

LEGAL COMMUNICATION & RHETORIC: JALWD

Fall 2023 / Volume 20

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Legal Communication & Rhetoric: JALWD (LC&R) (ISSN 1550-0950) is an annual publication of the Association of Legal Writing Directors. Its mission is to advance the study and practice of professional legal writing by becoming an active resource for the profession and by establishing a forum for conversation among all members of the legal academy—judges, lawyers, scholars, and teachers. For back issues and further information, see www.alwd.org/lcr/.

The **Association of Legal Writing Directors** (ALWD) is a nonprofit professional association dedicated to improving professional legal writing through programs that serve law schools and the legal profession. ALWD sponsors biennial conferences and information exchanges; publishes a citation manual that provides a consistent, flexible, and easy-to-use system of citation for legal materials; and supports accessible legal writing scholarship for an audience of lawyers, judges, law students, and academics. For information about ALWD's programs and publications, visit www.alwd.org.

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General Guidelines

Submission of articles and essays

Submissions of articles and essays under 15,000 words, inclusive, are due on or before **September 1** of the calendar year before an upcoming issue. More specifics about technical aspects appear below.

We welcome articles on any topic that falls within the mission of *LC&R*: to develop scholarship focusing on the substance and practice of professional legal communication, broadly defined to include many aspects of lawyering, and to make that scholarship accessible and helpful

to practitioners as well as to legal academics. Without compromising analytical rigor and the necessary theoretical and research foundation, our goal is to publish articles that are readable and usable by the broader audience of professional legal writers. We are looking for clear, concrete, direct writing; strong, interesting, intelligent voices; and a style that uses the text for substance and the footnotes to provide support, sources, and references for additional study.

Potential authors may wish to consult articles published in past issues, as well as the more specific information for authors available under the Submissions tab at www.alwd.org/lcr/submissions/.

Exclusive submission preferred / peer review and the effect on expedited requests

Because of the time involved with conducting the peer-review process, *LC&R* prefers exclusive submission of manuscripts but does not require it. Submission elsewhere does not prejudice the author's chances of receiving an offer from *LC&R*. If an author has submitted the manuscript elsewhere or wishes to do so, the author should inform the Journal at the time of submission and notify the Journal immediately should the author accept another offer of publication. This is to allow us to alert our peer reviewers. Using an anonymous, peer-review process is time-consuming and makes expedited review difficult to accommodate.

Technical requirements

Three parts to the submission

Electronic manuscripts should be accompanied by both a cover sheet summarizing the article and a CV, resume, or summary of scholarship background of the author, including preferred email and phone contact information.

Maximum length of submissions

For major articles, *LC&R* will consider manuscripts from **5,000–15,000 words of text, including footnotes**. For more informal essays, *LC&R* recommends manuscripts of approximately **2,500–5,000 words of text and fewer than 50 footnotes**. Book reviews are solicited separately and are short documents.

Microsoft Word (native) and explanation

Because we use a professional designer who requires it, all manuscripts must be prepared and submitted as native Microsoft Word

documents.¹ Most of us will be reading the submissions onscreen, whether on a desktop or tablet. For that reason there is no need for double-spacing, and in fact we prefer submissions in a multiple of 1.0 to 1.2 spacing (for readability purposes). Moreover, you are free to select the readable typeface of your choice. You are also free to use scientific numbering. At this time, we cannot print color graphics in our bound volumes, but if you do use charts, we will offer advice about converting to grayscale with patterns.

Citation and providing copies of source materials

LC&R follows standard legal citation form, contained in both the *ALWD Guide to Legal Citation* (7th ed.) and in *The Bluebook* (21st ed.). Please note that all accepted authors will be asked to provide copies of source materials that are unavailable through normal legal-research methods (including title and copyright pages). We prefer scanned materials shared via Dropbox.

Submission and process

Submissions should be sent through the Online Submission Form at www.alwd.org/lcr-submissions, by email to lcr@alwd.org, or via Expresso-O.

Process

This is a peer-reviewed journal. All submissions that meet the mission of the journal are sent to anonymous peer reviewers before being returned to the editorial board for a discussion of the anonymous reviews and a final vote. The peer-review system is double blind. Essays are also sent to peer reviewers.

Submission of Book Reviews

We include book reviews in each volume. Those are handled through a separate submission procedure after the articles are selected. For more information, send an email with the subject “Book Review question” to lcr@alwd.org.

Questions

If you have questions, please contact our co-Editors-in-Chief and co-Managing Editors at lcr@alwd.org.

¹ Any article that originated in another program such as WordPerfect will have to be recreated in Word because the footnote formatting is not converted properly (trust us, we speak from experience).

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PREFACE

We celebrate the Twentieth Volume of *Legal Communication & Rhetoric: JALWD!* This volume reveals and discusses opportunities for growth and new frontiers in the field of legal communication. ChatGPT makes its first impact on the journal with former Editor-in-Chief Ian Gallacher's essay, and we invited ChatGPT to help with the preface. ChatGPT's response to "write a preface for a journal volume with a theme of opportunities for growth and new frontiers in the field of legal communication" was a bit over the top (which could have been tempered with a revised prompt). Yet, the ideas we want to convey to you were there:

Welcome to this special volume of our esteemed journal, dedicated to exploring the exciting realm of opportunities for growth and new frontiers in the field of legal communication. In an era characterized by rapid technological advancements, globalization, and shifting societal dynamics, the landscape of legal practice has witnessed remarkable transformations. As legal professionals, scholars, and enthusiasts, we find ourselves standing at the threshold of a new era, replete with possibilities and challenges alike.

Effective communication lies at the heart of the legal profession, forming the bedrock of legal interactions, advocacy, and the dissemination of legal knowledge. It is through the power of language and persuasive discourse that legal professionals bridge the gap between complex legal concepts and the public, fostering understanding, cooperation, and justice. However, in an age of unprecedented information flows and evolving modes of communication, the traditional approaches to legal communication are being challenged and redefined.

In recognition of the evolving world of legal communication and to celebrate the twentieth volume of *Legal Communication & Rhetoric*, the editorial board invited former Editors-in-Chief to reflect on the journal's history and share their thoughts on where the journal has been and where it may be going. In the first of these three reflection pieces, Linda Berger, Ruth Anne Robbins, and JoAnne Sweeny chat with editor Genevieve Tung to share their EIC experiences and highlight influential articles. Their conversation illuminates criteria for articles that are "models of the habits of mind of the authors that are contributing to building knowledge about legal writing, developing theoretical knowledge," and it generates a robust reading list of articles that meet these criteria. The conversation reveals the great depth of legal writing scholarship and inspires readers to continue supporting, developing, and writing in the field.

The “first influential article” Professor Berger notes in her reflection is Michael Smith’s Foreword to the first volume of the *Journal*, “The Next Frontier: Exploring the Substance of Legal Writing.” And, fittingly, Professor Smith’s reflection piece is the second of the set of EIC reflections. In his essay, Professor Smith discusses the *Journal*’s mission and how the *Journal* has successfully maintained that mission in its articles. He also recognizes the range of interdisciplinary and empirical work published in the *Journal*, and notes that the “journal’s execution of its mission over the last twenty years has had a profound impact on the development of legal writing scholarship and on the growth and maturity of legal writing as a discipline within the general legal academy.” As the *Journal* continues to build the discipline, Professor Smith praises the *Journal*’s work and looks forward to further “exploration of new frontiers in legal writing doctrine.”

Speaking of new frontiers, have you heard of ChatGPT? In the final former-EIC essay, Ian Gallacher takes us on a journey that confronts the future of legal writing as generative AI. Professor Gallacher does so with a healthy and engaging dose of humor for even the most resistant. By engaging with Chat (yes, Professor Gallacher assures us, we can call it Chat), the essay demonstrates some of the strengths and weaknesses of generative AI and grapples with theoretical and practical aspects of generative AI. Professor Gallacher raises questions about what Chat can do, what it could do, and how it could change the practice of law and legal education. He calls on the legal writing community to address these questions. New frontiers, indeed.

Next, we have three articles and one essay, beginning with Alexa Chew’s article, “The Fraternity of Legal Style.” In her article, Professor Chew shares the findings of an empirical study of writing experts mentioned in popular legal style books. Professor Chew’s article identifies a significant opportunity for growth in the legal writing field, as her study shows that these experts are overwhelmingly men. In sum, Professor Chew’s study finds that popular legal style books mainly consist of “white male writers writing about other white male writers who went to elite schools and held elite lawyering jobs and are probably dead.” Professor Chew concludes that the results of her study “suck,” but offers hope for the future if “people who write about legal style . . . research harder.” And if they do, Professor Chew is confident that there are plenty of new models of legal style to discover.

In “Negative Language in Legal Writing,” Maria Termini focuses on the common good versus evil binary, which, in legal writing, appears in a writer’s linguistic decision regarding whether to make a point positively or negatively. While the traditional advice is that legal writers should be positive, more recent scholarship explores the benefits of negativity.

Professor Termini builds on this scholarship by distinguishing between two types of negative language used in legal writing: negation and negative valence. Using this research along with practical considerations, Professor Termini proposes six principles that can guide legal writers in choosing between positive and negative language.

Next, Amy Soled explores the implications of storytelling in attorney ethics hearings in “Do Client Narratives Belong in Attorney Ethics Hearings?” Professor Soled brings together two threads of scholarship: scholarship on the importance of storytelling, how and why it works; and scholarship on the ethics of storytelling in terms of truthfulness and whether the client has input into the story. In serving the overall purpose of attorney ethics hearings to protect the legal profession’s reputation, Professor Soled argues against using narrative in defending a client against ethical misconduct. She does, however, suggest that narrative can play a limited role in sanctions.

Brian Wolfman’s essay, “How to Conclude a Brief,” responds to an #AppellateTwitter discussion about what should go in an appellate brief conclusion. Professor Wolfman explores this question in the context of argument ordering in multi-issue appellate briefs. Professor Wolfman proposes a framework that calls for following court rules, keeping conclusions short and sweet, and avoiding unnecessary repetition, and provides several examples to illustrate his proposed framework. Given that multi-issue appellate briefs may end on the least powerful or least important argument, the brief has the potential to end on a down note. Professor Wolfman suggests implementing a thematic connection between the less important arguments and the more important arguments. This thematic connection between the weaker and stronger arguments can draw on the strengths of the earlier arguments to build toward the conclusion, ending on a high point. Professor Wolfman also suggests that writers may want to intentionally adjust argument order to begin and end on a strong argument.

The volume concludes with book reviews on a range of topics relevant to legal communication. Danielle Tully reviews *SHAPING THE BAR* by Joan Howarth, which examines the bar exam’s protectionist roots and ongoing gatekeeping based on mistaken ideas about attorney competence and how to measure it. Wayne Schiess reviews *THE (NOT TOO SERIOUS) GRAMMAR, PUNCTUATION, AND STYLE GUIDE TO LEGAL WRITING* by Diana J. Simon, a witty and engaging book about grammar in the context of legal writing. In her review of Leidy Klotz’s *SUBTRACT: THE UNTAPPED SCIENCE OF LESS*, Jennifer Murphy Romig examines how lessons about “less” can be used in legal writing. In his review of *REFLECTIONS ON JUDGING* by Richard Posner, which was published in

2013, Srikanth Reddy considers how Judge Posner's opinions, particularly his criticisms of judicial restraint and textualism, are still relevant today. Susanna K. Moran reviews *THE WAY FORWARD FOR LEGAL EDUCATION* by David I.C. Thomson, which makes a compelling case that the shift to online and hybrid learning is not only inevitable but essential for the survival of law schools and the future of the legal profession. Susan Green finds *SEDUCED BY STORY: THE USE AND ABUSE OF NARRATIVE* by Peter Brooks, to provide a helpful introduction to how stories work and the use of storytelling in the law. The volume's book reviews conclude with Jennifer Cooper's review of *SIMPLY SAID: COMMUNICATING BETTER AT WORK AND BEYOND* by Jay Sullivan, which provides concrete suggestions for simplifying communication strategies.

Finally, we must say farewell to four of our editorial board members: Susan Bay, co-managing editor, Brad Desnoyer and Beth Wilensky, lead editors, and Aysha Ames, associate editor. We are deeply grateful to Sue Bay for her many years of service to the journal, especially her behind-the-scenes work that went into each volume's publication. In her role as co-Managing Editor, Sue supported the journal's transition to primarily web-based publication. She was instrumental in working with the journal's designer to improve the overall editing and pre-designing process to better meet authors' needs. More recently, Sue streamlined the design process, resulting in significantly fewer technical errors and increasing the rate of delivery of the final proofs. Sue has also contributed to the journal's efforts to include practitioner essays that did not follow the journal's typical timeline. That development will not only increase the diversity of the journal's authors but we also anticipate an increase in readership among practitioners. We thank Brad Desnoyer for his contributions to nine volumes of the *Journal*, seven as an associate editor and two as lead editor. We thank Beth Wilensky for her willingness to jump in as a lead editor beginning with Volume 18 and we thank her for her flexibility in working on book reviews and the former-EIC essays. Thank you to Aysha Ames for her work as an associate editor since Volume 18. We appreciate her enthusiasm and commitment to the *Journal* during her time on the editorial board. We wish the best to Sue, Brad, Beth, and Aysha.

In ChatGPT's words, "let us engage in fruitful dialogue, challenge existing paradigms, and embrace the opportunities that lie before us. May this volume inspire the pursuit of excellence, foster interdisciplinary collaboration, and ignite a passion for shaping the future of legal communication." Onward.

Margaret Hannon & Jessica Wherry (2023)

Reflecting on 20 Years of *Legal Communication & Rhetoric: JALWD*

To celebrate the twentieth volume of *Legal Communication & Rhetoric: JALWD*, the editorial board invited former Editors in Chief to speak about the articles they have found to be the most impactful, interesting, and influential on the discipline and practice of legal writing. In the conversation that follows, our speakers are:

Linda L. Berger, Professor of Law Emerita, William S. Boyd School of Law at the University of Nevada, Las Vegas.

Ruth Anne Robbins, Associate Professor of Law, Rutgers Law School.

Dr. JoAnne Sweeny, Associate Dean for Academic Affairs and Professor of Law, Louis D. Brandeis School of Law, University of Louisville.

Genevieve Tung: Linda, you are one of the co-founders of what is now *Legal Communication & Rhetoric*. Could you tell us just a bit about your experience launching the journal and the role you had envisioned for it as part of the discipline and practice of legal writing?

Linda Berger: First of all, I'm grateful that you asked us to do this because it encouraged me to go back through all the volumes of the journal, and that was very interesting and very rewarding. I was delighted all over again to see what has been done since I left as well as what was done while I was there.

In 2002, ALWD had created a volume of conference proceedings on the theme of its biennial conference, *Erasing Lines: Integrating the Law School Curriculum*. To follow up, then-ALWD President Amy Sloan asked Michael Smith and me to come up with a proposal for a continuing journal that would be published regularly. She asked us because Michael had been banging the drums for what he called scholarship focusing on

the substance of legal writing, and I had been lucky enough to become one of a group of people introduced to the world of law and rhetoric scholarship by the Notre Dame Colloquia on Legal Discourse, organized by Terry Phelps and Linda Edwards and held at Notre Dame in 1998, 2000, and 2003. Michael had joined Linda Edwards at Mercer, and Linda had championed the concept that legal writing had a doctrine of its own. And because of the Notre Dame colloquia and the Mercer-Temple connection, there were these serendipitous occurrences which meant that Michael and I—along with Amy Sloan, Terry Phelps, Linda Edwards, Terrill Pollman, Jan Levine, Ellie Margolis, Kathy Stanchi, and others I have forgotten—got involved in discussing what kind of scholarship legal writing professors should be working on and what kind of scholarship this new journal should publish. Michael is, I think, primarily responsible for the specific details of the journal's mission that emerged, which I will talk about in a little bit when I talk about his article.

After the ALWD Board approved the proposed new journal late in 2002, I became the editor. Michael wisely declined the editor's role, but agreed to remain on the editorial board, and we recruited Terry Phelps, Carol Parker, and Marilyn Walter to join the editorial board.¹ So, I was the editor starting in 2002. We produced our first volume in 2004, which became volume two of *J. ALWD*.

From 2002 to 2009, I was editor-in-chief, and then I was very lucky to persuade Ian Gallacher to join me as a co-editor in 2009. Sue Painter-Thorne became the first managing editor at the same time. In 2010 we added a professional designer, primarily because of Derek Kiernan-Johnson's article about fonts,² and that was really terrific, as far as I was concerned, to have a co-editor-in-chief, a managing editor, and a designer. After stepping down as EIC in 2010, I stayed on the editorial board until 2012, and I've been watching the journal with awe and respect ever since.

