The Fact of the Matter

By Kimberly Y. W. Holst

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Each spring, we transition from teaching our first-year law students objective writing to teaching them persuasive writing. A great deal of our instructional design centers on identifying which of the basic skills learned by the students in the fall must be transferred and applied by the students in the spring. Year in and year out, the one area of writing that causes the students the most hesitation in the spring is transitioning to writing facts in a persuasive fashion.

It’s not difficult to understand why our students struggle with this concept; we’ve spent the previous semester drilling fundamental concepts about fact writing in their head such as:

- "Present the facts accurately and objectively."
- "Your statement of facts should focus on material facts and helpful background facts."
- "In drafting the fact section your primary tasks are (1) selecting which facts to include, (2) organizing those facts in an effective way, and (3) remembering your predictive role."
- Avoid legal conclusions.

As the fall semester turns to spring, we require students to rethink the presentation of facts. Now, we tell them things like:

- "The appellants' statement of facts and the appellee's statement of facts should each bring their respective client’s story to the fore while stating the facts accurately, fairly, and completely."
- "The writer must use the existing facts to persuade without appearing to persuade."
- "The writer must recite the facts in a manner that is objective enough to be fair and simultaneously persuasive enough to be compelling."
- "You can use persuasive writing techniques to tell the story from your point of view, to highlight facts that are in your favor, and to lead the reader to draw honest and favorable conclusions about your client’s case."
- "Although the statement of facts must be accurate, it need not be objective."
- "Be subtly persuasive."

Simply put, we ask our students to use a skill that they’ve only recently acquired and to manipulate it like an expert. We require them to perform a new task using skills they have yet become comfortable using. It’s downright daunting to think about presenting facts in a persuasive fashion. At a "gut" level, students perceive this new persuasive presentation of facts as manipulative and may even border on lying.

It should not be surprising how difficult it can be getting

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2. Edwards, supra n. 3 at 337.
3. Id. at 337-38.
5. Oates & Enquist, supra n. 1 at 349.
6. Id. at 350.
students to understand that it is possible to present facts factually, but in a persuasive fashion.

A Method to the Madness
I have used a variety of techniques to help students understand this delicate balance between writing factually and persuasively. Inspired by colleagues, and tapping into my great love of television and movies, I believe I have finally struck on a method that seems to resonate with the students. I call it Framing Facts in Film.

Origins
It all began with a post to the Legal Writing Professors Listserv—a simple, factual synopsis of the classic movie, The Wizard of Oz:

“Transported to a surreal landscape, a young girl kills the first person she meets and then teams up with three strangers to kill again.”

Then I discovered a synopsis of Aliens II, on Facebook:

“Sigourney Weaver and a platoon of space marines land on a desolate planet where they display an alarming intolerance for the indigenous population.”

I immediately thought, “Framing!” I decided to create a new lesson plan that would integrate these synopses into an exercise that would begin the students’ shift in thinking about fact manipulation in a more positive light. What resulted was an activity that engaged the students, produced fun results, and created a lasting reference for the rest of the course. Creating this type of shared language or shared understanding may help the students with bridging concepts throughout the course.

Film #1
A man’s wife and children are brutally murdered by a serial killer and the only son to survive is left physically disabled. A serial kidnapper then kidnaps his son and in a

persuasive fashion.15 Below, I briefly describe the lesson plan and provide examples that demonstrate the students’ results from the exercise.

From the Silver Screen
At the beginning of the class, I show the students the two synopses mentioned above to begin the transition from objective to persuasive. I follow that up with a video clip from How I Met Your Mother with Barney’s explanation of why he loves the film The Karate Kid.16

To the Classroom
Next, with the students working in small groups, I ask them to think of a well-known movie (one appropriate for classroom discussion) and write a short synopsis from a different perspective of the student’s choosing—that either from a different character’s perspective or in some fashion that highlights the key events in the film in a new light. Once the alternate synopses have been written, I have each group read their different synopsis aloud and challenge the rest of the class to identify the film. What follows are a few of the actual alternative film synopses developed by my students in the past. Can you identify the films? (The answers are in the footnotes.)17

15 See Jean Matter Mandler, STORIES, SCENES, AND SCHEMAS: ASPECTS OF SCHEMA THEORY 2, 4 (1984). One theory states that the schematic structures that we use to understand new information parallel the presentation of stories. And, that atypical event presentations can be easier to remember than typical structures. see id. Also, the way a story is presented may cause us to access the schema differently—creating different interpretations of the information depending upon the presentation. see id. at 31-46.

