²⁷ Sometimes the focus is on how much power the Court has, and at other times the message is one of limited power.²²⁸ Specifically, the writer focuses on the limitations created by *stare decisis* and the English common law.²²⁹ The use of this language evokes a negative category in the reader’s mind since judges do not like to be told they have no power. As far back as *Marbury v. Madison*, the United States Supreme Court has repeatedly claimed its power to “say what the law is.”²³⁰ Thus, arguments that the Court’s power is limited are not likely to be persuasive.

Another pathos lesson involves studying the medium mood control employed by the briefs. To a large extent, the formatting of the briefs is dictated by conventions of the Supreme Court rules. However, the overall structure and organization of the argument can affect the impact of the argument on the reader. Students should assess whether the arguments of the brief flow logically. The petitioner’s brief is laid out as follows:

1. The Fourteenth Amendment Requires That Counsel Be Appointed To Represent An Indigent Defendant In Every Criminal Case Involving A Serious Offense.²³¹

225. Respondent’s brief merely asserts:

In his petition to the Florida Supreme Court, *Gideon* made no affirmative showing of any circumstances or unfairness which would have entitled him to counsel under the Fourteenth Amendment. He merely alleged that he was without funds and that he pleaded not guilty and requested court appointed counsel while being tried on a charge of breaking and entering with intent to commit a misdemeanor. Petitioner made no allegations concerning his age, experience, mental capacity, familiarity or unfamiliarity with court procedure, or the complexity of the legal issues presented by the charge; he made no showing of unfairness or of a lack of fundamental justice in the trial proceedings. His petition lacked any material allegations which would entitle him to counsel under the Fourteenth Amendment, and the Florida Supreme Court, in denying the petition without requiring a hearing or return, properly applied existing rules of law which have been developed by this Court.

Id. at 14.

226. *See id.* at 11–14.

227. *See generally id.* at 8–53.

228. *Id.*

229. Respondent Brief, *supra* note 19, at 25–27.

230. “It is emphatically the province and duty of the judicial department to *say what the law is.*” *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added).

231. Petitioner Brief, *supra* note 20, at 10.

2. The Demands Of Federalism Do Not Indicate Continued Adherence To *Betts v. Brady*.²³²
3. The Rule Of *Betts v. Brady* Has Not Proved To Be A Satisfactory Standard For Judicial Administration.²³³
4. The Right To Counsel Minimally Includes Appointment Of An Attorney To Assist An Indigent Person At The Trial Of A Serious Offense.²³⁴
5. The Practical Implications With Respect To Persons Already Imprisoned Do Not Militate Against Overruling *Betts v. Brady*.²³⁵

By studying the order and structure of the arguments, students begin to understand why the petitioner's brief is so persuasive. First, in order for the Court to impose a rule on the states, the rule had to be firmly rooted in protection of a fundamental right.²³⁶ That is why the first argument had to address due process and equal protection.²³⁷ After establishing the existence of a fundamental right that needed protection, Fortas turned to the competing constitutional interest of the states.²³⁸ Not only did he show that the individual interest outweighed the state interest, but he showed how the *Betts v. Brady* rule was a "more noxious" violation of federalism than his proposed rule.²³⁹ Fortas argued that the states would still be free to provide counsel in any manner they saw fit, and in this way the state's constitutional interests would be preserved.²⁴⁰ After addressing the constitutional issues, Fortas detailed the failures of the *Betts v. Brady* rule, namely that it resulted in inconsistencies as applied, and its *post hoc* nature caused innocent people to "languish in jail" while awaiting appeal and re-trial.²⁴¹ Fortas concluded the arguments by explaining the practical implications of overturning *Betts v. Brady* and showing that the prison floodgates were unlikely to spring open as a result.²⁴² Notably, within each section of the argument, Fortas clearly laid out the synthesized rule itself, then provided examples of the rule from primary sources, and finally supplemented those arguments with policies as detailed in secondary sources.²⁴³ This technique positively impacts the reader through medium mood control because it provides a logical flow that the reader can easily follow.²⁴⁴

In contrast, the respondent's brief is laid out as follows:

232. *Id.* at 28.

233. *Id.* at 36.

234. *Id.* at 43.

235. *Id.* at 44.

236. *Id.* at 10.

237. Petitioner Brief, *supra* note 20, at 25–28.

238. *Id.* at 34–35.

239. *Id.* at 28–34.

240. *Id.* at 34.

241. *Id.* at 36–43.

242. *Id.* at 44–46.

243. The secondary sources "used by Abe Fortas in writing the brief . . . were the subject of conversation during the oral argument. These were the tools that assisted the Court in reaching its decision." Symposium, *supra* note 1, at 136 (Ellen S. Podgor presenting).