We thought of the founding of the journal as a political act. Just like ALWD was founded as a political act. We thought that it was a declaration of how we were going to broaden and deepen the work already going on to advance the discipline and the profession of legal writing.³ About that time there had been some changes that encouraged us to make that

¹ M.H. Sam Jacobson of Gonzaga and Danielle Istl of Detroit-Mercy joined us in drawing up the proposal that went to the ALWD Board.

² Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 *J. ALWD* 87 (2010).

³ *Legal Writing*, the journal of the Legal Writing Institute, was founded in 1991. In its inaugural issue, editor Chris Rideout called for more fundamental inquiry into legal writing, research, and analysis. J. Christopher Rideout, *Editor's Note*, 1 *LEGAL WRITING* v (1991). At the time of the founding of *J. ALWD*, most articles published in *Legal Writing* addressed the teaching of legal writing, thus complementing a journal that would focus on the study and practice of legal writing. See Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 *J. ALWD* 1, 6–7 & n.13 (2004).

kind of a bold political move. Finally, a few people were getting tenure based on their legal writing scholarship. (When I went up for tenure in 2000, it was hard to identify scholars who focused on legal writing to be my peer reviewers.) But tenure-track positions were slowly opening up, and as schools began to move away from very short-term contracts and caps on employment, people were staying around longer. More of them were interested in researching and writing about the field that they were working in. Starting around 2002, Linda Edwards and Terrill Pollman began to collect this huge bibliography of the scholarship produced by legal writing professors, and they found that only 25% of the scholarship of legal writing professors was on topics encompassed within the field of legal writing.⁴ In their article, they warned that continuing that state of affairs might threaten the future expansion and development of the field of legal writing. So those things, plus the Notre Dame Colloquia, which introduced us to each other and to a whole bunch of rhetoric and rhetoric-related scholars,⁵ persuaded us that there was this new kind of scholarship—or new for legal writing teachers—a kind of scholarship that would look beyond composition into interpretation of the law and interpretation of legal documents.

So we thought we were doing something radical. We thought we were building legal rhetorical knowledge and contributing to the professional development of the people who were teaching legal rhetoric.

Ruth Anne Robbins: What drew me to the journal? I was instructed that I would be joining the journal.

I had just become the president of the Legal Writing Institute in July of 2008, and I was approached by Linda, and I believe Terrill Pollman and Judy Stinson, and maybe Melissa Weresh at the biennial conference I was co-chairing. My name had been put forward to join the editorial board, and it had been approved. I had never applied, but they voted me in anyway, and then they came up to me and said, “Congratulations! You are a member of the editorial board.”

And I was told, “Don’t worry. We won’t make it too hard a job for you, because we know you’re busy being president.” I joined the editorial board as a lead editor, and then, two years later, Linda said she was going to be stepping down, and she sent me milk chocolate sea salt caramels, which

⁴ See Linda H. Edwards & Terrill Pollman, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 *LEGAL WRITING* 3, 10 (2006) (“The bibliography reveals that approximately 75% of the law review articles legal writing professors have published are about topics in areas other than legal writing, while only approximately 25% are about legal writing topics.”).

⁵ The invited speakers included James Boyd White, Peter Goodrich, Steven Mailloux, Marianne Constable, and Martha Nussbaum.

are a weakness of mine, and said, “Congratulations! Now you’re going to be the editor-in-chief.” Fortunately, Joan Magat had also applied and the Board, in its infinite wisdom, decided we would be co-editors-in-chief, and I thought that was really the right move. I was really glad to form that partnership. Joan has experience editing a journal at Duke and her technical skills and knowledge of, you know, how the English language works was a really wonderful balance to me (who does not really know how commas work), and so we worked on it together.

One of the first things we thought we needed to do was change the name of the journal. Volume eight became the first volume where the name changed from *J. ALWD* over to *Legal Communication and Rhetoric*, and that was quite a production. We didn’t really think it would be as hard as it was. We went through many iterations; the ALWD board was very *energetic* in its involvement in helping rename the journal. We went back and forth—should the word persuasion appear? Should the word rhetoric appear? Was persuasion a synonym for rhetoric? When we finally agreed on *Legal Communication and Rhetoric* we considered it a compromise. But looking back, it was the right call because the name says very much what we are. Honestly, it’s a better name for the field in general. And so we went forth!

Volume eight was also the first volume without a stated theme. We decided that we had enough submissions at that point in a variety of areas that we didn’t have to ask for themes.

I was the editor-in-chief through volume sixteen. (Then I came back for volume eighteen and part of nineteen.) Joan stepped down after volume fifteen, and JoAnne became editor-in-chief with me, and that has also been a really great partnership. I’ve enjoyed working with JoAnne a lot. Having two editors-in-chief has been really valuable and important, because things go wrong in people’s lives.

JoAnne Sweeny: I’m trying to recreate my own timeline. I think I just applied to be an associate editor. The first time I applied I was rejected. I applied again, and I got in as an associate editor, and had a very interesting experience my first year. And then I was volun-told by Ruth Anne that I should apply for the EIC position. I questioned whether that was appropriate—to go from the bottom rung to jump like that—and I was told, “Yes, that’s fine.” And so I became co-EIC with volume fifteen (2018).

Ruth Anne showed me the ropes, and then we did that for two years together, and then I did a year after she transitioned off, and then we volun-told Margaret Hannon into the co-EIC role, in keeping with tradition. That year it was. . . . We were still dealing with Covid, and then I became Academic Dean. I just didn’t have the bandwidth, and I felt like

I needed to step back because I wasn't able to give this the time that it deserves. Fortunately, Ruth Anne was able to pitch in, and we decided to see what would happen in a year, and then, when we talked in a year, nothing had changed with my workload. So I did not have a long tenure, unfortunately, because I really enjoyed the work. I very much enjoyed it, and I still read it, I would love to still be involved. It's a lot of fun.

Genevieve Tung: Thank you all so much! Now that we have sketched out a timeline, I want to ask for your perspectives on the work published in the journal. Are there articles that you have found to be particularly influential to the development of the discipline and the profession of legal writing?

Linda Berger: So, you know, I didn't exactly follow the directions. Because I kept finding so many articles I really liked, I came up with some criteria for articles that I decided were models of the habits of mind of the authors that are contributing to building knowledge about legal writing, developing rhetorical knowledge. I'll tell you what those are, and then later, I'll bring up an article or two that fit into some of the categories.

The habits,⁶ I think, are:

1. Curiosity. Looking at the material you're teaching and asking yourself, how does this work? Does this work? Why are we doing this? Should we be doing something else?
2. Questioning accepted wisdom. Taking the conventional formats and methods, and asking why not do this instead?
3. Openness. The willingness to consider new ways of being and thinking, but without forgetting about the context.⁷
4. Engagement. Does the author show a sense of investment and involvement in the topic? Are they saying, this is important, and worth studying seriously, and in depth?
5. Engagement again, this time with audiences other than ourselves.
6. Creativity. Using novel approaches to generate ideas and to research and write about them.⁸

⁶ This list is adapted from *Framework for Success in Postsecondary Writing*, from the Council of Writing Program Administrators & National Council of Teachers of English National Writing Project (available at https://archive.nwp.org/cs/public/download/nwp_file/15188/Framework_For_Success_in_Postsecondary_Writing.pdf?x-r=pcfile_d).

⁷ An example comes from Kate O'Neill, *But Who Will Teach Legal Reasoning and Synthesis?*, 4 J. ALWD 21 (2007), reflecting on how changes in legal education more generally would affect proposals to merge legal writing and clinical courses.

⁸ Ruth Anne's *Painting with Print* article models a creative approach to writing a law review article: entertaining and accessible. Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).

7. Metacognition. Reflecting on the author's own thinking and the cultural processes used to structure knowledge.⁹
8. Ambition. Was the article ambitious? Did I learn something new? Either new information or a new way of looking at things?

My first influential article, I think is—I hate to say the word no-brainer—but this has got to be a no-brainer. It's Michael Smith, *The Next Frontier: Exploring the Substance of Legal Writing*.¹⁰

He puts flesh on the bones of what we had been advocating. He tells us what kinds of articles fit within this notion of the substance of legal writing—what it means to write about the practice of legal writing rather than the teaching of legal writing—and he points out that that kind of scholarship will, first, build knowledge by expanding legal writing doctrine, and second, send the message to the rest of the academy and to practitioners that legal writing has substance, and that the substance is intellectually rich and challenging. This kind of scholarship also allows us to reach beyond ourselves, beyond the pedagogical articles which I love and which I've written, but which are really talking to an internal audience.

To fall within the category of the scholarship the journal would nurture and support, Michael designated three criteria. First, is it about the substance of legal writing? Second, is it based on legal doctrine, empirical research, or interdisciplinary theory? That criterion helps support the argument that this kind of scholarship is intellectually rich and challenging. And then number three, is it helpful and accessible to all *doers* of legal writing? Here, Michael reminds us that legal scholars are doers of legal writing as are practitioners, judges, and law students.

Genevieve Tung: Thank you so much for that opening article, and for the framework. Ruth Anne, can I ask the same question of you?

Ruth Anne Robbins: Michael's piece absolutely sets the stage. So, I have to join Linda's nomination. I also love that my article was selected for that volume, and Michael was my mentor. I was terrified about this new article that was on a topic that nobody had ever liked.¹¹ I got laughed at whenever I presented on it, and Michael just kept telling me to keep going with it, and now I know why. He mentored *Painting with Print*, I think,

9 Douglas M. Coulson, *Legal Writing and Disciplinary Knowledge-Building: A Comparative Study*, 6 J. ALWD 160 (2009) is a literal example, reporting on his study of how text practices affect disciplinary knowledge building.

10 See Smith, *supra* note 3.

11 See Ruth Anne Robbins, *supra* note 8.

because he saw it as fitting within his idea of something other than work on pedagogy.

I have so many articles that I want to nominate for different reasons, so this question has been difficult for me—to be honest, I have been debating it since you asked us to sit down for the interview. After volume two, we started receiving submissions—categories—of articles that are really groundbreaking. We’ve got our metaphor articles, of which Linda’s article kicks us off,¹² storytelling articles, rhetorical analysis articles, interdisciplinary articles across a host of areas, and even some empirical studies.

Thinking of the criteria Linda offered, I think that they dovetail with the bibliographies that have been produced so far. From the very beginning, the journal started not only creating knowledge in legal writing, but also collecting the knowledge of legal writing. And I do believe that, as we’re trying to build a discipline, the existence of the bibliographies both *prove* the discipline and *further* the discipline.

Michael Smith wrote one,¹³ and Kathy Stanchi wrote one¹⁴ which was later updated by Kristen Murray.¹⁵ Chris Rideout wrote one on storytelling and then updated it.¹⁶ Ellie Margolis has written one on visual legal writing.¹⁷ Margaret Hannon wrote one recently.¹⁸ I just think that the fact that we’re producing these bibliographies of our own work is important to the discipline and important to the people writing in it.

There are also so many great storytelling articles. I really think applied legal storytelling got a foothold in part because so many were published in *LC&R*. (Also in *Legal Writing* and *The Clinical Law Review*.) But in every volume since volume seven there has been at least one storytelling article.

The other category that I think we’ve really made a name for ourselves is with the “non-verbals.” We’ve got *The Lawyer’s Guide to Um*.¹⁹ But we also have Michael Higdon talking about vocal fry,²⁰ and we have Karen DaPonte Thornton’s article about parsing the visual rhetoric of dress

¹² Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004).

¹³ Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129 (2006).

¹⁴ Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ALWD 75 (2009).

¹⁵ Kristen E. Murray, *Persuasion: An Updated Bibliography*, 19 LEGAL COMM. & RHETORIC 205 (2021).

¹⁶ J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC 247 (2015); J. Christopher Rideout, *Applied Legal Storytelling: An Updated Bibliography*, 18 LEGAL COMM. & RHETORIC 221 (2021).

¹⁷ Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 LEGAL COMM. & RHETORIC 195 (2021).

¹⁸ Margaret Hannon, *Legal Writing Mechanics: A Bibliography*, 19 LEGAL COMM. & RHETORIC 185 (2022).

¹⁹ Barbara K. Gotthelf, *The Lawyer’s Guide to Um*, 11 LEGAL COMM. & RHETORIC 1 (2014).

²⁰ Michael J. Higdon, *Oral Advocacy and Vocal Fry: The Unseemly, Sexist Side of Nonverbal Persuasion*, 13 LEGAL COMM. & RHETORIC 209 (2016).

codes.²¹ I know that all of these have been part of my thinking of what's out there. I'm sure that I'm missing a bunch of articles.

Then we have the articles that are doing comparative studies. I know that I point to Kyle Velte's work. That work opens up a whole new world of ways that we could intersect with more "traditional" legal scholarship.²² That is a piece that could have been placed anywhere, but she chose to place it in the world of legal writing and storytelling. It is comparing two narratives in the Colorado school-funding cases. It's an education law piece and it's also a narrative piece, and she just chose to see it as a narrative piece. I think that there are other articles across the volumes that do kind of like that. But it jumps out at me as a crossover piece that I really enjoyed.

Genevieve Tung: JoAnne—may I turn to you now?

JoAnne Sweeny: I have to be a little, I don't know, personal or selfish with my choice. One I would suggest is *The Potemkin Temptation*.²³ That was one of the first ones I worked on as EIC. What I really enjoyed about it was that it was unexpected—to take an area that you wouldn't expect to be about rhetoric at all—but it was so hands-on and practical. There are pictures of whiskey labels in the article. There were a lot of visuals, which I thought was very cool, and it was interdisciplinary. It was history, it was, you know, dealing with court cases, but also visual rhetoric, and then it was a really important primer on what whiskey is, and how you make it, etc. So that one I really like, because it's in a middle ground between some of the really practical articles, getting into the minutia of pronouns and things like that, but it also had some, you know, broader concepts in it. I really enjoyed the history lesson, and it was just fun to read.

Ruth Anne Robbins: I've actually recommended that article to non-lawyers, who have recommended it to other non-lawyers. It's such a fun topic.

21 Karen DaPonte Thornton, *Parsing the Visual Rhetoric of Office Dress Codes: A Two-Step Process to Increase Inclusivity and Professionalism in Legal-Workplace Fashion*, 12 LEGAL COMM. & RHETORIC 173 (2015).

22 Kyle C. Velte, *A Tale of Two Outcomes: Justice Found and Lost for Colorado's Schoolchildren*, 12 LEGAL COMM. & RHETORIC 115 (2015).

23 Derek H. Kiernan-Johnson, *The Potemkin Temptation or, The Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey*, 15 LEGAL COMM. & RHETORIC 1 (2018).

JoAnne Sweeny: It's the kind of thing I could see a podcast being about.²⁴

Another area of articles I like a lot are the ones that talk about cognitive science. Those ones I find really interesting, like Lucy Jewel's article about rhetoric and cognitive science.²⁵

Linda Berger: May I talk about a couple other examples that fit into those categories that I proposed before?

Because it exhibits the role of the author's curiosity among other wonderful attributes, I would nominate the Betsy Fajans and Mary Falk article *Hendiadys in the Language of the Law*.²⁶ I liked it because they very explicitly say, you know, we were sitting around talking about the literary use of hendiadys, and we asked ourselves, hey, how might this apply to the law? So then they did the research, and they wrote this article. I like the fact that it was curiosity about this concept—this literary concept—that led them to write the article. And in doing so they became convinced, basically, that the one leading article on this literary trope was wrong.²⁷ In fact, they call the article in question “the poster-child for inter-disciplinary misalliance.”²⁸ I think that was an interesting lesson that I should take to heart from time to time, because I write about metaphor and analogy and storytelling and other rhetorical things, without really seriously saying to myself, “is there something different about this within the context of the law?” So the article was a good model because their curiosity led them to researching and writing this article, which then led them to make a very informed criticism of the use of this literary device in legal interpretation.

And since I'm on curiosity, I'll just mention another article about questioning received wisdom, Christy DeSanctis's *Narrative Reasoning and Analogy: The Untold Story*.²⁹ When Christy wrote this, I think some storytelling advocates were arguing that stories were better than logical reasoning. They were more concrete, they were more true, they were more real to life, and therefore they were better. Now, the conventional wisdom about the relationship between storytelling and logic has gone

²⁴ Derek was interviewed on a podcast about this article. See Derek Kiernan-Johnson on Potemkin Distilleries, *IPSE DIXIT*, Season 1, Ep. 64 (Dec. 16, 2018), <https://shows.acast.com/ipse-dixit/episodes/derek-kiernan-johnson-on-potemkin-distilleries>.