16 In this clip, Barney explains why The Karate Kid is his favorite movie. Through his description we learn that he sees the movie’s traditional antagonist, Johnny Lawrance, as the hero of the film while the traditional protagonist, Daniel LaRusso, as the villain. See How I Met Your Mother, Season 4, Episode 15: The Stinsons (20th Century Fox, CBS Broadcast on Mar. 2, 2009).

17 The student examples are presented as they were submitted to me. This exercise can be done with other familiar media—literature, fairytales, etc. For more information about alternative fact framing and examples of how this may be presented to students see Kimberly Y.W. Holat, Non-Traditional Narrative Techniques and Effective Client Advocacy, 48 THE LAW TEACHER: THE INTERNATIONAL SCHOLARLY JOURNAL OF THE ASSOCIATION OF LAW TEACHERS 166 (2014).
twisted turn of events, the father has to chase the kidnapper thousands of miles with the help of a mentally disabled companion. This poor companion has been wandering around for years, unsure of where or who she is. She is desperately trying to make friends with the father who is constantly attempting to leave her behind in his journey. Despite his numerous rejections, she “just keeps swimming.” In the end, her perseverance yielded an unforgettable friendship.18

Film #2
A grave robber turned archeologist breaks into ancient temple ignoring proper archeological techniques and safety procedures. He steals a religious artifact from the native population. Then, the U.S. government covers up supernatural events and hides evidence for monotheistic religion away in a warehouse.19

Film #3
A fragile old woman uses the only avenue available to her in order to preserve her life. Faced with imminent death, she is forced to find another alternative when the magical flower she regularly used to preserve her life was taken from her. When a princess is born with the flower’s magical ability (accessed through the princess’s hair), the old woman, victimized by her age, weighed the risks and was compelled to take and raise the child on her own. Still fearing for her life, the old woman protects the princess from worldly harm and gives her every luxury she can afford before the princess eventually abandons her, leaving the old woman powerless and alone. Worrying for the princess’s safety, she frantically searches for her. In the end, the princess’s decision to cut her hair and abandon the power, leads to the old woman’s demise.20

Film #4
One of the greatest and most memorable golfers of all time has his dominance challenged by an unprofessional and degenerate newcomer with questionable ethics. The established and successful golfer is also skilled in both real estate and investing. The golfer lives an extravagant life and in a shrewd move purchases the unprofessional golfer’s grandmother’s house to use as bargaining power in the future. The golf veteran is also a fan favorite with his over the top signature pistol gesticulation. The longtime tour veteran is performing admirably and in position to win the season ending golf tournament when some of the newcomer’s unruly fans become disruptive. On the last hole, the veteran is thwarted by an extremely controversial play in which the newcomer was allowed to use materials other than his golf club to finish the hole and win by one. The improper and unprecedented play should have been deemed illegal and the veteran—the rightful champion—should have been crowned again. Despite being denied the victory in that tournament and viciously assaulted by the newcomer’s fans afterward, the veteran went on to make a full recovery and is the all-time highest money earner in PGA tour history.21

Film #5
The prince was a juvenile delinquent who, in his largest offense, orchestrated his father’s death. He imperiled himself, knowing that his father would come to his rescue and then fled the royal community without acknowledging his role in the king’s untimely demise. He abandoned all responsibility to his mother, girlfriend, and tribe, and left the kingdom to live with a couple of lay-abouts in a remote jungle. Then, when he was finished relaxing in a faraway land, he returned to the family he abandoned to seize their government (and shake up their lives) and to reclaim

18 Finding Nemo (Pixar Animation Studios 2003).
20 Tangled (Walt Disney Animation Studios 2010).
21 Happy Gilmore (Universal Pictures 1996).
the responsibility he wasn’t man enough to assume ages ago.22

Film #6

After years of order, peace, and stability, a gang, including a criminal smuggler and his aggressive, unruly beast and a spoiled rich girl with a burning passion for her brother, wreak havoc in the galaxy forcing the government to respond. The rebels take advice from a senile and grammatically challenged sorcerer. The government responded proportionately and valiantly to crush the immoral rebellion, but in the end, the rebels won and many of the government’s courageous, well-trained soldiers and leaders were killed in the bloody insurrection.23

To the Courtroom

After we have explored alternative ways to framing facts from movies, I share examples of alternatively framed facts from real cases beginning with oral arguments. A familiar example is Johnnie Cochran’s closing argument in the O.J. Simpson case. In his closing argument, Mr. Cochran effectively shifts the jurors’ focus from the defendant, a famous, professional athlete, to a symbol—the ill-fitting glove. His repeated use of the phrase, “If it doesn’t fit, you must acquit”, brings the focus to the errors in the investigation rather than the evidence against defendant.24