244. SMITH, *supra* note 36, at 98; *supra* text accompanying note 82.

1. Petitioner Failed To Allege Any Circumstances Which Would Entitle Him To Habeas Corpus Relief On The Ground That His Right To Counsel Was Denied.²⁴⁵
2. Petitioner Was Not Entitled To Habeas Corpus Relief On The Mere Allegation That He Was Refused Court-Appointed Counsel At Trial For Breaking And Entering With Intent To Commit Petit Larceny.²⁴⁶
3. The Trial Record And Transcript Are Not Incorporated In The Judgment Of The Florida Supreme Court And Therefore Are Not Subject To Review By This Court.²⁴⁷
4. The Trial Record And Proceedings And Petitioner's Personal History Show That He Received A Fair Trial.²⁴⁸
5. Historically, There Is No Basis For Requiring States To Automatically Appoint Counsel In All Cases.²⁴⁹
6. Under Our Federal System, The States Should Not Be Required By Constitutional Mandate To Provide Counsel For Indigent Defendants In Every Case.²⁵⁰
7. The "Fair Trial" Test As Enunciated In *Powell v. Alabama* and *Betts v. Brady* Is Consistent With The Nature And Meaning Of Due Process.²⁵¹
8. The *Betts v. Brady* Rule, As Developed By This Court, Provides a Clear And Consistent Standard For Determination Of The Right To Counsel Under The Fourteenth Amendment.²⁵²
9. Although States Now Provide For Appointment In Many Instances, The Rights So Provided Have Not Generally Been Accepted As Being Fundamental Or Constitutional In Character.²⁵³
10. The Sixth Amendment, As Construed In *Johnson v. Zerbst*, Should Not Be Made Applicable Against The States Through The Due Process Clause Of The Fourteenth Amendment.²⁵⁴

245. Respondent Brief, *supra* note 19, at 11.

246. *Id.* at 14.

247. *Id.* at 16.

248. *Id.* at 18.

249. *Id.* at 22.

250. *Id.* at 29.

251. Respondent Brief, *supra* note 19, at 35–36.

252. *Id.* at 40.

253. *Id.* at 45.

254. *Id.* at 46.

11. Automatic Appointment Of Counsel For Defendants In All Criminal Cases Should Not Be Required Under The Equal Protection Clause Of The Fourteenth Amendment.²⁵⁵
12. The Practical Implications Involved In This Case Require Adherence To The Doctrine Of *Betts v. Brady*.²⁵⁶

The study of structure and argument in the respondent's brief reveals how unpersuasive basic legal writing can be. Immediately, the reader notices that the writer does not begin by addressing the Court's question.²⁵⁷ Additionally, the writer did not follow the same order of arguments as those presented in the petitioner's brief.²⁵⁸ Certainly, each party should adopt an organization that is persuasive for that side, even if the arguments are addressed in a different order.²⁵⁹ The curious aspect of the respondent's choice, though, is that it is actually not persuasive. By not immediately addressing the Court's question, the respondent sends a message of disrespect toward the Court. In essence, the respondent insisted on applying a rule of law that the Court had already indicated it was prepared to overrule. Rather than showing the Court why the rule was still viable, the respondent simplistically applied it.²⁶⁰ In addition, the writer also argued that the case had been improperly appealed and that the Court had improperly incorporated the trial transcript into the record.²⁶¹ Each of these arguments served to undermine the Court's authority to hear the case. One can see why this was a rather unpersuasive approach considering the Court had already granted certiorari.

Only as a secondary argument did the respondent attempt to answer the Court's question. Again, the approach highlighted the Court's lack of power over the states, and the respondent declined to recognize or value the constitutional rights of the individual. The respondent advocated for blind adherence to precedent and failed to address any of the weaknesses inherent in the rule.²⁶² Furthermore, the writer did not first establish a clear synthesized rule of law and then follow it up with examples from primary sources and policies articulated in secondary sources.²⁶³ The reader, therefore, is forced to synthesize the cases in an attempt to figure out

255. *Id.* at 51.

256. *Id.* at 53.

257. Respondent Brief, *supra* note 19, at 11.

258. *See id.*

259. Author Kathryn Stanchi notes:

In the appellate context, many advocates see direct refutation of opposing viewpoints as akin to playing on the "home team's turf"—per se disadvantageous—so the advocate will seek any avenue to avoid direct refutation. If he must confront opposing arguments directly, he will do so wholly and without qualification or concession. The tone of advocacy is unabashedly polemical; there is no attempt to present the brief as anything other than a one-sided document designed to push the client's position.

Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 391 (Winter 2008) [hereinafter Stanchi, *Playing with Fire*].

260. Respondent Brief, *supra* note 19, at 11–13.

261. *Id.* at 17–18.

262. *See id.*

263. *See id.*

the rule that the respondent claims best protects the constitutional interests of all involved in state criminal prosecutions. As medium mood control, the structure fails to evoke positive emotions in the reader; in fact, it strikes a negative chord both through the order in which the arguments are presented (which is contrary to the Court's specific question presented) and the failure to clearly articulate a rule and support it through primary and secondary authority.

Comparatively, the petitioner's brief provided the Court with all the justification it needed to overturn *Betts v. Brady*.²⁶⁴ This lesson is a good illustration to show students that a respondent brief need not track the organizational choices of a petitioner brief, but that all organizational choices should be deliberate and persuasive. The classroom discussion should include analysis about how the organizational choices of each party impacted, whether negatively or positively, the reader. Central to this discussion is whether the organization leaves the reader with the impression that the respondent misunderstood the question posed by the Court or simply failed to address it.²⁶⁵

C. Lesson 3: Identifying Ethos

The lessons in ethos involve identifying those characteristics apparent in the briefs that establish the writer's credibility. Credibility requires particular attention when the writer is arguing against well-established precedent.

As explained in section II above, a writer's ethos is established through character, good will, and intelligence.²⁶⁶ Character is demonstrated through truthfulness, candor, zeal, respect, and professionalism.²⁶⁷ Good will is established through the author's disposition "toward the audience, an adversary, or someone who will be affected by the position advocated."²⁶⁸ An advocate proves intelligence by exhibiting the following traits: "(1) Informed[;] (2) Adept at legal research[;] (3) Organized[;] (4) Analytical[;] (5) Deliberate[;] (6) Empathetic to the reader[;] (7)

264. Abe Fortas approached his argument from an educational perspective by explaining the adverse authority "in the course of refuting it, on the theory that the risk of greater exposure to the adverse point [was] outweighed by the ability to make a full and explicit rebuttal." Stanchi, *Playing with Fire*, *supra* note 259, at 392.