²⁵ Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 *LEGAL COMM. & RHETORIC* 39 (2016). This article won the 2018 Teresa Godwin Phelps Award for Scholarship in Legal Communication from the Legal Writing Institute.

²⁶ Elizabeth Fajans & Mary R. Falk, *Hendiadys in the Language of the Law: What Part of “and” Don't You Understand?*, 17 *LEGAL COMM. & RHETORIC* 39 (2020).

²⁷ See Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: *Hendiadys in the Constitution*, 102 *VA. L. REV.* 687 (2016).

²⁸ Fajans & Falk, *supra* note 26, at 40.

²⁹ Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 *LEGAL COMM. & RHETORIC* 149 (2012).

back and forth. But Christy says that thinking in terms of opposition and dichotomy is wrong, and she illustrates how narrative works alongside and with analogical reasoning. I actually think most people agree with that now, but there was this strand of argument, where, I think, because stories were accused of being emotional and not logical, storytelling advocates were defensively saying, “No, no, no, we’re better. We’re better than your reliance on so-called logic.” And I thought it helped advance our understanding when Christy said, “Let’s look at this, and just see how it’s all intertwined.”

Ruth Anne Robbins: At the time, there was an idea being floated that pathos and logos were both different strands of a double helix of argumentation. And Christy was saying, “No, there’s a difference between narrative persuasion versus syllogistic persuasion, and I don’t think that’s the same thing as saying stories versus logic. . . .”

Linda Berger: I’ll just mention one more related to questioning now-conventional wisdom: Teri McMurtry-Chubb’s *There Are No Outsiders Here*, rethinking intersectionality.³⁰ So many of us, including me, discovered intersectionality and thought wow, this explains how to take into consideration the multiple ways in which some individuals are oppressed. But as Teri points out, if the analysis that follows doesn’t look at the underlying forces that have created the culture that we live in, the analysis that follows is still based on dichotomy and hierarchy. The Black woman is being evaluated as a Black person against white persons and as a woman against male persons. So, basically, you just get two slices of the same old analysis. She points out different ways of thinking about these issues, and I highly recommend reading her analysis.

And one more! I’m sorry, and then I’ll stop. Christine Venter’s *Case Against Oral Argument*.³¹ She suggests that the questions the judges ask during oral argument often confirm their pre-existing biases, and so maybe we should all rethink whether or not we should ask for oral argument. I like the fact that she did this study, she listened to 100 randomly selected oral arguments, and she analyzed the questioning in great depth, and then came to the conclusion that perhaps oral arguments serve only to confirm rather than change people’s minds.

30 Teri A. McMurtry-Chubb, *There Are No Outsiders Here: Rethinking Intersectionality as Hegemonic Discourse in the Age of #MeToo*, 16 LEGAL COMM. & RHETORIC 1 (2019).

31 Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC 45 (2017).

Ruth Anne Robbins: I love that one, too. I've made my career challenging the conventional wisdom, so that kind of approach always appeals to me. Should we double space? Should we use Times New Roman? Should we ask for oral arguments?

Linda Berger: Look at what we're doing now and say, you know what if we did it otherwise? That question becomes the idea for an article, I think, no matter what the convention is, what if we did it some other way.

Ruth Anne Robbins: I think of Steve Johansen's article as well—*Was Colonel Sanders a Terrorist?*— about the ethical limits of storytelling.³² There's ongoing and plentiful debate about the ethical limitations in storytelling. Steve disagrees with people who say the existing rules somehow require special ethical limitations. In his article he explored the topic and concludes that there are no different ethical boundaries compared to anything else in the practice of law. There's nothing special and ethically dangerous about storytelling as a framework for the facts in a record. When he walked through the rules, saying, "I'm looking for it, and I don't see it." I do think that he actually challenged himself, I think he expected to find more than he found. Because of the ongoing debate even after his article, he and other scholars have engaged in a thought process about what a model rule might look like.

Linda Berger: I love the Steve Johansen article because it gives you, I think, a pretty good answer to the people who say, "Well, wait a minute. Stories are just emotional. You're just misleading people with stories. You're not really being ethical with that. Why don't you just tell the truth?"

Okay, tell the truth without telling you a story? Tell me how I could make something coherent without telling you a story? And I think Steve made the point, *what's the difference with statistics?*³³ If you lie when you're using statistics, it's the same thing. *Don't lie.* And beyond that, treat your client and the judicial world with some respect.

Ruth Anne Robbins: Those are the same ethical rules that apply when you're making a logical fallacy argument. Look at not the ethics of storytelling, but the ethics of how memory works, and whether the facts that are going into the stories themselves have problems to them. So it's not

³² Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010).

³³ See *id.* at 84 ("Stories, like statistics or other persuasive tools, can be abused. But that potential for abuse does not make storytelling any less legitimate than the truism that 'liars can figure' makes the use of statistical evidence illegitimate.").

about how we string material together in a cause-and-effect narrative way, but about whether the things themselves that we're stringing together have problems associated with them. The ethical boundaries are really about fabrication or fallacious reasoning or unreasonable inferences.

Linda Berger: Or if it's just that we remember things differently. I think that's a really interesting thing. That literary narrative theory differentiates between what happened and the story of what happened. You're always aware that those are two different things. You know we're never going to know what actually happened because there's a lot of versions of what people say happened.

Ruth Anne Robbins: There's also a lot of distortion in what our brains make of something because we give it an outsized importance, so our minds don't remember things exactly. But we remember our impressions of a thing. We might not accurately talk about how big the gun was, or how big the gun wasn't—our memories assign importance to a scene, which plays with our impressions and therefore our sense of proportion of an object. That is, our memories are not necessarily linear, which can lead to what some people think are "ethical issues." There are some people who go further with criticisms, though, and have accused the applied legal storytelling scholars of pushing story even if the facts are fabricated, or that storytelling is somehow "cheating" at persuasion by going beyond the syllogistic. There's been a lot of that kind of debate. At least in the early years of the storytelling scholarship.

Linda Berger: Yes, that all you have to do is just find the facts and follow them along, and then we have the answer, and that's different somehow than arguments that are messy and human and complex.

Ruth Anne Robbins: Well, of course we all agree that they're wrong. We're all storytelling people.

JoAnne Sweeny: Another thing I would like to mention about the storytelling articles that I read in *LC&R*—they have helped me develop my own scholarship in the area and showed me an area of legal scholarship that I didn't know existed. It's something that I've been paying forward ever since and showing it to other people. This work, and particularly the bibliographies, were very helpful to me as a researcher. I want to highlight their value.

Linda Berger: And I think JoAnne also illustrates this in her article on *The Language of Love v. Beshear*, in the civil rights context. She illustrates this point about how the ethics in some cases are much more complicated.³⁴ It's not just your client, it's future clients. If you're trying to make human rights or civil rights arguments, you need to consider how the story affects future clients as well as your current client, and I think that's really helpful context. I had this vague notion that yes, in civil rights cases people were a little bit more careful about how they picked clients and that sort of thing, but I wasn't aware of all the ramifications of that. So, I learned something new from the article.

Ruth Anne Robbins: This is interesting, because in the same volume you have Jessica Lynn Wherry's work about storytelling in the military.³⁵

JoAnne Sweeny: Yeah, there's a relationship to that. It gets back to what you were talking about—story versus truth and whether that's a dichotomy, and it really is, and it really isn't. But also, whose story is being told? I think that shows up in a lot of articles that we've published in *LC&R*. It's the "negative narrative" story. How do we do this work when there are real people involved and people are complex? How do you boil down their lives to something that's "legally relevant"?

As *The Language of Love v. Beshear* article discusses, when you have multiple clients, it starts to become a question of *whose* story is being told, not just what parts of their story get told. And it gets more complicated when you're representing these clients, but *they* represent something else, some bigger issue. And then that article also points out that when the judicial opinions came out, those stories were whittled down even further, and the judges get to pick whose stories they told, and what parts of the stories they told, and it all comes back to persuasion. But as Linda pointed out, there's ethics involved with this, too. When you represent these people, you want to do right by them. But you know, and they know, that they represent something else, too, and that their case is going to have this huge impact. Potentially it gets very complicated, and it's a very tight, difficult line to walk to serve all the interests.

These are the kinds of choices that you make when you're telling a story.

³⁴ Dr. JoAnne Sweeny & Dan Canon, *The Language of Love v. Beshear: Telling a Client's Story While Creating a Civil Rights Case Narrative*, 17 *LEGAL COMM. & RHETORIC* 129 (2020).

³⁵ Jessica Lynn Wherry, *(Not the) Same Old Story: Invisible Reasons for Rejecting Invisible Wounds*, 17 *LEGAL COMM. & RHETORIC* 15 (2020).

Ruth Anne Robbins: But I was just recently looking at volume fifteen, several articles of which I just assigned to my students, and noting how the journal turns that year into what I call the “dark side” of persuasion. The *Potemkin Temptation* is one.³⁶ Terri LeClercq’s *Rhetorical Evil*.³⁷ Mel Weresh on the power of distraction or redirection.³⁸ It was just this interesting year on the journal for all the negative stuff.

Genevieve Tung: Even though it wasn’t a themed issue.

Ruth Anne Robbins: It was not. In volume sixteen we saw *Negative Narrative* from Helena Whalen-Bridge,³⁹ and it was all work from the same storytelling conference.

JoAnne Sweeny: Well, that’s the other thing. When you’re the editor-in-chief you have to write the preface, and you have to find something to connect everything together. So, there’s not a theme but we have to really think about how do we tell the story of this volume, with all of these articles that came from a general call for papers? And how do we connect them all?

It’s kind of a fun little exercise, actually, especially when it’s towards the end of the process, when you have read all of them repeatedly at different stages. And to that, is there a connection between these articles? We have to find one because we have to be able to talk about the volume as a whole.

Ruth Anne Robbins: That is something that worries me about the journal. The pounding of the pavement that we’ve had to do to get people to pay attention to this journal. Someday we might not succeed if people don’t engage with and believe in the discipline.

Linda Berger: So that handily engages one of my remaining categories: What about engagement with audiences other than ourselves? And I know that’s only tangentially related to what Ruth Anne is talking about. Because from the very beginning, you know, people were not writing this kind of scholarship. That’s why we started the journal, I think, and why

³⁶ Kiernan-Johnson, *supra* note 23.

³⁷ Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC 47 (2018).

³⁸ Melissa H. Weresh, *Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion*, 15 LEGAL COMM. & RHETORIC 81 (2018).

³⁹ Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 LEGAL COMM. & RHETORIC 151 (2019). This article won the 2019 Teresa Godwin Phelps Award for Scholarship in Legal Communication.

we thought we had to explain it. We thought we had to explain it in such detail because people were not writing this kind of scholarship, and now many people are.

But there were a couple of examples in the journal that I thought showed this kind of engagement with outside audiences, which I think is helpful for its own sake, as well as helpful for getting more authors interested in publishing in the journal to the extent that they may be able to influence audiences outside of legal writing. We've always had the notion that we want to influence practitioners and judges. I thought that Amy Griffin's essay about the law of judicial precedent⁴⁰ was directly aimed at the judicial audience. She's challenging this kind of accepted wisdom that what we need is black letter law on all kinds of rules, including the rules of precedent. And she points out that black letter *rules* about the laws of precedent are sort of contrary to the whole idea of precedent, which is contingent and contextual, and evolves over time. That is the kind of article that really reaches out to legal scholars as well, and makes an impact, because she's criticizing, very adeptly, a book that was written by some very influential people and has been cited by, I think, 150 courts at the time that she wrote it. So, I thought that was an excellent example of engaging audiences other than ourselves.

The other one is one Ruth Anne just mentioned, the Terri LeClercq article, which is about evil rhetoric, and I think she's very specifically going after legislators, and saying, "Hey, this is why you shouldn't have done this, and this is what you should do." We don't do a lot of advocacy scholarship, I don't think, in that direct a manner in the journal. At least I can't remember another example quite as *direct* as advocacy specifically addressed to legislators. It is an interesting sub-genre that's connecting with other audiences in a different way, directly trying to say: do this instead of that.

Genevieve Tung: Do you have any other favorite pieces, perhaps that you produced during your tenure, that we would be remiss not to talk about?

Linda Berger: Volume two, the first after the ALWD Board established *J. ALWD*, is my personal favorite. We were all jumping off this high dive, with no knowledge whatsoever of how to swim, or whether there was any water in the pool. I know that Ruth Anne said she was nervous. I think every one of us—with the possible exception of Michael Smith and Dan Hunter—I think the rest of us were kind of going, "*I don't know about this.*"

⁴⁰ Amy J. Griffin, "*If Rules They Can Be Called*": An Essay on The Law of Judicial Precedent, 19 *LEGAL COMM. & RHETORIC* 155 (2022) (analyzing BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016)).

Is this really what we're intending to write? Is this really a new genre of scholarship? And is it really going to be helpful and useful?" So, it's my personal favorite, even though it was scary.

Ruth Anne, can you talk about the reception of your piece in volume two?

Ruth Anne Robbins: When volume two came out, it started in the west coast and came east, as I recall it. Wherever it was being mailed from, I was the last to see it in print. I hadn't seen it yet, and it was not online. It was only in print. So before I'd seen it, I received an email saying, "I read your article. I like it. Can I put it on the Seventh Circuit website?" signed Frank Easterbrook—just like that. It was in late October, and it was the day that my kids' elementary school Halloween parade was happening, and I was too busy getting them ready for it—they were at that perfect age and I really love Halloween school parades—so I forwarded it to my husband, with a quick line, "Well, this seems kind of cool. I guess the article is out." And I forwarded it to Linda Berger, saying, "I think I need your permission for this."

Luckily my husband called me and said, "Before you write back, professor, you do remember this is Judge Easterbrook, right? Not Mr. Frank Easterbrook." And he woke me up from my Halloween reverie very fast. Oh my gosh, it would never have occurred to me that a renowned federal appellate judge might read it! I could have ruined my moment. That moment certainly launched my career—it certainly got my dean's and faculty's attention. The judges modified the Seventh Circuit rules and their typography advice, and I believe Colorado courts may have also changed their rules. New Jersey finally just changed twenty years later—although only to [sigh] Times New Roman. I love the New Jersey courts, but they might never stop disappointing me typographically speaking.

Genevieve Tung: Any final thoughts as we come to a close here?

Ruth Anne Robbins: One thing I also noticed is that the volumes got pretty big for a while. Volume nine was a big volume, volume twelve, volume fifteen. But seventeen, eighteen, and nineteen have been smaller. I know that Covid had something to do with it. But I continue to worry. I hope that the dovetailing of more legal writing professors having access to tenure will invite more dialogue in our field rather than deter it. I hope that other legal scholars will encourage professors in legal writing to explore our own field and to award status for doing so. I sometimes wonder aloud if our discipline building might die out with Gen X—I really want to be proven massively incorrect.

JoAnne Sweeny: To what Ruth Anne is saying, I think another piece of it is that perhaps as more legal writing programs go to a tenure track, and it becomes more mainstream to write about rhetoric and communication, we lose some of our authors to flagship law journals and law reviews. I can see why we may be losing authors. Because I know we have lost some.

The thing to think about is that the purpose of the journal is a good purpose. When we're speaking to a practitioner audience we are asking: what is it that practitioners need? What do they want? And you know, I'm just waiting for this whole thing to turn into a podcast. That's what the future is, baby. [Everyone chuckles]

I think that this has a place, even if it changes a little in the format. Maybe there is more practitioner work, or a few more shorter pieces, but I don't see this going away anytime soon. It is something that people hopefully know more about, and that will help on both the supply and the demand side for these articles. Especially with the rise of publicly engaged scholarship counting towards tenure.

Linda Berger: I hope that Ruth Anne's concerns about the future are swept aside by a wave of discipline-building scholarship. And I foresee that wave based on the many curious and creative people who study and teach legal communication and rhetoric.

Genevieve Tung: Thank you all so much for joining this conversation!