Students are shocked to discover that judges at all levels of the judicial system regularly use framing techniques to support their opinions. One popular exercise (used by many legal writing professors) considers the facts from Walker v. City of Birmingham, 388 U.S. 307 (1967) and Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). Both cases describe events leading up to and including the famous civil rights march through Birmingham, Alabama, on Easter Sunday, April 14, 1963.25 In Walker, the Court’s description frames the facts in a more violent fashion,26 while the Shuttlesworth Court frames it in a more peaceful fashion.27 I challenge students to tell identify the different framing techniques used by each Court to frame the reader’s perception of the march. Ideally, students will highlight framing techniques such as fact selection, how facts are highlighted or de-emphasized, particular word choices, the manner in which names and numbers are handled, the presentation of the timeline of events, and other aspects of the facts that offer contrasting perspectives. At the end of the discussion, I reveal to the students that both opinions were written by Justice Stewart—further emphasizing that a single author is capable of using framing techniques to persuade the reader.28

If time permits, we may also explore other examples of persuasive framing such as the Courts’ use of non-traditional narrative techniques to present facts in a certain light as the illustrated in Boykin v. Alabama, 395 U.S. 238 (1969).29 In Boykin, the court frames the facts to shift the focus from the defendant and the heinous crimes for which he was convicted to a story in which the focus is on the procedural defects in the case.30 This approach paints a picture of the defendant in a passive role rather than an active role within the case. (Other examples of non-traditional framing include non-chronological presentations of events or challenging the good guy v. bad guy archetypes, etc.).

22 The Lion King (Walt Disney Pictures 1994).

23 Star Wars: Episode IV—A New Hope (Lucasfilm, 20th Century Fox Film Corp. 1977). I received another alternate synopsis for Star Wars that mashes up Episodes IV & V: An orphan, living with his step-family, is found by a family friend, who convinces him to embark on a quest to save the world, which ultimately culminates in a reunion with his father. See id. and Star Wars: Episode V—The Empire Strikes Back (Lucasfilm, 20th Century Fox Film Corp. 1980).


26 Walker, 388 U.S. at 308-11.


28 Another option is to use only the Walker opinion. The majority opinion and the dissenting opinion give contrasting narratives of the facts surrounding the march. See Walker, 388 U.S. at 309-11, 324-26.


30 Id. For a more in-depth discussion of this technique see Linda L. Berger, The Lady or the Tiger? A Field Guide to Metaphor and Narrative, 50 Washburn L.J. 275 (2011).
To the Spring Writing Assignment

Ultimately, greater exposure to uses of alternative framing techniques for the purpose of persuasion helps the students feel comfortable with using these techniques to frame the facts of their case. After we've explored alternative framing in films, oral arguments and judicial opinions, we shift to discussions of how the facts from their spring writing assignment may be persuasively (alternatively) framed for each party. This brings the exercise full circle—from a familiar context (films), to a slightly newer context (cases), to their current assignment. This leads students to the last step in the exercise: application of these techniques to the facts in their hypothetical case. The theory driving this last step in the exercise is building the students' confidence in using narrative techniques to frame facts by starting in a familiar context (movies) and moving to a less familiar context (facts in a litigation document).

During this final portion of the exercise, I ask the students to apply the techniques we used to frame movie synopses and identified in real cases to the facts of their spring writing assignment. Typically, I have the students continue to work in small groups to discuss whether a traditional framing of the facts (a chronological protagonist driven narrative) or an alternative framing of the facts best serves their client, and to identify the facts that should be highlighted or de-emphasized to achieve the best possible outcome for their client.

Conclusion

This non-traditional approach to teaching persuasive framing of facts has proven successful in my own experiences. Since I began implementing this approach to teaching persuasive framing of facts, I have found that students are more apt to try different narrative techniques and often create more compelling statements of facts in the first drafts of their briefs. As a result, my feedback on the first draft can focus on refining these statements of facts rather than on restructuring them—leading to a better final product in the final draft. And, it doesn't hurt that we have a little fun along the way.

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Micro Essay

What is a government junkie to do if they are stranded on a desert island? Easy! Take Voxgov, a continuously updated database that tracks social media posts of elected representatives and governmental departments. Voxgov combines the needs of a social media addict, a government wonk, and a database guru in one handy resource. You can follow Tweets, Facebook posts, YouTube videos, and official press releases from thousands of sources. Users can compare Republican and Democrat postings, follow trending topics, and research what their own elected officials are talking about. With Voxgov, I’d feel connected, even on a desert island!

Kris Turner, Head of Reference, University of Wisconsin Law School Library, Madison, Wis.