265. In 2001, Anthony Lewis, author of *Gideon's Trumpet*, reflected the following:

In *Gideon's Trumpet* I portrayed Jacob[s] [attorney for the respondent] as a young assistant attorney general overmatched by the lawyer appointed by the Supreme Court to argue *Gideon's* case, Abe Fortas—and indeed he was, in terms of experience. But he was *not* overmatched, I've come belatedly to understand, in dedication or moral understanding. Even before the Supreme Court agreed to hear the case, Jacob[s] says he and his colleagues understood that it was going to be the occasion for the overruling of *Betts v. Brady*. He did not disagree with that course. He thought it mattered how the Court took that step—how broadly, with how much understanding of the past. He worked night after night with his wife because he thought the Supreme Court was owed a proper presentation of all the considerations. So in a way, ladies and gentlemen, even though he was not the heroic figure in the case—he lost the case, he made an inexperienced argument—to me Bruce Jacob[s] represents the way a lawyer ought to act and think about such matters.

Symposium, *supra* note 1, at 149 (Anthony Lewis presenting).

266. SMITH, *supra* note 36, at 103.

267. *Id.* at 103–04.

268. *Id.* at 173.

Practical[;] (8) Articulate[;] (9) Eloquent[;] (10) Detail-oriented[;] [and] (11) Innovative.”²⁶⁹

In the petitioner brief, candor is the issue most likely to raise concerns regarding the writer's ethos because so much of the precedent is contrary to Gideon's position. Working in small groups, students should compare the petitioner and respondent briefs and, in particular, study how Fortas crafted the foundation for his argument that the *Betts v. Brady* rule should be abolished. Both briefs rely heavily on precedent, but students should notice how the petitioner brief first states the negative controlling rule of law and then explains its implications.²⁷⁰ Often when teaching persuasive writing, professors will instruct students to “bury” unfavorable arguments in the middle of the brief by sandwiching them between strong arguments, especially because readers have limited attention spans and will better recall first and last arguments.²⁷¹ Gideon, however, did not have the luxury of burying weak arguments since he was arguing to overturn a controlling precedent. Under such circumstances, the unfavorable rule of law must be frankly identified in order for the writer to maintain credibility with the reader.²⁷²

Throughout the briefs, both sides candidly identified the law, though they advanced opposing perspectives about the meaning of the law as applied.²⁷³ Fortas did it by identifying the problems and tensions promulgated by the *Betts v. Brady* rule; the respondent did it by distinguishing *Johnson v. Zerbst* as applying only to federal cases rather than state cases.²⁷⁴ Students should consider whether the respondent's interpretation of *Johnson v. Zerbst* was authentic; to the extent it was not, students should consider how the respondent's credibility may have been affected. In the petitioner's brief, Fortas did not hide his agenda; rather, he embraced his argument for a new rule of law by first stating the controlling rule and then chiseling away at it bit by bit. The respondent used a similar approach by embracing the existing rule of law and arguing for its retention (although the respondent did not explain away the weaknesses in the rule). Both sides, then, attempted to build ethos through candor by showing they understood the controlling law.

With regard to establishing their character, both parties missed opportunities. For example, the petitioner's brief demonstrated a lack of zeal when it relied on

269. *Id.*

270. Fortas explains the previous Supreme Court ruling on an individual's right to counsel: In *Betts v. Brady*, decided in 1942, this Court ruled that the 14th Amendment does not require that the state courts furnish counsel to an indigent defendant in a non-capital case unless the total facts and circumstances in the particular case show that there has been “a denial of fundamental fairness, shocking to the universal sense of justice.” In short, counsel need not be appointed unless there are “special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense.” Petitioner Brief, *supra* note 20, at 10 (internal citations omitted).

271. EDWARDS, *supra* note 32, at 150–51; Stanchi, *Science of Persuasion*, *supra* note 57, at 415.

272. This type of argument is known as a two-sided refutational message. These arguments are effective “in that they result[] in more sustained attitude-change that [is] less vulnerable to opposing arguments.” Stanchi, *Playing with Fire*, *supra* note 259, at 424.

273. See Respondent Brief, *supra* note 19; Petitioner Brief, *supra* note 20.

274. Respondent Brief, *supra* note 19, at 25–27; Petitioner Brief, *supra* note 20, at 11–12.

phrases like “in our opinion” and “we believe” throughout.²⁷⁵ The petitioner’s brief toed the line of respect and professionalism in other ways as well. For example, Fortas argued that “[t]he necessity for counsel in a criminal case is too plain for argument.”²⁷⁶ Seeing as how the Supreme Court had decided *Betts v. Brady* a mere twenty years earlier, Fortas’ word choice and language could be seen as a harsh criticism of the Court itself. It could also be viewed as hostility toward his opponent who was arguing for retention of the *Betts v. Brady* rule. In comparing the respondent’s brief, the language is notably more subdued. The overall organization, however, shows a lack of respect for the Court in that it initially fails to address the question posed by the Court. By ignoring the Court’s question at the beginning of the brief, the respondent’s brief alienates the reader because it is not considerate of addressing the reader’s needs.

As an in-class exercise, students should identify other examples of language and organizational choices that are potentially inflammatory or unprofessional. Students should then discuss whether these uses have enhanced the persuasiveness of the brief or detracted from the author’s credibility. Students should also discuss whether the language evinces a lack of moral character or a lack of good will. Moral character is concerned with the writer’s general morality and personality whereas good will concerns the writer’s disposition toward another advocate or audience in a particular circumstance.²⁷⁷ In this writer’s opinion, the respondent brief tends to speak more to good will whereas the petitioner brief speaks more to character.