LC&R
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Twenty Years of Exploring New Frontiers in Legal Writing Doctrine

Michael R. Smith*

I. Introduction

In 2004, the Association of Legal Writing Directors (ALWD) published the first volume of *The Journal of the Association of Legal Writing Directors (JALWD)*¹ as a mission-driven, ongoing periodical publication.² I was honored to write the Foreword for that volume.³ The Foreword was titled *The Next Frontier: Exploring the Substance of Legal Writing*, and it introduced the legal writing world to ALWD's new journal and explained its daring mission: to publish articles that explore and expand the substantive doctrine of legal writing.⁴ In this essay, I will briefly revisit the unique nature of *JALWD*'s mission, will explain how and why that mission was chosen, and will explore how the journal's execution of its mission over the last twenty years has had a profound impact on the development of legal writing scholarship and on the growth and maturity of legal writing as a discipline within the general legal academy.

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¹ *JALWD* changed its name to *Legal Communication & Rhetoric: JALWD* in 2011, beginning with volume eight. See Joan Ames Magat & Ruth Anne Robbins, *Preface*, 8 *LEGAL COMM. & RHETORIC* vi (2008). For the sake of ease, I will refer to the journal as *JALWD* throughout this essay.

² For reasons that will be explained later, see *infra* section II, the 2004 volume of *J. ALWD* was actually numbered volume two.

³ Michael R. Smith, *Foreword, The Next Frontier: Exploring the Substance of Legal Writing*, 2 *J. ALWD* 1 (2004).

⁴ See generally *id.*

II. The creation of *JALWD*

The creation of *JALWD* as an ongoing periodical publication occurred in two important steps. First, in 2002, under the leadership of then-President Pamela Lysaght, ALWD published the first volume of *JALWD* as a Proceedings edition that contained articles based on presentations at the Association's 2001 Biennial Conference held at University of Minnesota Law School.⁵ The editors of that first volume were Professor Lysaght, Bradley G. Clary, and Amy E. Sloan.⁶ Then, after the publication of the first volume of *JALWD*, Professor Sloan, as the newly-elected ALWD President, and the ALWD Board of Directors decided to explore the idea of establishing *JALWD* as an ongoing periodical publication. At that point, still in 2002, the Board appointed an Editorial Committee to prepare a proposal setting out the potential journal's mission, policies, and procedures.⁷ The members of that Editorial Committee consisted of me, Linda L. Berger, M. H. Sam Jacobson, and Danielle Istl.⁸ I was asked to lead the effort of crafting a mission for the journal that would both set it apart from other legal writing periodicals and significantly advance the development of legal writing as a respected discipline.⁹ That effort led to *JALWD*'s original—and enduring—mission. Before I explain that mission, however, I must first describe the scholarly environment in which it was created.

III. The status of scholarship by legal writing professors in 2002

In 2002, several circumstances in the legal academy conspired to send the message that legal writing as a field of study lacked substance worthy of serious academic exploration. I wrote extensively about these circumstances in my Foreword to the 2004 volume of *JALWD*.¹⁰ I will briefly summarize these circumstances here.

First, as of 2002, many law schools staffed their legal writing courses with part-time employees or teaching professionals with no scholarship expectations, which limited the incentive and the ability of these

⁵ See generally *Erasing Lines: Integrating the Law School Curriculum—Proceedings from the 2001 ALWD Conference*, 1 J. ALWD 1 (Pam Lysaght, Bradley G. Clary & Amy E. Sloan eds., 2002) [hereinafter *Erasing Lines*]; see also Smith, *supra* note 3, at 2 n.1, 5 n.9.

⁶ See generally *Erasing Lines*, *supra* note 5.

⁷ See Linda Berger, *Preface*, 2 J. ALWD vii, viii (2004).

⁸ *Id.*

⁹ See Magat & Robbins, *supra* note 1, at x.

¹⁰ See Smith, *supra* note 3, at 22–26.

legal writing professionals to produce scholarship of any kind.¹¹ Second, many law schools did not value scholarship on legal writing and strongly encouraged those legal writing teachers who did publish to write scholarship in other, more traditional doctrinal areas.¹² Third, the large majority of legal writing teachers who did publish articles on legal writing focused not on expanding legal writing doctrine, but on the politics of legal writing within the academy, legal writing program design, or legal writing pedagogy.¹³ Fourth, those legal writing teachers who did publish pieces on substantive legal writing mainly focused on anecdotal lawyering advice or topics of general English composition.¹⁴ As I said, these circumstances created and perpetuated the perception within the legal academy and the legal profession that legal writing as a discipline lacked potential for learned exploration and was devoid of profound substance that could engage the attention of serious scholars.

It was within this scholarship culture, and with attention to it, that *JALWD*'s first Editorial Committee crafted the *Journal*'s mission. The mission was designed in significant part to address the underwhelming reputation of scholarship on the substance of legal writing. As I wrote in my Foreword, "[One] goal of this Journal is to encourage scholarship on substantive legal writing doctrine and, in doing so, to demonstrate in dramatic fashion that legal writing has substance worthy of academic exploration."¹⁵

IV. The mission of *JALWD*

The mission of *JALWD* is to advance the study of professional legal writing and to become an active resource and a forum for conversation between the legal practitioner and the legal writing scholar. The Journal is dedicated to encouraging and publishing scholarship (1) focusing on the substance of legal writing, (2) grounded in legal doctrine, empirical research, or interdisciplinary theory; and (3) accessible and helpful to all "doers" of legal writing: attorneys, judges, law students, and legal academicians.¹⁶

¹¹ See *id.* at 22.

¹² See *id.* at 22–23, 22 n.82.

¹³ See *id.* at 22–24.

¹⁴ See *id.* at 18, 24.

¹⁵ *Id.* at 24.

¹⁶ Association of Legal Writing Directors, *copyright page*, 2 J. ALWD ii, ii (2004). This original statement of *JALWD*'s mission can still be seen on *JALWD*'s webpage. ASS'N OF LEGAL WRITING DIRS., Legal Communication & Rhetoric: *JALWD*, <https://www.alwd.org/aboutlcr> (last visited Feb. 26, 2023).

This mission statement identifies three bedrock characteristics of the scholarship the Journal has sought to attract and publish. The first and third bedrock characteristics call for *scholarship on the substance of legal writing accessible and helpful to all “do-ers” of legal writing*. My Foreword to the inaugural volume identified five categories of legal writing scholarship: (1) Scholarship on Program Design and the Administration of Legal Writing Programs; (2) Scholarship on Legal Writing Pedagogy; (3) Scholarship on Legal Writing as a Profession; (4) Scholarship on Legal Writing Scholarship; and (5) Scholarship on the Substance of Legal Writing.¹⁷ While all of these categories of scholarship have been important to the advancement of legal writing, surveys at the time of *JALWD*'s creation indicated that legal writing scholars were spending a disproportionate amount of time and energy publishing works within the first four categories and relatively little time and energy on the fifth category: scholarship that explores the nature of effective legal writing in practice.¹⁸ This phenomenon had two unfortunate consequences. First, as previously mentioned, by collectively ignoring a deep exploration of the topic, the legal writing profession had sent the harmful message within the legal academy that legal writing—unlike torts, criminal law, constitutional law and other traditional law school subjects—lacked substance that would support serious scholarship. Second, legal writing professionals had spent most of their scholarly effort talking amongst themselves. The audience of the first four categories of legal writing scholarship is other legal writing teachers (and maybe law school administration generally). The irony was palpable: while legal writing is a quintessential practical skill, legal writing experts were spending relatively little effort producing scholarship targeted to the practitioners of the skill. *JALWD*'s mission was designed to address these areas of concern by encouraging the best minds in our discipline to explore the true nature of effective legal writing (broadly defined) and to share this understanding with the practitioners of the craft.

The second bedrock characteristic of *JALWD*'s targeted scholarship calls for works *grounded in legal doctrine, empirical research, or interdisciplinary theory*. As I discussed earlier, at the time of *JALWD*'s creation, the scholarship that was being produced on substantive legal writing was predominantly anecdotal and was not based on underlying theory or empirical research. The anecdotal nature of this scholarship again set it apart from the scholarship that was produced by non-legal writing law faculty and which was historically valued by the legal academy. Not

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¹⁷ See Smith, *supra* note 3, at 5–8.

¹⁸ *Id.* at 22–23.

surprisingly, this phenomenon also contributed to the inferior perception of legal writing as an area of study. *JALWD*'s mission sought to address this problem as well by calling on contributors to go beyond anecdote and to explore the essence of effective legal writing from the standpoints of interdisciplinary theory and/or empirical data.

V. The execution of *JALWD*'s mission

Despite leadership and staffing changes in *JALWD*'s editorial board over the years, *JALWD* as a publication has remained faithful to its original mission. The *Journal* has continued to focus primarily on articles that explore legal writing doctrine. As a consequence, it has been a reliable and "active resource and a forum for conversation between the legal practitioner and the legal writing scholar."¹⁹

The *Journal* has also maintained its commitment to publish scholarship that is based on serious research rather than anecdote or informal advice. The *Journal* regularly publishes articles that analyze effective legal writing and advocacy based on an in-depth look at legal doctrine. *JALWD* has particularly made a name for itself by publishing articles that apply interdisciplinary theory to the practice of legal writing. The following is a chronological list of representative examples of interdisciplinary articles on legal writing doctrine that have appeared in *JALWD* since its inception. I have made no effort to include all the *Journal*'s interdisciplinary scholarship in this list. The listed items merely reflect the wide variety of disciplines that have served as the basis for these types of articles:

Doctrinal Scholarship Based on Metaphor Theory—Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004).

Doctrinal Scholarship Based on Principles of Typography and Document Design—Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).

Doctrinal Scholarship Based on Classical Rhetoric Theory—Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ALWD 5 (2006).

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¹⁹ Association of Legal Writing Directors, *supra* note 16, at ii.

- Doctrinal Scholarship Based on Economics Theory and Evolutionary Psychology—Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ALWD 32 (2008).
- Doctrinal Scholarship Based on Cognitive Linguistics Theory—Michael R. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 Legal Comm. & Rhetoric 1 (2011).
- Doctrinal Scholarship Based on Music Theory—Ian Gallacher, *The Count's Dilemma: Or, Harmony and Dissonance in Legal Language*, 9 Legal Comm & Rhetoric 1 (2012).
- Doctrinal Scholarship Based on Narrative Theory and Applied Storytelling—J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 Legal Comm. & Rhetoric 67 (2013).
- Doctrinal Scholarship Based on Working-Memory Theory and Psycholinguistics—Andrew M. Carter, *The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers*, 11 Legal Comm. & Rhetoric 31 (2014).
- Doctrinal Scholarship Based on Principles of Electronic Communication—Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 Legal Comm. & Rhetoric 1 (2015).
- Doctrinal Scholarship Based on Visual Rhetoric Theory—Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 Legal Comm. & Rhetoric 107 (2016).
- Doctrinal Scholarship Based on Cognitive Categorization Theory—Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 Legal Comm. & Rhetoric 39 (2016).
- Doctrinal Scholarship Based on Linguistics and Probability Lexicon—Joe Fore, "A Court Would Likely (60-75%) Find . . .": *Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 Legal Comm. & Rhetoric 49 (2019).
- Doctrinal Scholarship Based on Principles of Tone in Literary Theory—Lisa Eichhorn, *Declaring, Exploring, Instructing, and (Wait for It) Joking: Tonal Variation in Majority Opinions*, 18 Legal Comm. & Rhetoric 1 (2021).

Doctrinal Scholarship Based on Principles of Grammar and Psycholinguistics—Jacob M. Carpenter, *The Problems, and Positives, of Passives: Exploring Why Controlling Passive Voice and Nominalizations Is About More Than Preference and Style*, 19 *Legal Comm. & Rhetoric* 95 (2022).

Also, in keeping with its stated mission, *JALWD* has published substantive legal writing articles based on the authors' original empirical research. Here are a few examples from over the years:

Judith D. Fischer, *Got Issues? An Empirical Study about Framing Them*, 6 *J. ALWD* 1 (2009).

Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 *J. ALWD* 1 (2010).

Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 *Legal Comm & Rhetoric* 99 (2012).

Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias*, 14 *Legal Comm & Rhetoric* 1 (2017).

As one can see from the above illustrations, *JALWD* over the last twenty years has stayed true to its original mission. First, the Journal predominantly publishes articles that expand knowledge on legal writing in practice. Second, these articles go beyond informal advice and ground their instruction on comprehensive legal research, respected interdisciplinary theory, and/or original empirical data. Third, and perhaps most importantly, these articles are written in a style that is “accessible and helpful to all ‘doers’ of legal writing: attorneys, judges, law students, and legal academicians.”²⁰

VI. *JALWD*'s legacy and its contribution to the maturity of legal writing as a substantive discipline

Legal writing as a discipline has matured greatly over the last twenty years, and *JALWD* has played a big role in this maturation process. Operating as both a resource and a model, as both an outlet and an exemplar, *JALWD* has helped usher in an era of tremendous expansion of substantive legal writing doctrine. Following the lead set by *JALWD*, many legal writing scholars today are publishing groundbreaking pieces on substantive legal writing topics, and this valued scholarship is being

20 *Id.*

published in peer-edited legal writing journals as well as in traditional law reviews.

The expansion of legal writing doctrine based on interdisciplinary theory has also found its way into textbooks. Consider, for example, the following interdisciplinary legal writing textbooks now on the market:

Linda L. Berger & Kathryn M. Stanchi, *Legal Persuasion: A Rhetorical Approach to the Science* (2018).

Catherine Cameron & Lance Long, *The Science Behind the Art of Legal Writing* (2d ed. 2019).

Linda H. Edwards, *Readings in Persuasion: Briefs that Changed the World* (2012).

Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (2016).

Brian L. Porto, *Rhetoric, Persuasion, and Modern Legal Writing: The Pen Is Mightier* (2020).

Ruth Anne Robbins, Steve Johansen & Ken Chestek, *Your Client's Story: Persuasive Legal Writing* (2d ed. 2018).

Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (3d ed. 2012).

Kristen Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* (2d ed. 2016).

The legal writing profession has also seen in recent years the creation and organization of events and conferences that focus predominantly on substantive legal writing topics from interdisciplinary perspectives. Here are just a few examples:

Applied Legal Storytelling Conferences—“Applied Legal Storytelling (AppLS) examines the use of stories, storytelling, or narrative elements in law practice, legal education, and the law. . . . The Applied Legal Storytelling Conference brings together academics, judges, other lawmakers, practitioners, and any other type of legal storyteller. The conference has previously convened in 2007 (London), 2009 (Portland), 2011 (Denver), 2013 (London), 2015 (Seattle), 2017 (Washington D.C.), 2019 (Boulder), and 2021 (Virtual/Mercer).”²¹

²¹ LEGAL WRITING INSTITUTE, *Ninth Applied Legal Storytelling Conference*, LWI, <https://www.lwionline.org/conferences/ninth-applied-legal-storytelling-conference> (last visited Mar. 19, 2023).

The Feminist Judgments Project—“The United States Feminist Judgments Project is part of a global collaboration of hundreds of feminist law professors who reimagine and rewrite key judicial decisions from a feminist perspective.”²²

West Coast Rhetoric Scholarship Workshop—“This workshop is aimed at gathering and encouraging a critical mass of people who enjoy collaborating with or at least talking to one another about law and rhetoric scholarship, broadly defined. . . . This annual scholarship exchange is organized by an informal consortium of professors from UNLV, the University of Washington, and Stanford (Jeanne Merino).”²³

The “Psychology of Persuasion” Conference hosted by the University of Wyoming College of Law on September 18, 2015.

The “Impact of Cognitive Bias on Persuasion and Writing Strategies” Symposium hosted by Brooklyn Law School on March 1, 2013.

The “Using Metaphor in Legal Analysis and Communication” Symposium hosted by the Mercer University Law Review on November 10, 2006.

Law review articles, books, and scholarly events: the serious exploration and expansion of the substance of legal writing is today a respected and robust area of legal scholarship. *JALWD*, which introduced its unique and visionary mission in 2004, has contributed substantially to this growth and to the general maturation of legal writing as a legal discipline. I look forward to the next twenty years, as *JALWD* continues to lead the exploration of new frontiers in legal writing doctrine.

²² UNLV WILLIAM S. BOYD SCHOOL OF LAW, *The U.S. Feminist Judgments Project*, UNLV, <https://law.unlv.edu/us-feminist-judgments> (last visited Mar. 19, 2023).

²³ UNLV WILLIAM S. BOYD SCHOOL OF LAW, *West Coast Rhetoric*, UNLV, <https://law.unlv.edu/event/west-coast-rhetoric-0> (last visited Mar. 19, 2023).

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Is the Writing on the Wall Meant for Us?

Ian Gallacher^{**}

There's a medical condition known as benign paroxysmal positional vertigo. Sufferers experience sudden, intense, disorientation and loss of equilibrium, sometimes accompanied by intense feelings of nausea. Attacks usually last for around thirty seconds and rarely last longer than a minute. The condition isn't medically serious, although you wouldn't want to experience an attack while driving, and there's a relatively simple cure that involves realigning the crystals in the inner ear.¹

I mention this because if you're fortunate not to suffer personally from this condition you've likely suffered from its professional equivalent, ChatGPT.² Chat—can I call it Chat?³—is a natural language processing (NLP) program that set the world in a tizzy at the end of 2022 and beginning of 2023. Chat has caused disorientation among legal academics, who reel when they discover that a computer can write in full and complete sentences, can pass law school exams⁴ and even pass the bar exam.⁵ The loss of equilibrium felt by legal academics, indeed all involved

^{*} *Daniel* 5:25–28. During a feast held by Belshazzar a hand writes these words on a wall. None of Belshazzar's wise men can read or understand the words, but eventually Daniel is summoned, and he translates them as follows: "MENE: God has numbered your kingdom and finished it; TEKEL: You have been weighed in the balances and found wanting; UPHARSIN: Your kingdom has been divided and given to the Medes and the Persians." The day doesn't go well for Belshazzar after that.

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¹ See, e.g., Mayo Clinic, *Benign Paroxysmal Positional Vertigo (BPPV)*, <https://www.mayoclinic.org/diseases-conditions/vertigo/diagnosis-treatment/drc-20370060> (last visited May 30, 2023).

² "GPT" stands for "Generative Pre-Trained Transformer." ChatGPT, <https://chat.openai.com> (last visited Jan. 9, 2023).

³ Let me answer that for you. Yes.

⁴ Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan & Daniel Schwarcz, *ChatGPT Goes To Law School*, 1 *LEGAL EDUC.* (forthcoming 2023) 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335905. But see Ashley Binetti Armstrong, *Who's Afraid of ChatGPT? An Examination of ChatGPT's Implications for Legal Writing* (Jan. 23, 2023) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4336929 (Chat made up cases and citations but wrote text that "seemed real and sounded 'lawyerly.'").

⁵ Michael J. Bommarito II & Daniel Martin Katz, *GPT Takes the Bar Exam* (Jan. 3, 2023) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4314839.

with the legal profession, might well be accompanied by intense feelings of nausea, but unfortunately the attack is long lasting and there's no simple cure for it. And professionally, it might be very serious indeed.

You know this, of course, because by the time you read this you will doubtless have spent many hours in meetings, many of them likely long and frustrating, to discuss all aspects of Chat's role in the education and practice of law. Indeed this essay, finished in the middle of February, 2023,⁶ is a fool's errand, more like a time capsule than anything else; something that reflects where the world was, in those far-away days of a few months ago, when people could remember a time when text was written, not "generated," even though we "wrote" on computer keyboards, using word processing programs to create electronic letters on a screen. Innocent times.

Undaunted, I'll plunge ahead if only to give you a reminder of some of the things we were thinking about at the start of Chat's rise to prominence, and to encourage our community to grapple with the theoretical as well as the practical aspects of AI-generated text. But I have no hope that this essay will offer any insights into addressing the concerns that have arisen since February 2023. If it follows the five previous drafts I've written it will not only be outdated by the time you read it, it will be outdated before I've had time to finish it.

ChatGPT

In the interests of saving space, I'm not going to engage in a long discussion about what Chat is and how it was developed. I'm almost certain that you will know much more about that by the time you read this than I know now. Moreover, the Chat you are engaging with is certainly not the Chat I've been using in preparation for writing this essay: the version I'm familiar with is version 3.0, but version 4.0 is rumored to be on its way in my near future.⁷ And the version of Chat that will most affect the practice of law will likely be a law-dedicated product that's specifically trained in the conventions of legal writing, document review and preparation, and legal research. That product might be in development as I write this but there's been no indication of its existence. Yet.⁸

⁶ To be honest, the body of this article was finished in February. Some footnotes were revised, and some added, in late May and early June 2023.

⁷ Roger Montti, *GPT-4 Is Coming: A Look into the Future of AI*, SEARCH ENGINE J. (Jan. 20, 2023), <https://www.searchenginejournal.com/openai-gpt-4/476759/#close>.

⁸ Not in February 2023, but certainly by May. Both LexisNexis and Westlaw have announced the use of AI in their services. Press Release, LexisNexis, LexisNexis Announces Launch of Lexis+ AI Commercial Preview, Most Comprehensive Global

Chat and legal writing

When you have a horse, it's interesting to ask it to give its own opinions straight from its mouth. With that whimsical idea in mind, I asked Chat to explain the role of Artificial Intelligence (AI) in legal writing. Here's what it said.

AI can assist with legal writing in a variety of ways. One example is using natural language processing (NLP) to analyze legal documents and extract relevant information, such as identifying key clauses or summarizing the main points of a contract. AI can also assist with document drafting by generating text that is more consistent in style and tone, or by suggesting language to make the document more legally precise. Additionally, AI can help with legal research by quickly searching through large numbers of documents and identifying relevant case law or statutes. Overall, the goal of using AI in legal writing is to make the process more efficient and accurate, and to help lawyers and legal professionals save time and resources.⁹

Some quick observations. Chat writes more accurately¹⁰ than some of my incoming students used to, although it makes some of the same mistakes: it claims to generate text that is “more consistent in style and tone” but doesn't tell us what it's comparing itself to. People? Other programs? My students used to make that mistake as well and sometimes I was able to persuade them not to do it again. I wonder if Chat can be taught to eliminate that problem.¹¹

Chat also falls prey to a tendency to technobabble, as did some of my students. Chat doesn't “write,” Chat helps lawyers by “generating text,” and it doesn't “read,” it uses “natural language processing.” I suppose we can't fault it for that, though; it's technically correct to say that its text is “generated” rather than “written” and it really can't be said to “read”

Legal Generative AI Platform (May 4, 2023), <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-announces-launch-of-lexis-ai-commercial-preview-most-comprehensive-global-legal-generative-ai-platform>; Press Release, Thomson Reuters, Thomson Reuters Brings Forward Vision to Redefine the Future of Professionals with Content-Driven AI Technology (May 23, 2023), <https://www.thomsonreuters.com/en/press-releases/2023/may/thomson-reuters-brings-forward-vision-to-redefine-the-future-of-professionals-with-content-driven-ai-technology.html>. By the time this is published these services might be commonplace or they might have been discontinued.

⁹ ChatGPT, <https://chat.openai.com> (last visited Jan. 12, 2023).

¹⁰ “Accurate” in the sense that it writes in complete sentences, with some formal organization, and with punctuation in the right places. Other interactions I had with Chat, which I won't include here for sake of saving space and your patience, suggest that it can split infinitives when that seems to be appropriate for the tone it's using, and that it can recognize and use metaphor. Honestly, I've read much worse student writing. I'm sure you have as well.

¹¹ Chat's creators are training it to improve and will continue to update it with improvements over time. OpenAI, *Introducing ChatGPT* (Nov. 30, 2022), <https://openai.com/blog/chatgpt/>. When Chat, some offshoot of it, or some other similar program is developed specifically for the law, it will surely go through a similar training period.

anything so it would seem harsh to criticize writing . . . sorry, text . . . that is accurate, even if it sounds a little sterile. My students no, but I think Chat gets a pass for this.

The text is formally correct, with a neat beginning and ending to the paragraph and some concrete examples of how the program can be used by lawyers to write documents. And it doesn't overclaim: it doesn't extoll Chat's ability to write memos or briefs, but rather limits itself to document analysis, "suggesting language," and conducting legal research. It doesn't seek to take the whole field for itself. I can't say how you feel about it, but for me it's a better piece of text than I had hoped the computer would generate.

But there are some troubling hints in Chat's short paragraph that suggest a less-than-rosy future ahead. It suggests that the text it generates will be "more consistent in style and tone" than something; presumably text written by humans. So Chat, or the team that programmed it, assumes¹² that it will be able to generate text that is, at least in the areas of style and tone, better than something humans could write.

And Chat's mention of "tone" is interesting, and perhaps a little ominous. Tone is something we think of as being unique to the individual writer. If Chat can successfully manipulate textual tone in legal writing,¹³ then it might be difficult to distinguish its work from that of a human writer. That's not intrinsically bad, perhaps, and it surely is the goal of Chat's creators that its work be thought of as equal, if not superior, to human writing, but it might give us pause.

Also mildly menacing is Chat's contention that it can "help" with legal research by "identifying relevant case law or statutes." We have been using computer-aided legal research for some time now, as anyone who has used natural language-based searches on Westlaw or Lexis can attest, but Chat is surely going beyond what the search engines' passive algorithms can do and is putting its toe across the line of the practice of law. We teach our students that finding the law might be a relatively mechanical process but that selecting among the found results of our searches is a job that is inherently legal in nature, and therefore something to be done by lawyers. A lawyer who allows a paralegal to do the work that Chat foresees for itself might be in trouble with a disciplinary body; how would such a body react to Chat's involvement in legal research?

12 And this is how insidious this discussion can become. Without really thinking about it, I'm writing, and I suspect you're reading, a sentence that ascribes human responses to a computer program.

13 AI can, in fact, mimic tone and has been doing so for some time, albeit not in legal writing. Ian Gallacher, *Do RoboMemos Dream of Electric Nouns? A Search for the Soul of Legal Writing*, 4 CASE W. RES. J.L. TECH. & INTERNET 41, 49 (2012) (discussing the ability of AI to customize the tone of documents).

Chat, the bar exam, and the practice of law

One solution to this dilemma would be to let Chat take the bar exam. Even in its February 2023 unsophisticated state, Chat has taken and passed both law school exams¹⁴ and the multistate portion of the bar itself.¹⁵ Later versions of the program will surely improve on its performance. Allowing Chat to take and pass the bar and become a licensed “attorney” would remove any concerns about the unauthorized practice of law.¹⁶ The program would, of course, have to reside within a law firm’s own network in order to preserve confidentiality and privilege, but assuming that could happen, Chat could be a form of permanent associate in a firm, conducting research, writing memos, drafting letters and discovery requests, contracts, wills, and all the other important, but relatively low-level, work currently performed by junior associates.

Again, it seemed fair to give Chat a chance to contribute to this conversation, so I asked it if it should be licensed as a lawyer if it passed the bar exam. Here’s its response:

The question of whether AI should be licensed as a lawyer is a complex one that raises a number of¹⁷ ethical and practical considerations. On the one hand, AI has the potential to greatly improve the efficiency and accuracy of legal work, and would make legal services more accessible to a wider range of people. On the other hand, there are concerns about the potential for AI to make errors or to lack the judgment and empathy that human lawyers bring to the job. Ultimately, the decision of whether to have AI as a lawyer will likely depend on a careful assessment of the benefits and risks involved.¹⁸

Judgment and empathy? I managed, barely, to restrain myself from asking if Chat had met many lawyers. It raises a good point of course; a computer’s inability to exercise independent judgment or empathy is, and will likely for the foreseeable future remain, a significant hurdle to making AI programs truly human-like.¹⁹ But Chat’s answer also points out

14 Choi, et al., *supra* note 4, at 5.

15 Bommarito & Katz, *supra* note 5, at 6.

16 This assumes that Chat could also pass a character and fitness interview. That would be an interesting interview to observe.

17 In editing this before sending it away to the editors, I noticed that my word processing program flagged “a number of” as being verbose. It suggested “several” instead. It was mildly thrilling, and mildly disturbing, to see one computer program criticizing the work of another.

18 ChatGPT, *supra* note 9.

19 A computer’s inability to experience empathy was the way humans were able to identify robots simulating humans in Phillip K. Dick’s book, *DO ANDROIDS DREAM OF ELECTRIC SHEEP* (1968) and its movie adaptation, *Blade Runner* (Michael Deeley 1982).

the fact that the bar exam currently doesn't test for judgment or empathy, so a human lacking those traits can currently be licensed to practice law. Should a computer be restricted from active law practice just because it hasn't learned to hide its shortcomings?

Some will object that Chat has shown itself to make significant mistakes and can produce convincing, but entirely wrong-headed, descriptions of fictitious events.²⁰ This critique points out one of Chat's most significant flaws; it is entirely dependent on the information it has been fed and if it's given garbage, it will produce garbage. That's a fair point, but one that likely won't apply to any version of Chat that is especially trained for legal practice. Westlaw and Lexis are readily accepted by lawyers and judges as authoritative sources of legal information without anyone checking to see if the cases say what the computers say they say. Those programs also can make "mistakes" if they're not given clear instructions or if they fail to identify the most relevant cases at the top of their search results. Lawyers have learned to cope with these limitations, and it seems likely that lawyers would learn to deal with Chat's limitations as well.

A more difficult objection to pin down, and one that we haven't had to address until now, is that some just feel that something is inherently wrong with a machine being licensed to perform work that was, until now, only possible to be performed by humans. Whether or not that's a reasonable position I'll leave to others to discuss. My concern here is that the bar exam, as it's presently constituted, doesn't test for many of the things—judgment and empathy, for example—that are now being offered as reasons for computers not becoming lawyers. So, if we want to use these, or other, qualities to differentiate between people and machines, we should modify the bar exam so that we have a principled basis for accepting some and denying others into the practice of law. But if Chat has presented us with a crisis, then we shouldn't let it go to waste²¹ and

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²⁰ Stephen Paskey, for example, persuaded Chat to write a well-written description of the Bicholim Conflict, a fictitious historical event. Email from Stephen Paskey, Lecturer in Law and Dir. of the Leg. Analysis, Writing, and Research Program, University of Buffalo School of Law to author (copy on file with author). Chat has also been the downfall of a lawyer who allowed it to perform legal research for a motion filed in federal court. Kathryn Armstrong, *Chat GPT: US Lawyer Admits Using AI for Case Research*, BBC NEWS (May 27, 2023), <https://www.bbc.com/news/world-us-canada-65735769>. Chat provided citations to several persuasive-sounding cases that were, unfortunately for the lawyer, completely fictitious. *Id.* At the time of writing, the inevitable disciplinary process against the lawyer was not completed. While it is easy to laugh at the lawyer in this case, and use his spectacular misjudgment as proof that Chat will never be able to perform real legal tasks, it's worth considering three things first: (a) This was the equivalent of sending a ten-year-old into court to perform complex legal analysis. Perhaps not a fair prediction of what AI will be able to do; (b) We don't know how many times lawyers have used Chat effectively to perform work on briefs; and (c) This is surely not the first time a lawyer has done a stupid thing. See, e.g., *Curran v. Price*, 150 F.R.D. 85 (D. Md. 1993). I had a passive role in part of this case (mercifully, not from the lawyering side). Buy me a beer sometime and I'll tell you all about it.

²¹ A quote variously attributed to Rahm Emanuel, Winston Churchill, or Machiavelli, an interesting set of people with whom to be aligning myself.

should use this opportunity to reexamine the bar admissions process, decide what we want it to examine and how to do that, and then offer an exam that will yield us a crop of prospective lawyers who have the qualities we seek in lawyers.²²

Opportunities and challenges for lawyers and paralegals

Indeed, Chat, and its potential role in the legal market, opens up several opportunities for lawyers and for society. In particular, Chat could provide more meaningful access to the law than many currently enjoy. These opportunities, though, also present some challenges and could cause significant disruption to the practice of law and the educational superstructure that supports the practice by feeding new professionals into the job market every year.

In the law firm, as we have seen, Chat could perform many of the tasks currently undertaken by junior lawyers and paralegals. Chat's ability to review large bodies of documents and craft narrative summaries of them, identifying key documents based on the parameters it's been given, is something that parallels tasks assigned to people in law firms every day. And Chat's skill at writing simple, and not-so-simple, documents means it could likely outperform junior associates in those tasks. But Chat's work would be done faster and—arguably—more reliably, and at a fraction of the cost.

If this is correct, then Chat poses an existential threat to legal practice as it currently exists. The paralegal position in a law firm, in particular, could vanish almost completely. Law firms would still need junior associates to perform the tasks that could not be assigned to Chat, and to provide future firm leadership. But firms would likely be able to manage with substantially fewer associates than they hire today and might look for different skill sets than those they seek at present. Writing and research skills, for example, would be significantly less prized than they are now.

And this, of course, poses some challenges for law schools and institutions providing paralegal training. Chat poses short-term problems, of course, including substantially enhanced possibilities for cheating on assignments and exams, but the longer-term problems such as reduced writing and analytical abilities from incoming students who have grown up using Chat, and reduced demand for new lawyers from the legal profession, will likely be more intractable.

²² Whether or not we should re-test all those currently practicing lawyers to make sure that they also have the qualities we seek in practicing lawyers is a question far above my pay grade.