Part of the ethos lessons must also involve studying the methods by which the authors evinced intelligence. Intelligence may be established either substantively or through highlighting by drawing attention to “the fact that [the writer] possesses characteristics of intelligence.”²⁷⁸ By displaying intelligence through substance, the writer relies on the soundness of the legal arguments to establish credibility. This means that both logos and ethos are at play simultaneously, and the same argument may function in multiple ways to establish separate rhetorical traits.²⁷⁹

This particular lesson should begin with a lecture on the traits indicating intelligence and the ways to identify those traits.²⁸⁰ Thereafter, students should complete the following assignment outside of class. Students should study both the petitioner and respondent briefs to determine whether intelligence has been established either through substance or highlighting techniques. They should then draft essays identifying which traits of intelligence exist and work well to establish ethos, and which traits are absent or work against establishment of ethos.²⁸¹

275. See Petitioner Brief, *supra* note 20.

276. *Id.* at 13.

277. SMITH, *supra* note 36, at 123.

278. *Id.* at 129.

279. *Id.*

280. Chapter eight in ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING is a good source of materials for such a lecture. See *id.*

281. The SMITH text also requires, as separate exercises, that students draft essays studying the establishment of intelligence in various legal documents. *Id.* at 172.

As a shortened model of this lesson, the professor can focus the students on particular areas of the briefs or specific traits and have the students work in groups and present their findings to the class. For example, one of the student groups may study Section I of the petitioner brief to identify what traits of intelligence appear (or what techniques may indicate a lack of intelligence). Students should be required to identify the specific language and technique used. For example, the group may report that Fortas showed he was adept at legal research by including persuasive secondary sources like the New York City Bar Association, Special Committee to Study Defender Systems, *Equal Justice for the Accused* (1959), Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956), Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961), and numerous others. The group may also identify that Fortas demonstrated empathy toward the reader when he argued that *Betts v. Brady* promulgated “a rule which compels continual, unseemly, and improper intervention by the federal courts in state criminal proceedings not on the basis of applying a concrete, fundamental principle but by the corrosive and irritating process of case-by-case review.”²⁸²

By comparison, the respondent brief evidences fewer traits of intelligence. First, the respondent brief does not synthesize a clear rule of law from authorities and then support it with examples of primary law and policies from secondary authorities like the petitioner’s brief does.²⁸³ The respondent, therefore, appears

282. Petitioner Brief, *supra* note 20, at 12.

283. In every section of the brief, the petitioner’s brief states the rule of law, then illustrates its application through primary law, then further advances its argument by relying on secondary authority. Consider:

Finally, a word should be said about the contention that *Betts v. Brady* should not be overruled because it may result in releasing indeterminate numbers of prisoners in some states.

First, it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial.

Second, the claim that some offenders would go free was urged in opposition to the decisions in *Mapp v. Ohio* and *Griffin v. Illinois*. In both cases, this Court brushed aside that consideration. The practical implications of the ruling in *Mapp* are in some respects more drastic than the ruling sought here. As a consequence of *Mapp*, illegally obtained evidence cannot be used; the prosecution may be completely disarmed. But no comparable handicap will be imposed upon the prosecution by reversal of *Betts v. Brady*. Further, the claims of the Petitioner here are stronger than those of the petitioner in *Griffin*. *Griffin* involved the rights of a *convicted person* seeking equality of treatment in connection with an appeal; as the Court pointed out in that case, there is no constitutional right to an appeal. The present case, however, involves the rights of persons presumed to be innocent who are seeking meaningful protection of their right to a fair trial, a right which is safeguarded by the Constitution.

Thirty years have passed since the Court, in *Powell v. Alabama*, spoke of the necessity for appointment of counsel by the states. The states have had adequate notice and ample time to conform their practice to the requirements of a constitutional imperative. As Mr. Justice Clark stated in *Mapp v. Ohio*, “further delay in reaching the present result could have no effect other than to compound the difficulties” in the future.

Id. at 44–46 (internal footnotes and citations omitted).

less informed, less analytical, and less deliberate than the petitioner. The organization of the petitioner's brief is also easy to follow and makes it seem like the petitioner is more empathetic to the reader than the respondent. Additionally, the respondent's brief overlooks the details of policies and practices from other states while the petitioner's brief extols those examples as a beacon guiding the Court's decision.²⁸⁴ Most of all, the writing in the petitioner's brief is articulate and eloquent, and the arguments are innovative. The respondent's brief, on the other hand, is the antithesis of innovation. It remains anchored to an outdated precedent that fails to consider the essence of the human rights guaranteed protection by the Constitution. As students practice identifying character, good will, and intelligence in the briefs, they will see more clearly how subtle details may have a monumental impact on their credibility as legal writers and advocates.

D. Lesson 4: Identifying Elements of a Story

For every assignment, my students are required to complete an editing checklist to ensure they are following the "process" of legal writing. Process is important to newer legal writers in the same way that practicing scales is important to a pianist. Scales provide structure and practice of basic techniques that the pianist will build on to perform more complex music.²⁸⁵ The process of legal writing likewise provides a foundation upon which a good legal writer can build increasingly sophisticated arguments. The checklist is only a tool for the students to help them remember the foundation as they build their arguments. One part of the checklist asks the students to identify the following:

- Protagonist: _____
- Antagonist: _____
- Plot: _____
- Conflict: _____
- Theme: _____
- Resolution: _____

284. The majority opinion on the right to counsel was discussed by Fortas in the petitioner's brief:

We recognize, of course, that resolution of an important question of constitutional law cannot and should not be made simply by taking a census of the states. But the practice among the states was emphasized in *Betts v. Brady* as a factor to be used in determining the standard of procedural fairness required by the due process clause. There is no doubt that there is today widespread consensus among the states that legal assistance should be furnished to indigent persons. Further, it is a principle which has the overwhelming support of the bar. The task here is essentially a modest one: to bring into line with the consensus of the states and professional opinion the few "stragglers" who persist in denying fair treatment to the accused.