One person's problem is another's opportunity, though, and Chat offers a myriad of possibilities to those for whom the number of lawyers in practice is irrelevant because they can't afford to retain any of them. Chat, married to specially-prepared databases in specific areas such as landlord-tenant disputes, simple criminal matters, simple wills, and simple real-estate transactions, could improve pro se litigants' outcomes and enable them to more confidently cope with the complexities of the legal system.²³

But this raises the ugly prospect of an even more stratified legal system than exists at present, with the rich able to afford the bespoke legal services of humans and the poor only having access to expert systems, with legal aid organizations and those lawyers able and willing to make a living working high volume, low return cases likely being squeezed out quickly after Chat becomes commonly available in the legal market.

Opportunities and challenges for the legal writing community

It's true, of course, that whatever affects the legal market will affect the legal academic market as well. And whatever affects law schools will affect our small part of the law school world, especially when writing is at issue. In a pre-Covid world we might say that when law firms sneeze, we catch a cold. These days that seems less appropriate, but you get my meaning.

But it's surely clear that anything that has the potential to affect legal writing as profoundly as Chat appears to be able to do must have particular interest to us. And while I'm sure that the conversations about Chat in many law schools have been going on without our input,²⁴ I believe, or at least hope, that many other law schools have actively solicited our input and have listened to what we have to say.

Whether or not our voices have been listened to, though, we nonetheless must speak out. Chat specifically, and AI-generated text in general, is our issue, and our thoughts and scholarship should turn to it right away. That's already happening as I write this, with forums being hosted by the

²³ Donotpay.com already claims to operate in this space, claiming that it can allow its customers (clients?) to "Fight Corporations, Beat Bureaucracy, Find Hidden Money, Sue Anyone, [and] Automatically Cancel Your Free Trials." DoNotPay, <https://donotpay.com> (last visited Jan. 26, 2023). How successfully the website performs any of these tasks is outside the scope of this essay.

²⁴ And I suspect those conversations have revolved mostly around the parochial questions of how Chat will affect law school exams, rather than the bigger picture questions of how it will affect law practice. If law school administrations were in charge of the Titanic, it would have had very neat rows of deckchairs.

legal writing community²⁵ and the first fruits of scholarship on Chat, in particular, appearing even as I write this.²⁶ I hope that by the time this essay is published, all the journals devoted to legal writing are being deluged with articles on Chat and the questions raised by AI-generated text, and that the flood continues for years to come.

Quite apart from the practical considerations of how lawyers could use Chat, or whether they should resist it, the potential for scholarship in this area is vast. We are in the first few months of a revolution in writing unlike anything we've ever seen since . . . well . . . the advent of writing. We should consider what it means when a computer can, with a few fundamental human prompts, generate readable, intelligent prose.²⁷ I've seen Chat derided as merely a predictive text algorithm that's only slightly more advanced than the irritating program that tries to spare my thumbs from more clumsiness on my iPhone, but isn't all writing, in a sense, a succession of words implied by the words that preceded them? And isn't writing the act of carefully meeting and, or, subverting the expectations we've set up? If it's true that the *sine qua non* of good writing is a conversation between writer and reader, then isn't predictability an important part of that conversation?²⁸ I'd love to read some articles from this community about that.

The situation we're in is eerily reminiscent of another sea-change wrought by computers a few years ago with the introduction of Boolean searching on Lexis and Westlaw. For the first time since the proliferation of case and statutory law in the Nineteenth Century, lawyers could self-index the entire, vast, body of law for the search terms that interested them, rather than the index terms that the West editors had selected for them, and could do so using multiple terms, thereby exploring the relationship between diverse concepts. That development generated years of thought and scholarship, albeit more by law librarians than the legal writing community. The challenges and opportunities presented by Chat, though, are placed squarely at our door and give us the chance to take the spotlight by leading the conversation about it using the pages²⁹ of this journal and the other legal writing journals, law reviews, and the less

25 The ALWD Leadership and Development Committee hosted a Virtual Front Porch on February 17, 2023, with the topic "How ChatGPT and Generative AI Impact Legal Writing and Research Courses," and I'm sure it's one of many such sessions that will be convened in the coming months.

26 In particular, Ashley Binetti Armstrong's paper, *supra* note 4, is an example of a scholarly eye examining and thinking carefully about Chat's implications for lawyers.

27 It can also generate readable, nonsensical prose, of course, and we need scholarship on that as well.

28 I tried to throw a curveball into that sentence with some fancy Latin I don't actually understand. Did you predict that? Was it bad writing? If Chat wouldn't do that, and I suspect it wouldn't, is it a better writer than me? Don't answer that.

29 A rapidly dying metaphor, but a more elegant way of describing the thought than "the electrons," no?

formal, but still important, pages of practitioner journals, magazines, and newspapers. For many of us, this work might be less interesting than the traditional fields of legal writing scholarship. But to be blunt about it, how much does more research about how to employ rhetoric and storytelling in legal writing matter if humans aren't doing the writing?

Conclusion

It's commonplace to say that everything new brings good and bad in its wake, but that's the case with Chat and its relationship to the law. It offers transformative possibilities to the way law is practiced and those who have access to the law, but it poses significant problems for those currently in the legal practice business and, especially, for those about to get into it. And it offers similar possibilities and challenges to us as legal writing scholars.

I hope the picture is different when you read this, but I suspect it won't be. Things will have changed, of course, and the picture showing what Chat can and can't do might be incrementally clearer. But I suspect that with that clarity will be new uncertainty, as the possibilities and limitations of new versions of Chat present themselves. We might not yet know if we have indeed been weighed in the balances and found wanting, but we in the legal writing world should be, and are, in the forefront of providing the answers to the many questions posed by Chat. And if that puts us in the uncomfortable role of Daniel,³⁰ it's what we're called to do.

The one thing we can say with certainty is that Chat isn't going to go away. In the words of Omar Khayyam about another form of automatic writing, "The Moving Finger writes; and, having writ, Moves on: nor all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all your Tears wash out a Word of it."³¹ What was true in the Twelfth Century is undoubtedly true in the Twenty-First as well: like it, loath it, fear it, or embrace it, Chat is here to stay. It's up to us to figure out how the legal community should deal with it.

³⁰ Daniel was, after all, thrown into the lion's den by his good friend Darius the Mede, successor to Belshazzar. *Daniel* 6:1–23. Even though we can't perhaps hope for the same divine intervention that Daniel received, we can take some comfort in remembering that it all worked out in the end for him.

³¹ RUBAIYAT OF OMAR KHAYYAM 89 (Edward Fitzgerald trans., Grosset & Dunlap 1971).

The Fraternity of Legal Style

Alexa Z. Chew*

This article reports the findings of an empirical study of writing experts mentioned in popular legal style books. The study shows that these experts are overwhelmingly men.¹ This study complements the many other studies showing that gender and racial bias exists throughout the legal profession,² but it focuses on one area that has not yet been examined: bias in books that give writing advice to lawyers. I call these books “legal style books.” The area of legal writing advice books is admittedly niche. However, it is worth studying because writing is central to lawyering.

Writing is central to three of the highest status positions in law: federal judge, tenured law professor, and Supreme Court advocate. Because writing well is so attached to these highly regarded positions, being known as an expert legal writer conveys status—that the person is an authority figure, an influencer, a person others should emulate.³

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* Clinical Professor of Law, University of North Carolina School of Law. I thank Meredith Bock, Erica Frederick, Ariel Freedman, Allison Kraynek, and Marshall Newman for excellent research assistance; Aaron Kirschenfeld for helping me with the study design and doing awesome-librarian-level research for me; Melissa Jacoby for helping me get from a gelatinous idea blob to a paper proposal; my fellow WARriors at the 2022 Writing as Resistance: Legal Writing Professors of Color workshop, especially Sha-Shana Crichton, for their comments on an early draft; Peter Nemerovski for detailed comments on a late draft; W. Nicholson Price II & Jonathan Tietz for generously sharing data; Margaret Hannon for processing my rage as I worked on this project; Rachel Gurvich and Katie Rose Guest Pryal for detailed comments on numerous drafts, rage support, and coffee; and Amy Griffin and Kent Stresemann for excellent editing.

1 I take as a premise that gender and racial biases in the legal profession are bad things that should be reduced.

2 See, e.g., MINORITY CORP. COUNS. ASS'N & AM. B. ASS'N COMM'N ON WOMEN IN THE PROF., YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION 2 (2018) [hereinafter YOU CAN'T CHANGE WHAT YOU CAN'T SEE].

3 This suggests that, while being widely regarded as an expert legal writer confers high status, either (1) being regarded an expert teacher of legal writing does not or (2) those who teach legal writing to law students are simply not seen as experts. Decades of scholarship analyzing the occupational segregation of legal writing professors supports this suggestion. See, e.g., Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525, 527 (2019) (explaining that “[l]aw schools have bolstered their overall faculty diversity by hiring women for non-tenure track clinical and legal writing faculty positions” while these bolstering women “suffer ‘occupational segregation’ characterized by lower pay, lack of job security, and limits on the subject areas they are permitted to teach”) (citing Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 565 (2000)).

These high-status positions in law still tend to be occupied by men, but women’s share is increasing. For example, in 1977, 1.2% of federal judges were women,⁴ but by 2022, about 30% were women.⁵ And, in 1970, only 2.2% of tenured or tenure-track law professors were women, but by 2013, that percentage had grown to 36%.⁶ Even the high-status position of Supreme Court oral advocate has become more female, with the percentage of lawyers appearing in argued cases increasing from 14% during the 1993–2001 terms⁷ to 17% during the 2018–2019 term.⁸ All of these percentages still lag far behind the percentage of J.D. students who are women: that percentage has been around or above 50% since 2003.⁹ Figure 0 below summarizes the percentage of women in law school and in high-status positions over time. Although the data is incomplete, the overall pattern is obvious.

Figure 0

Percentages of women as law students, as lawyers, as tenured or tenure-track professors, as federal judges, and as oral advocates before the U.S. Supreme Court. Empty cells indicate incomplete data.

Year	Female J.D. Students	Female Attorneys	Female Tenure-track Professors	Female Federal Judges	Appearances in Argued Cases at SCOTUS
1880		0.1% ¹⁰			
1960		3.5% ¹¹			
1967			1.7%		
1970	8.6%	4%	2.2%		
1977				1.2% ¹²	
1980	34.2%	8.1% or 12% ¹³	10.8% ¹⁴		

⁴ Linda Greenhouse, *Pipeline to the Bench: Women’s Legal Careers*, 16 U. ST. THOMAS L.J. 138, 140 (2020). Five district court judges plus one circuit court judge were women out of “nearly 400 judges” serving on the federal district courts and ninety-seven judges on the courts of appeals. 6/497 = 0.01207.

⁵ AM. B. ASS’N, 2022 ABA PROFILE OF THE LEGAL PROFESSION 11 (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf> [hereinafter 2022 ABA PROFILE].

⁶ Kristen K. Tiscione, *Gender Inequity Throughout the Legal Academy: A Quick Look at the (Surprisingly Limited) Data*, 69 J. LEGAL EDUC. 116, 117 (2019).

⁷ Tammy A. Sarver, Erin B. Kaheny & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238, 241 (2008).

⁸ Greenhouse, *supra* note 4, at 142.

⁹ Sarver, Kaheny & Szmer, *supra* note 7, at 239 (“The gap between the number of women entering/completing law school and holding prestigious legal positions indicates that contemporary women lawyers still face serious barriers to advancement and access to power.”).

¹⁰ *Id.* at 238 (noting that in 1880 there were seventy-five women lawyers and 64,000 men lawyers).

¹¹ *Id.*

¹² Greenhouse, *supra* note 4, at 140. Five district court judges plus one circuit court judge were women out of “nearly 400 judges” serving on the federal district courts and ninety-seven judges on the courts of appeals. 6/497 = 0.01207.

1993–2001					13.91% ¹⁵
2006	46.9% ¹⁶	30.2% ¹⁷	31% ¹⁸	< 25% ¹⁹	
2007-2008			35% ²⁰		
2009			28% ²¹		
2012		33% ²²			
2013			36% ²³		
2018-2019	51% ²⁴				17% ²⁵
2021	55% ²⁶				
2022		38% ²⁷		30% ²⁸	

Given the rise in female legal writing experts in real life, I was curious about the percentage of female experts cited in popular legal style books.

I now teach and write about legal writing,²⁹ but before all that I was just a lawyer who wrote and needed help with her writing. Back then, I had noticed that the legal style books I used were written exclusively by men. Some examples are *Plain English for Lawyers* by Richard Wydick,

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¹³ Sarver, Kaheny & Szmer, *supra* note 7, at 238.

¹⁴ This percentage was calculated from Appendix 2 in Richard H. Chused’s *The Hiring and Retention of Minorities and Women on American Law School Faculties* by adding together tenured and tenure-track “classroom” and “clinical” faculty. 137 U. PA. L. REV. 537, 557 (1988). Only contract-status legal writing faculty were reported.

¹⁵ Sarver, Kaheny & Szmer, *supra* note 7, at 241.

¹⁶ *Id.* at 239.

¹⁷ *Id.* at 238.

¹⁸ Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the “Top Ten” Law Reviews*, 31 WOMEN’S RTS. L. REP. 385, 419 (2009) (using ABA data).

¹⁹ *Id.*

²⁰ *Id.* at 417 (using AALS data from 2007–2008). Kotkin also notes that sixty percent of contract faculty in the 2007–2008 academic year were female.

²¹ Tiscione, *supra* note 6, at 117.

²² AM. B. ASS’N, 2022 ABA NATIONAL LAWYER POPULATION SURVEY, https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf.

²³ AM. B. ASS’N, 2013 LEGAL EDUCATION AND ADMISSIONS TO THE BAR, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_school_staff_gender_ethnicity.xlsx.

²⁴ Greenhouse, *supra* note 4, at 141.

²⁵ *Id.* at 142.

²⁶ AM. B. ASS’N, *Profile of the Legal Profession 2022, Legal Education: Law School Demographics*, <https://www.abalegal-profile.com/legal-education.php>

²⁷ AM. B. ASS’N, 2022 ABA NATIONAL LAWYER POPULATION SURVEY, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2012-2022.pdf. Note, however, that these data were collected from individual state bar associations and licensing agencies, and not all states reported statistics to the ABA. *Id.* n.27.

²⁸ 2022 ABA PROFILE, *supra* note 5, at 11.

²⁹ For example, I’ve written two textbooks about legal writing: THE COMPLETE LEGAL WRITER (2d ed. 2020) and THE COMPLETE BAR WRITER (2020), both with Katie Rose Guest Pryal. And I’ve published an article about how to integrate in-line legal citations more stylishly: *Stylish Legal Citation*, 71 ARK. L. REV. 823 (2019).

The Lawyer's Guide to Writing Well, by Tom Goldstein and Jethro K. Lieberman, and of course the many legal style books by Bryan A. Garner, such as *The Elements of Legal Style*.

Later, while reviewing legal style books for an earlier study,³⁰ I noticed a second thing: the same “great writers” and even some of the same “great passages of legal writing” appeared in multiple books by different authors. For example, the opening passage from *Palsgraf v. Long Island Railroad* appears as an example of good legal writing in both *Plain English for Lawyers* and Stephen V. Armstrong and Timothy R. Terrell's *A Lawyers Guide to Effective Writing and Editing*.³¹ And when I looked more closely inside my legal style books, I noticed that they were filled with men—men giving advice about writing, men whose words were models to follow, and men who were declared to be great legal writers. Everywhere I looked inside these books, men. For example, here is the first paragraph of *The Elements of Legal Style*, which names eight men:

Why should we need a book on the elements of *legal* style? After all—above all—good legal style is good English style. Take the opinions of Justice Oliver Wendell Holmes, Justice Robert H. Jackson, or Judge Learned Hand; the commentary of William Prosser or Fred Rodell; or the advocacy of Clarence Darrow. These lawyers wrote superb prose. If that's your aim as well, then a thorough understanding of Strunk and White's *The Elements of Style* might be all you need.³²

These men were also all dead by the time *The Elements of Legal Style* was written, E. B. White being the last to die in 1985.

Once I noticed this pattern of male writers talking up other male writers, I couldn't stop seeing it. To my friends, I referred to the pattern as “dudes duding.”³³ This was a useful shorthand but probably not appropriate for a professional law journal publication like this one. As I read other studies about gender disparities in legal writing, I saw that I was not the only one to have noticed this dudes-duding pattern. For example, in a 1984 article looking at who cites whom in civil rights legal scholarship, Professor Richard Delgado described “an inner circle of about a

³⁰ Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823 (2019).