Id. at 32 (internal citations omitted).

285. Art Zimmet, *Talent Is Overrated By Geoff Colvin*, 85 FLA. B.J. 46, 46 (2011).

This list can be used as a guide to study the petitioner and respondent briefs in *Gideon*. The petitioner and respondent told Gideon's story in very different ways. For the petitioner, Fortas broke nearly every persuasive "rule" in the book, even beginning with the decision to depersonalize Gideon.²⁸⁶ On the other hand, the respondent's brief took a more traditional approach and demonized Gideon as a career criminal who did not deserve to have his case heard by the United States Supreme Court.

Prior to studying the briefs as examples of legal storytelling, students would benefit from identifying elements of stories from other more commonly understood sources (like movies or books). One lesson I have presented over the past several years involves showing clips from the movie *Sleepers*.²⁸⁷ The class begins with me showing a scene where two adult males sitting in a bar notice a man sitting at a nearby table eating his dinner.²⁸⁸ The two men approach the individual, sit at his table, and proceed to shoot him multiple times, ultimately killing him.²⁸⁹ Throughout the shooting, the two "bad guys" remain relatively calm, and they walk out of the restaurant as if nothing has happened.²⁹⁰ After showing the clip, I engage the class in a discussion about the characters we have just seen. We talk about whether the two "bad guys" contribute any value to society or if they appear to have had any noble goals; we also attempt to identify the "victim" in the scene. After the discussion, I show them another scene from the movie that develops the backstory of the two boys. That scene shows them living in a juvenile detention center where they were brutally sexually abused over a period of months.²⁹¹ The abuse is not explicitly shown in the movie at all, but by watching the scene the viewer "knows" it happened. After watching the scene, we talk about what techniques the movie uses to show, rather than tell, the backstory. We also bring back up the questions about the characters from the first scene. The students usually can see that the adults may have had some noble goals, and their concept of which characters are victims may shift as well. This movie also offers good clips during the trial stage when the prosecutor (a friend of the defendants who suffered the same abuse in the detention center) seeks to covertly put the detention center on trial.

286. For years now, leading scholars have recognized that at times an attorney may need to downplay facts about an unsavory client "and instead make him a proxy for an 'ideal,' such as the Fourth or Fifth Amendment: a holding against the client is a holding against the Fourth Amendment." Foley & Robbins, *supra* note 39, at 473.

287. *SLEEPERS*, *supra* note 122. I use *Sleepers* because the movie speaks to me personally, and I am familiar with it. Any professor of legal writing should become familiar with the resource to be used, and there are certainly a number of other films that could be substituted and accomplish the same purpose. For this particular lesson, the professor should endeavor to use a film or written story/book where the main character has engaged in highly unlikeable behavior, but the back story offers justifications for the behavior that causes the reader to root for the "bad guy."

288. *Id.* If any of the students have seen your movie, you may have to ask the student to separate any knowledge of the backstory from the scene(s) shown so that the discussion can progress. Most of my students have not seen *Sleepers* as it was a movie that came out in the early 1990s, and I think it is a benefit to use older and more obscure films for this exercise.

289. *Id.*

290. *Id.*

291. *Id.*

After studying the movie, students are usually primed to begin studying the *Gideon* briefs. The first task is to have them identify the characters in the briefs. Interestingly enough, the protagonist in the petitioner's brief is not Gideon himself. Gideon's name is mentioned only a handful of times, and the brief refers to him mostly as "the defendant."²⁹² Depersonalizing the defendant is counterintuitive when one considers the objectives of persuasive writing, but it worked well to advance Fortas' theory of the case. Fortas focused on a reified idea—fundamental fairness and justice in state criminal proceedings as the protagonist;²⁹³ the antagonist was the "special circumstances test" articulated in *Betts v. Brady*. Fortas sought to highlight that Gideon's case was much bigger than Gideon himself, and he established that early in the brief.²⁹⁴ In other words, Fortas made Gideon a "proxy for an ideal,"²⁹⁵ and that ideal was the Sixth Amendment (as applied to the states through the Fourteenth Amendment).

This approach was genius considering that the Court would have struggled to identify with Gideon, a criminal with multiple convictions on his record. The Court could identify, however, with fundamental notions of fairness and justice. Furthermore, Fortas pointed out that to claim counsel was not necessary in every criminal case undermined the legal profession as a whole,²⁹⁶ as well as judges who

292. Petitioner Brief, *supra* note 20.

293. Abe Krash explains the constitutional law issues asserted in the *Gideon* case:

[T]he great constitutional law issue presented in the *Gideon* case to the Court was this: Is the Sixth Amendment, which guarantees the right to counsel, incorporated in the Due Process clause of the Fourteenth Amendment, so that it would be obligatory on the states to provide counsel? To put it another way, does the Due Process clause of the Fourteenth Amendment guarantee to an indigent person—without regard to the Sixth Amendment—the assistance of a lawyer in every criminal prosecution?

Symposium, *supra* note 1, at 137 (Abe Krash).

294. The petitioner brief addresses why Gideon's case is analogous to the issues presented in *Betts v. Brady*:

In Appendix B to this Brief we analyze the specific points that demonstrate that Gideon did not receive the benefits and protection which would presumably have been afforded him by counsel. We believe that these constitute a vivid demonstration of the fact that he was deprived of his due process rights under the Fourteenth Amendment: that he did not have a fair trial in the constitutional sense. But it is our opinion that these points are not peculiar to Gideon's case. We believe, *mutatis mutandis*, these points are present in every criminal prosecution. In short, we believe that the circumstances of this case are no more "special" than in other criminal cases—unless we are to draw a line between twedledee and twedledum. We are therefore of the opinion that the fundamental question of *Betts v. Brady* is at issue in the present case.

Petitioner Brief, *supra* note 20, at 13.

295. When the judge is unlikely to relate to the client, using the client as a proxy for an ideal, like a constitutional right, is preferred. *Foley & Robbins*, *supra* note 39, at 473.

296. Fortas explains the difficulties for an individual in representing himself:

No individual who is not a trained or experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea, or marshal and present all of the factual and legal considerations which have a bearing upon his defense. Even a trained, experienced criminal lawyer cannot --and will not, if he is sensible-- undertake his own defense.

Petitioner Brief, *supra* note 20, at 13–14.

are also included in the profession. In a very direct way, then, Fortas personalized the case for the Court, although it had nothing to do with the particular defendant named in the case.

The respondent's brief, on the other hand, defined the characters in a much more traditional way. It painted Gideon as the antagonist: a mere criminal who was attempting to get a second bite at the apple by manipulating the system. The protagonist of the respondent's brief was the state itself who, as the respondent argued, was entitled to prosecute criminal defendants without interference by the federal courts.

By examining the characters, students begin to see how the Court was more likely to relate to the petitioner's brief than the respondent's brief. Both characters in the respondent's brief were crafted in opposition to the United States Supreme Court whereas the protagonist in the petitioner's brief coincided with the Court's very essence. By siding with the petitioner, then, the Court aligned itself with fundamental fairness and justice in a fight against the "special circumstances test." In contrast, to align with the respondent would have undermined the very nature of the Court itself. This lesson illustrates for students why courts are more likely to rule in favor of a party it can identify with. It also provides a good example of how depersonalizing the client does not necessarily depersonalize the cause. It shows how sometimes the individual client may interfere with the cause of the case and how redefining the characters can establish a new perspective through which courts can understand the legal issue.

Throughout the argument, Fortas attacked the antagonist: the special circumstances test.²⁹⁷ Even before defining the protagonist, he defined the test itself.²⁹⁸ Then, the assault began. Fortas argued that "[f]or twenty years, this Court, the lower federal courts, and the courts of a number of states have been charged with the duty of administering this rule. The experience has not been a happy one."²⁹⁹ He pointed out that the rule "has not assured and cannot be expected to assure that counsel will be provided where necessary in the interests of fundamental fairness in state criminal proceedings."³⁰⁰ Beyond that, the rule compelled, he argued, "continual, unseemly, and improper intervention by the federal courts in state criminal proceedings not on the basis of applying a concrete, fundamental principle but by the corrosive and irritating process of case-by-case review."³⁰¹

297. *Id.*

298. Fortas explains:

In *Betts v. Brady*, decided in 1942, this Court ruled that the 14th Amendment does not require that the state courts furnish counsel to an indigent defendant in a non-capital case unless the total facts and circumstances in the particular case show that there has been "a denial of fundamental fairness, shocking to the universal sense of justice." In short, counsel need not be appointed unless there are "special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."

Id. at 10 (internal citations omitted).

299. *Id.* at 10–11.

300. *Id.* at 11.

301. *Id.* at 12.

This initial assault focused on redefining the category of the special circumstances test through describing the conflict. Prior to *Gideon*, the idea behind the special circumstances test was that it ensured the basic requirements of due process without undue interference with the states and produced consistent results as applied.³⁰² The respondent advanced this argument in its brief as well.³⁰³ As a storyteller, Fortas masterfully destroyed this preexistent category by exposing its insidious interference with state court prosecutions case-by-case. Only after exposing the weaknesses of the special circumstances test and showing its effects had been the reverse of the Court's intentions could it be replaced with a new rule that would ensure fundamental fairness and justice for all.

After damaging the antagonist, he introduced the protagonist: fundamental fairness and justice. He began by showing how typical a defendant *Gideon* really was.³⁰⁴ Then, he detailed the complexities involved with a criminal case.³⁰⁵ Interestingly enough, *Gideon*'s case did not involve many of these specific complexities. For example, *Gideon* was not charged by a grand jury, and the facts of his case were not particularly difficult to understand (as the respondent aptly pointed out in his brief). Because of the way Fortas defined the characters, though, he was not bound by the specifics of *Gideon*'s case in making his argument.

The attack on the antagonist continued as Fortas exposed the flaws in the application of the special circumstances test, which required a defendant to show "a denial of fundamental fairness, shocking to the universal sense of justice."³⁰⁶ Fortas reframed what it meant to shock the universal sense of justice by describing the inconsistent results of cases from across the nation where courts had attempted

302. Respondent Brief, *supra* note 19, at 12.

303. *Id.* at 12.

304. *Gideon*

can claim neither extreme youth, inexperience, mental incapacity, nor illiteracy on the part of the defendant. It is true that the defendant could not possibly have fully understood the legal subtleties of the crime with which he was charged; he could not have been aware of the decisions of the Supreme Court of Florida or principles of *corpus juris* which might affect his defense. He could not have been alert to the opportunities theoretically offered by the law to cope with the problems of jury selection or the testimony of witnesses adduced by the State. It is true, too, that the judge in *Gideon*'s case did not serve as *Gideon*'s defense counsel—although it is obvious that he tried to conduct the trial fairly.