³¹ *Id.* at 841, 843.

³² BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 1 (2d ed. 2002) [hereinafter GARNER, *ELEMENTS OF LEGAL STYLE*].

³³ My friends also referred to the pattern as *dudes duding*, including Katie Rose Guest Pryal, who wrote about her early-aughts letter to the editors of literary magazine *The Believer*, in which “[a]ll of the feature pieces were written by men,” and “[a]ll of them were about men as well, except one, which profiled a female baker.” Katie Rose Guest Pryal, *Pretending I'm Not a Woman, on Betrayals Large and Small*, KATIE ROSE GUEST PRYAL (May 13, 2022), <https://katiroseguestpryal.com/2022/05/13/pretending-im-not-a-woman-on-betrayals-large-and-small/>.

dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other's ideas."³⁴ Delgado referred to the phenomenon as "something like an elaborate minuet," a more elegant turn of phrase than "dudes duding." At about the same time, Professor Mary Joe Frug analyzed a contracts casebook authored by three men, which she found to be so filled with men writing about men that it gave the impression that "men monopolize legal authorship in contracts."³⁵

One reason men write about men is that men have written most of the source material.³⁶ In the legal realm, men have authored way more stuff than women—more judicial opinions, legislation, briefs for the Supreme Court, law review articles,³⁷ student notes, and reading materials in the first-year law school curriculum.³⁸ This gender disparity in writing makes sense given the miniscule number of women in high-status legal writing positions until the 1970s. Professor Nancy Leong has argued that this disparity "distorts" legal writing by "conforming that discourse to male perspectives."³⁹

Legal style books can reinforce this distortion with writing rules derived from opinions, briefs, and commentary written by men. As Professor Kathryn Stanchi explained, the rules of legal writing "are not necessarily elemental or natural"—they "are created and validated by legal culture."⁴⁰ Given that the culture has included so few women federal judges and tenured professors and Supreme Court advocates, one would expect legal style books to replicate that culture. But legal writing rules created by a culture can also be questioned by the culture, and Stanchi's article invites us "to ask what (or who) is the source of these persuasive writing rules."⁴¹

This article answers Stanchi's question by cataloguing the writing experts that legal style books use to convince their audiences that their writing rules are the ones lawyers should follow. A real quick answer to

34 Richard Delgado, *Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563 (1984).

35 Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1096, 1097 (1985).

36 Nancy Leong, *Discursive Disparities*, 8 FIU L. REV. 369, 369 (2013). Professor Leong systematically reviewed "the underrepresentation of women in most forums in which people write," *id.* at 371, and argued that this gender disparity harms women, crowding out writing that is informed by women's experiences in a society that treats them differently than men.

37 Professor Minna J. Kotkin studied articles published in the "top ten" (by "top ten" she meant "fifteen") law reviews and found that only 20.4% of those journals' authors were women. See Kotkin, *supra* note 18, at 395 ("The analysis yielded a total of 629 pieces, with 1373 authors. Of these, 292 were women, for an overall percentage of 21.26%").

38 Leong, *supra* note 36, at 369, 373–74.

39 *Id.* at 370. By "male perspective," Leong doesn't mean that men have a particular perspective that is essentially different than women's but a perspective derived from their experiences in society.

40 Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 435 (2002).

41 *Id.*

the question of who writes the rules is this: white male writers writing about other white male writers who went to elite schools and held elite lawyering jobs and are probably dead. But read on for more nuances about which elite schools they attended, how many were federal judges versus tenured law professors, and how many were born before the Titanic sank.

1. Basic methodology

This section describes how I gathered my data about experts named in legal style books. I designed my own methodology.⁴² I didn't see any other similar studies in my literature review, or I would have tried to borrow from them. That said, my methodology was straightforward. Here's a quick overview: (1) identify a group of legal style books to study, (2) review those books to identify the experts named in each one, (3) assign a gender to each expert, and (4) for the most popular experts, gather biographical data.

1.1. How I chose which legal style books to study

For this project, I was interested in legal writers who are presented as experts in books like *Plain English for Lawyers* and *The Elements of Legal Style*, meaning style books written for lawyers rather than textbooks written for law students. These are the books that create the professional reality of "good legal writing" because their authors describe what experienced practitioners should aspire to. These books identify expert legal writers and share their writing wisdom, their words, and their techniques. These books also create legal writing experts simply by treating those writers as experts. As librarian and information scientist Patrick Wilson put it, "A 'leading expert in the field' is recognized as such simply by discovering that other practitioners in the same field think highly of him."⁴³

To select books for this study, I started with eight legal style books I had heard of and either owned or had borrowed often enough that I should have just bought them. In my mind at least, these books were well known, popular legal writing books:

1. Stephen V. Armstrong and Timothy R. Terrell, *A Lawyers Guide to Effective Writing and Editing* (2d ed. 2009)
2. Robert E. Bacharach, *Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word* (2020)⁴⁴

⁴² Many thanks to my editor Amy Griffin, my law librarian colleague Aaron Kirschenfeld, and my research assistant Marshall Newman for their help finessing the study design.

⁴³ PATRICK WILSON, *SECOND-HAND KNOWLEDGE: AN INQUIRY INTO COGNITIVE AUTHORITY* 22 (1983).

⁴⁴ Because I later limited my study to books published between 1998 and 2018, it does not include this book by Judge Bacharach.

3. Bryan A. Garner, *The Elements of Legal Style* (2d ed. 2002)
4. Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (2d ed. 2004)
5. Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well* (3d ed. 2016)
6. Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* (2d ed. 2014)
7. Steven D. Stark, *Writing to Win: The Legal Writer* (1999)
8. Richard Wydick, *Plain English for Lawyers* (5th ed. 2005)

The next step was to identify what category all of these books belonged to so that I could identify other books in that category. I used WorldCat for this process because multiple law librarians suggested it. WorldCat is the “world’s largest library catalog” and connects “thousands of libraries’ collections in one place.”⁴⁵ This online catalog had more than 540 million bibliographic records as of April 2023.⁴⁶

All eight books were classified under the subject heading “Legal Composition” in the WorldCat library catalog. A query of WorldCat run in OCLC FirstSearch for books published between 1998–2018 with the subject heading “Legal Composition” produced 3,448 results.⁴⁷ These results were then further filtered to limit them to print books and then ranked by the number of libraries that held each book.⁴⁸ I thought that the number of libraries that held each book was a reasonable proxy for each book’s popularity, especially because sales data were not available.⁴⁹

From there, I assessed the 100 books that were held by the most libraries (most popular) to determine if they fit into the legal style category that I wanted to study.⁵⁰ I define legal style books as those with a primary audience of attorneys, with a primary purpose of helping those attorneys write better by giving advice about legal writing, in the form of a cohesive book that can be read from beginning to end. Thus, I excluded books written primarily for law students or judges as well as books written

⁴⁵ About WorldCat.org, OCLC, <https://www.worldcat.org/about> (last visited May 29, 2023).

⁴⁶ Inside WorldCat, OCLC, <https://www.oclc.org/en/worldcat/inside-worldcat.html> (last visited May 29, 2023).

⁴⁷ This was the initial query, using FirstSearch: su="Legal composition" and dt="bks" and yr:1998-2018.

⁴⁸ This brought the number of results down to about 2000.

⁴⁹ In general, book publishers and retailers do not publish sales data for books of any genre, not just legal style books.

⁵⁰ The decision to look at the 100 “legal composition” books with the most holdings was made mostly out of the practical need to limit the number of books I reviewed. There is a natural break in the number of holdings, between *Thinking Like a Writer* (413 holdings) and *Legal Writing and Analysis in a Nutshell* (240 holdings), so I considered looking only at the books with more than 400 holdings, but doing so would have excluded books authored by women. Given the nature of this project, studying only books written by men seemed wrong. So I stuck with the top 100 books in the legal composition category—a nice, round number that I thought would both capture the most popular books and also be small enough for me to work with.

primarily as reference books,⁵¹ textbooks for group instruction,⁵² and collections of previously published essays.⁵³ I also excluded “legal drafting” books, those whose primary purpose was writing contracts, legislation, and the like.⁵⁴

To determine whether a book fit the parameters of my study, I reviewed each book’s WorldCat abstract for purpose and audience. If I could not determine whether a book met my criteria based on the abstract, I reviewed the book’s introduction or preface. For a handful of books, I read a few chapters to be sure.⁵⁵ After this review was complete, I had my final list of books. For books with multiple editions on the list, I combined the number of holdings across editions and listed each book only once; for those with multiple editions on the list, I reviewed the most current edition.⁵⁶

In total, I ended up with nineteen books to review. Figure 1.1 shows the authors, books, and publication dates and editions. The books are ordered by my proxy for popularity—number of holdings—with the highest number of holdings at the top.

Figure 1.1

Legal writing books included in this study, listed by popularity

WorldCat Holdings	Author(s)	Title	Year & Editions
986	Antonin Scalia & Bryan A. Garner	Making Your Case: The Art of Persuading Judges	2008
965	Bryan A. Garner	Legal Writing in Plain English: A Text with Exercises	2013 (2d ed.) 2001
924	Bryan A. Garner	The Elements of Legal Style	2002

⁵¹ For example, JOAN AMES MAGAT, *THE LAWYER’S EDITING MANUAL* (2009), which had 161 holdings.

⁵² For example, TERESA J. REID RAMBO & LEANNE J. PFLAUM, *LEGAL WRITING BY DESIGN: A GUIDE TO GREAT BRIEFS AND MEMOS* (2d ed. 2013), which had 166 holdings.

⁵³ For example, GERTRUDE BLOCK, *LEGAL WRITING ADVICE: QUESTIONS AND ANSWERS* (2004), which had 176 holdings.

⁵⁴ For example, PETER BUTT, *MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE* (3d ed. 2013), which was a popular book with 675 holdings. The two books by Wayne Schiess include a lot of legal drafting content, but enough of each book addressed other kinds of legal writing that I included both in my study.

⁵⁵ One example is Peter Butt’s *Modern Legal Drafting*, which is a legal drafting book. Although the title includes the word “drafting,” that word is sometimes synonymous with the word “writing.”

⁵⁶ For example, several editions of *Plain English for Lawyers* appeared in my top 100 list, but I reviewed only the most recent one listed, the fifth edition. But for another book, *Writing to Win*, only the first edition appeared on my top 100 list, and so I reviewed the first edition even though a second edition was published before 2018.

797	Bryan A. Garner	The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts	2014 (3d ed.) 2004 (2d ed.) 1999
755	Richard C. Wydick	Plain English for Lawyers	2005 (5th ed.) 1998 (4th ed.)
538	Ross Guberman	Point Made: How to Write Like the Nation's Top Advocates	2014 (2d ed.) 2011
446	Tom Goldstein & Jethro K. Lieberman	The Lawyer's Guide to Writing Well	2016 (3d ed.) 2002 (2d ed.)
413	Stephen V. Armstrong & Timothy P. Terrell	Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing	2009 (3d ed.) 2003 (2d ed.)
240	Lynn Bahrych, Jeanne Merino & Beth McLellan	Legal Writing and Analysis in a Nutshell	2017 (5th ed.) 2003 (4th ed.)
238	Steven D. Stark	Writing to Win: The Legal Writer	1999
232	Wayne Schiess	Preparing Legal Documents Nonlawyers Can Read and Understand	2008
230	Sandra Oster	Writing Shorter Legal Documents: Strategies for Faster and Better Editing	2011
227	Lenné Eidson Espenschied	The Grammar and Writing Handbook for Lawyers	2011
223	Marie P. Buckley	The Lawyer's Essential Guide to Writing: Proven Tools and Techniques	2011
211	Jane N. Richmond	Legal Writing: Form and Function	2002
205	Judith D. Fischer	Pleasing the Court: Writing Ethical and Effective Briefs	2005
196	Wayne Schiess	Writing for the Legal Audience	2003
175	Jayne Kracker	ABA Basic Guide to Punctuation, Grammar, Workplace Productivity, and Time Management	2012
173	Austen L. Parrish & Dennis T. Yokoyama	Effective Lawyering: A Checklist Approach to Legal Writing and Oral Argument	2007

1.2. How I categorized legal writing experts

I created three categories of experts who might appear in the legal writing books I studied: advisors, heroes, and models.

The advisor category is for people a book's author quoted as having something wise to say about good writing. A clear example of a quoted authority is from one of Bryan Garner's lists of "quotable quotes" in *The Winning Brief*. At the beginning of each chapter, under the heading of "quotable quotes," appear several quotations about the chapter's topic. At the beginning of chapter 48, which advises using "but" to begin sentences, is this quote by William Zinsser, "I can't overstate how much easier it is for readers to process a sentence if you start with 'but' when you're shifting direction."⁵⁷ I coded that quote by Zinsser as an "advisor" mention because he was giving writing advice.

The hero category is for people whom a book's author declared to be a good writer. A clear example of a declaration is "Judges such as Holmes and Brandeis are staples of literary excellence, known to everyone and studied by everyone."⁵⁸ Here's an example of a more subtle declaration, "When I practiced as a litigator and had to write a brief in, say, an administrative case, the first thing I wanted to see was a selection from a comparable brief by a Laurence Tribe or a Kathleen Sullivan."⁵⁹ I would have coded each declaration as a "hero" mention: one each for Holmes, Brandeis, Tribe, and Sullivan. Heroes also showed up in lists, such as Ross Guberman's "Best Advocates" appendix at the end of *Point Made*.

The model category is for instances in which a book's author reproduces a passage written by the expert, presenting it to readers as a model of good legal writing.⁶⁰ The passage could be as long as an entire brief or as short as a phrase. An example from later in *The Winning Brief's* chapter 48 is this quote by Lon L. Fuller, presented as a model of beginning with "but": "When a vessel at sea begins to founder there comes a time when it must be given up as lost. But we do not give the order to abandonment as soon as, let us say, a fuel pump begins to function erratically."⁶¹ I coded that quotation as a "model" mention because Fuller's words were presented as a model of how to begin a sentence with the word "but."

57 BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 246 (3d ed. 2014).

58 TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 210 (3d ed. 2016).

59 STEVEN D. STARK, *WRITING TO WIN: THE LEGAL WRITER* xiii–xiv (1999).

60 Sometimes the examples are bad, but that's much less common. Roughly 50 of 1500 excerpts were presented as bad examples.

61 GARNER, *THE WINNING BRIEF*, *supra* note 57, at 247 (quoting LON L. FULLER, *ANATOMY OF LAW* 21 (1968)).

The experts in these categories include more than just *legal* writers. This makes sense given the popular view that “good legal style is good English style.” I also thought that there might be more opportunities to find women experts if I kept the categories inclusive. But including all writers was also a practical decision I made once I saw the huge lists of advisors in my data. Limiting advisors to just legal writers would have required extensive biographical research as well as criteria for determining whether a writer was a legal writer.

When reviewing the books, I only counted experts who were referred to by name in the text — “above the line.” Experts who were named only in footnotes or endnotes were not included. My reason for this was that I thought people mentioned above the line were those who were most imbued with expertise and most likely to influence readers.

1.3. How I assigned genders to writers

I assigned genders to each writer using the same method as Keerthana Nunna, W. Nicholson Price II, and Jonathan Tietz in their recent “quantitative study of one way to observe the impact of hierarchy, race, and gender: the acknowledgments sections of law review footnotes and what they can tell us about legal scholarly networks.”⁶² These acknowledgement footnotes, also known as “star” or “dagger” footnotes, “give[] a peek into who contributed (nominally, at least) to the intellectual product that is the final, published law review author.”⁶³ By aggregating these peeks into about 30,000 law review articles, Nunna, Price, and Tietz revealed a new picture of “the underlying relationships, interactions, and social networks that make up legal academia.”⁶⁴ They then studied “that picture for signs of the effects of hierarchy, race, and gender to see whether those characteristics show up in a quantitatively observable fashion,” and found those signs aplenty.⁶⁵

To assign gender to the names appearing in these 30,000+ footnotes, the authors “first assigned a ‘gender likelihood score’ resulting from [their] analysis of the Social Security baby names database” in a prior paper.⁶⁶ This

⁶² See Keerthana Nunna, W. Nicholson Price II & Jonathan Tietz, *Hierarchy, Race & Gender in Legal Scholarly Networks*, 75 *STAN. L. REV.* 71, 73 (2023).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 102 (citing and describing the methodology in Price and Tietz’s earlier paper, Jonathan I. Tietz & W. Nicholson Price II, *Commentary, Acknowledgments as a Window into Legal Academia*, 98 *WASH. U. L. REV.* 307, 322 & n.60 (2020)). The explanatory example given in both papers is the same: “[T]he database has 1,228,719 male examples of ‘Mark’ and 3984 female examples. The gender likelihood score reflects that 99.68% of Marks are listed as male. The name ‘Pat,’ though, has 11,998 male entries and 8455 that are female—so the score would reflect that this name is 58.66% likely to be male.”

score “corresponds to sex assigned at birth,” a limitation of both their data set⁶⁷ and mine. For names overwhelmingly associated with one gender—eighty percent likelihood or higher—the authors used that gender. And for the remainder of the names, they manually checked for which pronouns were used in other documents referring to those people.⁶⁸ This method is imperfect. As Nunna, Price, and Tietz recognized, “race and gender are more complicated than the binaries” they (and I) “turned to for tractability of analysis.”⁶⁹ Identifying writers’ race and gender is “a complex and potentially fraught task given the lack of readily available, high-quality self-identified gender and race information.”⁷⁰ For their gender analysis, they used the binary of “men versus women and nonbinary scholars.”⁷¹ For my study, I used the binary of men versus women; I didn’t identify any nonbinary writers.