Petitioner Brief, *supra* note 20, at 12–13.

305. Fortas asserts that defendants need skilled representation regardless of the possible penalty:

"[I]n determining whether absence of counsel has denied a fair hearing, the important consideration seems less the penalties that may be imposed than the *need* for skilled representation. Any experienced defense lawyer is likely to testify that most murder cases, in which capital penalties are involved, are by no means the most difficult to try or those in which representation is most urgently required. Indictments charging such crimes as embezzlement, confidence game, or conspiracy are likely to place the defendant in a far more helpless position. The distinction that the Court has drawn lacks integrity, and so long as it persists, the law of the subject will remain in a state of unstable equilibrium."

Id. at 23 (quoting Francis Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 197 (1958)).

306. *Betts v. Brady*, 316 U.S. 455, 462 (1942).

to apply the special circumstances test.³⁰⁷ He then highlighted that such results were to be expected through continued application of the special circumstances test because there was “an inherent incongruity in [it].”³⁰⁸ The petitioner’s brief continually highlights its protagonist, fundamental fairness and justice. For example, the petitioner argued that “the accused may languish in prison for years before his conviction is adjudged to have been unfair by reason of the absence of counsel.”³⁰⁹ Additionally, he argued that “[i]t is ironic, but we believe true, that in final analysis, whether a post-conviction petition is filed, or whether a poverty-ridden prisoner gets a hearing on his right to counsel, may turn upon the quality of the fellow-inmate—usually equally untrained—who is the jailhouse lawyer.”³¹⁰

307. The petitioner brief discusses some previous cases dealing with the special circumstances test:

In the present case, the trial court did not call petitioner’s attention to the ‘special circumstances’ bearing on the right to appointment of counsel. As the state court decisions discussed below show, the ‘special circumstances’ rule has only infrequently led the state courts to appoint counsel. Some of the state decisions are startling. For example, in *Commonwealth ex rel. Simon v. Maroney*, the defendant, an 18 year old boy, was sentenced in 1942 to a term of 20 to 40 years imprisonment following a conviction for rape, robbery, and assault and battery. The Pennsylvania Supreme Court recently denied relief. It felt that denial of counsel did not produce an “ingredient of unfairness” although the court recognized that “The defendant was not wholly a normal person. A behavior clinic study made of the defendant shortly after his arrest revealed him to be a high grade moron with an intelligence quotient of 59,” equivalent to a “mental age of only nine.” The defendant was “illiterate”, but the court felt no prejudice occurred because “There were no ‘intricacies of criminal procedure,’ no ‘improper conduct on the part of the court or prosecuting officials,’ and nothing complicated about the charges of robbery and rape.”

In *Butler v. Culver*, the court refused to set aside a conviction for second degree murder for which the defendant had been sentenced to life imprisonment, although there was a “showing in this record that approximately two months after the petitioner pleaded guilty to second degree murder [without counsel], it was formally adjudicated that he was suffering from an acute condition of insanity, described as paranoid schizophrenia.” The court said no contention was made on appeal that the accused was mentally incompetent at the time of trial.

In *Shauffer v. Warden*, the accused was convicted without counsel on charges of burglary. The accused contended that “he was only nineteen years of age and the average in mental capacity and was suffering from a congenital speech defect.” The defendant maintained that as a result of his speech defect a plea of not guilty was mistaken as a plea of guilty; that he was unable because of his speech impediment [sic] to make the trial court understand the whereabouts of certain necessary witnesses; and that he vainly attempted to “stammer out” a request for appointment of counsel. The conviction was upheld.

The opinion of the Alabama Court of Appeals in *Artrip v. State*, reads in a similar vein. The court felt the following pertinent to its conclusion that petitioner was not prejudiced by denial of his request for counsel in a prosecution for escaping from the penitentiary: “Artrip was considered a good all round mechanic and electrician by his supervisor at the Kilby motor pool. His original brief was well typed and concisely stated a number of pertinent points. His supplemental briefs which exhibit good penmanship are also pertinent to the contentions he advances.”

Contrast with the foregoing cases the opinions of this Court in *Carnley v. Cochran*, *Chewning v. Cunningham*, and *McNeal v. Culver*.

Petitioner Brief, *supra* note 20, at 38–41 (internal citations omitted).

308. *Id.* at 41.

309. *Id.* at 42.

310. *Id.*

Plot, conflict, theme, and resolution, of course, are closely connected with character development in the petitioner's brief. As for the respondent's brief, these elements are practically non-existent. Ever mindful that humans are predisposed to categorize and rely on stock stories, one of the commonly recognized categories apparent in the petitioner's brief is that of rich versus poor.³¹¹ This categorization would have been particularly poignant in the early 1960s during the heart of Kennedy's era and the civil rights movement.³¹² In a slightly more abstract way, another category that emerges is that of man versus self. This category developed as Fortas explained that "[t]he aid of counsel is indispensable to a fair hearing."³¹³ His approach showed the Court how the special circumstances test undermined the value of attorneys as a legal profession and thus created an impossible dilemma of man [legal professionals] vs. self [legal professionals].

Every argument in the petitioner's brief builds upon the foundation established in the immediately preceding section. The brief is entirely consistent, and the details address any lingering questions that may emerge in the mind of the reader. Fortas resolved the conflicts created by the special circumstances test by declaring the test should be overruled and that the Court should require appointment of counsel to represent criminal defendants in state court criminal prosecutions.³¹⁴ The conclusion section of the brief, rather than simply reiterating all the legal points previously raised, quotes a powerful phrase published in the New York Times shortly after the decision in *Betts v. Brady* was handed down:

[A]t a critical period in world history, *Botts* [sic] v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right of counsel, for the poor as well as

311. Fortas explains the discrimination that results in failure to appoint counsel for an indigent defendant:

The refusal to appoint an attorney to represent a destitute person results in discrimination against defendants based solely upon poverty. There is no doubt that a defendant in a state criminal trial has an unqualified right under the Fourteenth Amendment to be heard through counsel he has retained. We submit that if a person with funds is entitled to be heard through an attorney, the same privilege must be extended to indigents. In the case of those able financially to hire counsel, the rule is not limited to capital cases or to "special circumstances." It is absolute and complete, and a state may not restrict it. How, then, can the right be restricted in the case of the poor? We have agreed since *Powell v. Alabama* that the state has a duty to appoint counsel for the indigent in at least some criminal cases in order to meet the requirements of due process. If this is so, counsel must be provided in all criminal cases in which there is a constitutional requirement to permit counsel to appear and act for those who have the funds to hire them. The indigent defendant cannot be denied an "unqualified right" solely because of poverty; to do so results in a denial of equal protection. "The need of counsel is the same, whatever the economic status of the accused."

Id. at 25.

312. "[I]t's difficult now to recapture the spirit of idealism that infected [Gideon's attorneys] in 1963. . . . [T]his was the Kennedy era, and [they] had high very hopes that establishing this principle of the right to counsel would really have a profound effect and impact." Symposium, *supra* note 1, at 140 Abe Krash presenting).

313. Petitioner Brief, *supra* note 20, at 13.

314. *Id.* at 46.

the rich, is an indispensable safeguard of freedom and justice under law.³¹⁵

This one quote restates the theme, conflict, plot, and character directly for the reader. Yet, Fortas' reliance on this non-legal source is poignant and powerful only because its sentiments have been well-established and supported in the brief through primary sources of law.

Studying the resolution in the petitioner brief's conclusion provides a good lesson to students that each section of the brief serves an independent purpose while no section is entirely independent. This conclusion would have had no persuasive power without the underlying law supporting it in the argument section. Yet, a mere reiteration of those points of law would have had little persuasive impact on the reader.

In three short paragraphs, Fortas summarizes the overarching theme and nestles Gideon's case and his proposed resolution both historically and philosophically to show the correctness of the arguments previously made to support abolishing the special circumstances test. Read alone, this section appeals to pathos and enhances the logos arguments made throughout. In contrast, the respondent brief merely asserts "[f]or the reasons stated, the doctrine of *Betts v. Brady* should be adhered to, and the judgment of the Court below should be affirmed."³¹⁶ Standing alone, the reader cannot understand why the requested relief should be granted let alone the potential significance or impact of the decision.

Read side-by-side, the conclusions in both briefs represent fundamentally distinct approaches to persuasion. As a lesson in the classroom, the conclusions demonstrate the importance of understanding the purpose of each section of the brief. The conclusion in any brief should quickly evince in the reader the desire to rule in favor of that party. The petitioner's conclusion does just that and provides a model that students can build on in learning to construct their own persuasive conclusions.

IV. CONCLUSION

The *Gideon* briefs contain numerous examples of advanced persuasive techniques that legal writing professionals can use to teach students how to move beyond basic persuasion. Many of these lessons can be incorporated even in the first year to provide students with good examples of how to persuade an audience. The *Gideon* briefs provide a good source of comparison because one brief is powerfully persuasive while the other is just okay. When students begin studying the respondent's brief, they will likely think it is well-researched and good. Once compared to the petitioner's brief, however, the flaws and weaknesses quickly emerge. The lessons are valuable for teaching students to understand that their

315. *Id.* (quoting *Bute v. Illinois*, 333 U.S. 640, 677, n. 1 (1948) (Douglas, J., dissenting) (quoting Benjamin V. Cohen & Erwin N. Griswold, N.Y. TIMES, Aug. 2, 1942, §IV, p. 6, col. 5).

316. Respondent Brief, *supra* note 19.

briefs will also be compared to their opponent's brief. They also teach students to think about tools of persuasion in new ways and to be conscious of their choices when using persuasive tools in legal writing.

Gideon's legacy has endured fifty years, now, and the power of the petitioner brief remains strong. The argument crafted by Fortas is impenetrable. A final interesting observation is that Fortas himself was not an expert or specialist in criminal law when he was appointed to represent Gideon.³¹⁷ Fortas was an attorney at various New Deal agencies, including the Securities Exchange Commission and the Agricultural Adjustment Administration, aside from his private practice.³¹⁸ Considering that his specialties "were in securities law and antitrust law [he had] a profound effect on the criminal law."³¹⁹ Students who scrutinize the brief written by Fortas will learn from its organization, clarity, and detail. These lessons will guide students on how to formulate equally impenetrable arguments on behalf of their own clients.

Perhaps most importantly, through these lessons students will begin to understand the value of moving beyond a "fill-in-the-blank" approach to legal analysis. These lessons will also provoke thoughtful consideration of the rhetorical purpose of each section of the brief as well as the uses and disuses of various tools of persuasion. Finally, students should begin to understand enough of the underlying theory of legal analysis and argumentation to become sophisticated advocates who can advance complex reasoning on behalf of their clients.

317. Symposium, *supra* note 1, at 137 (Abe Krash presenting).

318. *Id.*

319. *Id.* at 137–38.