Nicholson Price and Jonathan Tietz were kind enough to share their database of gender likelihood scores, which I used to initially assign gender to the experts in my dataset. Like them, I used the cutoff of eighty percent to assign gender to the experts’ first names. For names outside that eighty percent cutoff, I conducted a manual review looking for pronoun usage. Because this process resulted in only 115 female experts or so (out of about 850), I reviewed those manually to check whether the experts were referred to with female pronouns.

1.4. How I gathered biographical information and assigned most notable job

My research assistants and I gathered additional biographical information for the experts who were mentioned in at least three of the nineteen books in my study. Although somewhat arbitrary, I used this three-book cutoff because it seemed to me like a reasonable indicator of influence within this category of books. For each of these experts, we recorded the person’s year of birth and whether they were trained as a lawyer in the United States. For the lawyers in the list, we recorded the law school they attended and their most notable job. In general, we relied on court websites, employer websites, and Wikipedia pages for these details.

This information was straightforward to gather except for designating the most notable lawyering job, as many experts had multiple notable jobs. For example, Elena Kagan was a law professor at the University of

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 101.

⁷⁰ *Id.*

⁷¹ *Id.*

Chicago School of Law and Harvard Law School, then dean of Harvard Law School, then an Associate Justice of the U.S. Supreme Court. For purposes of this study, I assigned “SCOTUS justice” as her most notable job. In general, I used the following hierarchy of notable jobness to pick just one job for each expert:

1. Justice at the Supreme Court of the United States
2. Judge at a U.S. Circuit Court
3. Judge at a U.S. District Court or Bankruptcy Court
4. Judge at a state court
5. Law professor (full-time)
6. Practitioner

To be clear, I don’t mean to advance this hierarchy as my personal judgment about which law jobs are more important than others. I do think the first four items in the list reflect a generally understood hierarchy of judge prestige within the United States. I ranked law professor higher than practitioner because professor seemed to be the anchor job that experts returned to. For example, Walter Dellinger was a law professor at Duke University School of Law for the majority of his career but also practiced law, including high profile practitioner roles as the U.S. Attorney General and Solicitor General.

2. Results

This section describes the results of my study. The first part describes the expert mentions by book. An “expert mention” means that the expert was mentioned once. That expert might be mentioned more times, in which case that person would have multiple expert mentions. By contrast, the second part in the results section describes the “experts mentioned” (or “mentioned experts”). “Experts mentioned” refers to individual people who might be mentioned once or twice or thirty times.

2.1. Expert mentions by book

Of the nineteen legal writing books that I reviewed for this study, sixteen referred to experts. Of those sixteen, four referred to experts five times or fewer. And six referred to experts between 6 and 100 times. The remaining six books referred to experts over 100 times, with the largest number of mentions being 621 in Bryan Garner’s *The Winning Brief*. Each book’s total number of expert mentions is listed in the second column of

figure 2.1.1 below. The total number of expert mentions across all sixteen books was 2,249.

Of the 2,249 expert mentions in the books, 1,978 of them—or 88%—are to men. Of the six books that make more than 100 mentions, Wayne Schiess’s *Writing for the Legal Audience* has the lowest percentage of men (76%), followed by Ross Guberman’s *Point Made* (81%). Of those same six books, Bryan Garner’s *The Elements of Legal Style* has the highest percentage of men (97%), followed by Tom Goldstein and Jethro K. Lieberman’s *The Lawyer’s Guide to Writing Well* (94%).

Figure 2.1.1

Experts mentioned in each book, including male versus female experts

WorldCat Holdings	Book	Total Expert Mentions	Male Expert Mentions	Female Expert Mentions	Male Expert %
986	Scalia & Garner	97	95	2	98%
965	Garner (Plain English)	36	33	3	92%
924	Garner (Elements)	261	254	4	97%
797	Garner (Winning Brief)	621	549	72	88%
755	Wydick	4	4	0	100%
538	Guberman	472	383	89	81%
446	Goldstein & Lieberman	269	252	16	94%
413	Armstrong & Terrell	18	18	0	100%
240	Bahrych, Merino & McLellan	5	4	1	80%
238	Stark	138	125	14	91%
232	Schiess (Nonlawyers)	77	64	13	83%
230	Oster	0	0	0	-
227	Espenschied	5	2	3	40%
223	Buckley	58	52	6	90%
211	Richmond	0	0	0	-
205	Fischer	8	8	0	100%
196	Schiess (Legal Audience)	131	99	32	76%
175	Kracker	0	0	0	-
173	Parrish & Yokoyama	49	36	13	73%
Total		2249	1978	268	88%

The biggest share of expert mentions was to advisors, with 64% being words of wisdom about writing. Twenty-eight percent of the mentions were models of good writing and 8% were declarations of writing heroes. The gender breakdown across all three categories was similar to each

other and the overall gender breakdown of about 88% male. The gender breakdown of the three categories of experts is summarized in figure 2.1.2 below. Note that figure 2.1.2 only includes the sixteen books that mentioned experts.

Figure 2.1.2

Gender breakdown of advisors, heroes, and models in each book

WorldCat Holdings	Book	Advisor Mentions		Hero Mentions		Model Mentions	
		M	F	M	F	M	F
986	Scalia & Garner	79	1	13	1	3	0
965	Garner (Plain English)	3	1	23	2	7	0
924	Garner (Elements)	113	2	20	0	120	2
797	Garner (Winning Brief)	506	65	5	1	38	6
755	Wydick	3	0	0	0	1	0
538	Guberman	50	8	47	15	286	66
446	Goldstein & Lieberman	206	15	27	1	20	0
413	Armstrong & Terrell	6	0	1	0	11	0
240	Bahrych, Merino & McLellan	3	1	1	0	0	0
238	Stark	76	8	8	1	40	5
232	Schiess (Nonlawyers)	64	13	0	0	0	0
227	Espenschied	2	3	0	0	0	0
223	Buckley	22	6	3	0	27	0
205	Fischer	8	0	0	0	0	0
196	Schiess (Legal Audience)	92	30	7	2	0	0
173	Parrish & Yokoyama	34	13	0	0	2	0
Total		1267	166	155	23	555	79
Percentage male		88%	12%	87%	13%	87%	12%

2.2. Results by experts mentioned

Across the sixteen books that mentioned experts, I counted 830 unique experts. Many of these experts were mentioned multiple times—in multiple books or multiple times within the same book. The most books that any expert was mentioned in was nine, and the vast majority of experts (83%) were mentioned in only one book. Like the expert mentions, the mentioned experts skew heavily male (87%). Figure 2.2 summarizes the results by unique experts mentioned.

Figure 2.2

All experts mentioned and experts mentioned in multiple books

	Total	Male	Female
Unique experts mentioned across all books	830	720	110
Experts mentioned in 9 books	3	3	0
Experts mentioned in 8 books	1	1	0
Experts mentioned in 7 books	2	2	0
Experts mentioned in 6 books	5	4	1
Experts mentioned in 5 books	11	19	1
Experts mentioned in 4 books	13	13	0
Experts mentioned in 3 books	30	27	3
Experts mentioned in 2 books	78	70	8
Experts mentioned in 1 book	685	588	97

2.3. Results for most-mentioned writing experts

This section describes the subset of sixty-five experts who were mentioned in at least three books. Figure 2.3.1 lists these sixty-five experts, as well as their gender, how many times each was mentioned in my data set, how many books each was mentioned in, their birth year, the law school they attended (if any), and the top lawyering job they held (if any).

Figure 2.3.1

Experts mentioned in three or more books

Name	M/F	Total Mentions	Books Mentioned in	Birth Year	Law School Attended	Top Lawyer Job
Holmes, Oliver Wendell Jr.	M	35	9	1841	Harvard	SCOTUS
Posner, Richard A.	M	14	9	1939	Harvard	federal circuit
White, E. B.	M	17	9	1899	-	-
Garner, Bryan A.	M	76	8	1958	Texas	lexicographer
Cardozo, Benjamin N.	M	25	7	1870	Columbia	SCOTUS
Strunk, William Jr.	M	12	7	1869	-	-
Jackson, Robert H.	M	22	6	1892	Albany	SCOTUS
Marshall, Thurgood	M	9	6	1908	Howard	SCOTUS
Scalia, Antonin	M	8	6	1936	Chicago	SCOTUS

Wald, Patricia M.	F	14	6	1928	Yale	federal circuit
Zinsser, William K.	M	15	6	1922	-	-
Churchill, Winston	M	7	5	1874	-	-
Easterbrook, Frank R.	M	11	5	1948	Chicago	federal circuit
Fowler, H. W.	M	12	5	1858	-	-
Ginsburg, Ruth Bader	F	12	5	1933	Columbia & Harvard	SCOTUS
Kozinski, Alex	M	10	5	1950	UCLA	federal circuit
Llewellyn, Karl N.	M	16	5	1893	Yale	law professor (Columbia)
Mellinkoff, David	M	12	5	1914	Harvard	law professor (UCLA)
Orwell, George	M	8	5	1903	-	-
Rehnquist, William H.	M	7	5	1924	Stanford	SCOTUS
Stark, Steven D.	M	14	5	1951	Yale	author
Twain, Mark	M	7	5	1835	-	-
Aldisert, Ruggero J.	M	14	4	1919	Pittsburgh	federal circuit
Aristotle	M	6	4	384 B.C.E.	-	-
Flesch, Rudolf	M	16	4	1911	University of Vienna	writing professor
Frank, Jerome	M	10	4	1889	Chicago	federal circuit
Johnson, Samuel	M	4	4	1709	-	-
Painter, Mark P.	M	7	4	1947	Cincinnati	state court (Ohio Ct. App.)
Prosser, William	M	8	4	1898	Minnesota	law professor (Berkeley, Hastings, Harvard)
Roberts, John G.	M	32	4	1955	Harvard	SCOTUS

Tribe, Laurence H.	M	20	4	1941	Harvard	law professor (Harvard)
Trimble, John R.	M	19	4	1940	-	-
Wiener, Frederick B.	M	20	4	1906	Harvard	practitioner
Wright, Charles Alan	M	9	4	1927	Yale	law professor (Minnesota)
Wydick, Richard C.	M	6	4	1937	Stanford	law professor (UC Davis)
Alterman, Irwin	M	4	3	1941	Columbia	federal district
Asprey, Michele M.	F	11	3	-	Australian lawyer	plain language consultant
Barzun, Jacques	M	12	3	1907	-	-
Bernstein, Theodore M.	M	6	3	1904	-	-
Brandeis, Louis D.	M	8	3	1856	Harvard	SCOTUS
Cooper, Frank E.	M	4	3	1910	Michigan	practitioner
Davis, John W.	M	5	3	1873	Washington and Lee	practitioner
Douglas, William O.	M	3	3	1898	Columbia	SCOTUS
Dworkin, Ronald	M	10	3	1931	Harvard	law professor (NYU, Yale)
Eliot, T. S.	M	3	3	1888	-	-
Enquist, Anne	F	4	3	1950	-	-
Frankfurter, Felix	M	7	3	1882	Harvard	SCOTUS
Friedman, Daniel M.	M	10	3	1916	Columbia	federal circuit
Friedman, Lawrence M.	M	6	3	1930	Chicago	law professor (Harvard)
Hand, Learned	M	9	3	1872	Harvard	federal circuit
Harlan, John Marshall	M	3	3	1833	Transylvania University	SCOTUS

Hemingway, Ernest	M	4	3	1899	-	-
Kimble, Joseph	M	21	3	1945	Michigan	law professor (WMU Cooley)
Lambuth, David	M	6	3	1879	-	-
Leonard, Elmore	M	3	3	1925	-	-
Lincoln, Abraham	M	3	3	1809	self-taught	practitioner
Miner, Roger J.	M	6	3	1834	New York Law School	federal circuit
Raymond, James C.	M	5	3	1940	-	-
Rodell, Fred	M	20	3	1907	Yale	law professor (Yale)
Schopenhauer, Arthur	M	5	3	1788	-	-
Shaw, George Bernard	M	3	3	1856	-	-
Stevens, John Paul	M	4	3	1920	North-western	SCOTUS
Williams, Joseph M.	M	4	3	1933	-	-
Williams, Robin	F	3	3	1953	-	-
Wisdom, John Minor	M	5	3	1905	Tulane	federal circuit

Of the sixty-five most-mentioned experts, sixty are men and five are women; forty of these experts were born more than a century ago (all men). Forty-three of the most-mentioned experts are lawyers, meaning they trained as lawyers by getting a law degree or “reading the law.” Of those forty-three lawyers, eleven of them attended Harvard Law School, and thirteen served as justices on the U.S. Supreme Court. Figure 2.3.2 summarizes the breakdown of most-mentioned experts by gender, birth year, lawyer status, law school attended, and top job held.

Figure 2.3.2

Summary of characteristics of most-mentioned experts

Men	Women
60	5
Year Born	
Born before 1850	8
Born 1851–1900	18
Born 1901–1950	34
Born 1951–2001	4
Lawyers	
43	22
Law Schools Attended	
Harvard	10
Columbia	5
Yale	5
Chicago	4
Michigan	2
Stanford	2
Albany, Cincinnati, Howard, Minnesota, New York Law School, Northwestern, Pittsburgh, Texas, Transylvania University, Tulane, UCLA, Vienna	1
Top Jobs Held	
SCOTUS justice	13
Federal circuit court judge	10
Federal district court judge	1
State court judge	1
Law professor	10
Practitioner	4
Other	3

3. Discussion

The results mostly met my expectations. The writing experts are mostly men and the most mentioned experts are mostly graduates of elite law schools who held elite law jobs. There were a few surprises, though, including the percentage of women experts being lower than even my inner cynic imagined.

3.1. Who writes these books (mostly men, mostly Bryan Garner)

The nineteen books in my study skew male in all respects. The nineteen books were written by twenty-one different authors, 57% of whom are male. Although several of the books were written by multiple authors, the groups of co-authors were all one gender; for example, co-authors Austen Parrish and Dennis Yokoyama are both male. Thus, each book has only one gender of author. Of the nineteen books, 63% were authored by men. If we look at the number of library holdings for all the books, which totals 6,663, the vast majority of those holdings (82%) are for the twelve male-authored books. Figure 3.1.1 summarizes the gender attributes of the books, their authors, and their holdings.

Figure 3.1.1

Gender breakdown of authors, books, and holdings

	Male	Female	% Male
Individual authors	12	9	57%
Individual books	12	7	63%
Library holdings	6663	1511	82%

The disparity in male and female discourse in legal style books is somewhat surprising because legal writing is “coded as female” in law school.⁷² However, it is not so surprising if we think of teaching legal writing as a service role⁷³ and being a legal writing expert as an authority role. Service roles and authority roles split along gender lines, with the lower status service roles being predictably held by women and the higher status authority roles being predicably held by men. Time spent care-taking is time that cannot be spent convincing other practitioners in the same field to think highly of you and tell everyone that you are a leading expert in the field.⁷⁴

The percentage of authors in my study who are male is much higher than the percentage of male legal writing professors. As of the 2020–2021 academic year, 22.5% of legal writing professors self-identified as male.⁷⁵ And in 2008, at the midpoint of my survey period, 25%–30%

⁷² See Kotkin, *supra* note 18, at 426 (describing research in Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 306–08 (2004).

⁷³ Allen et al., *supra* note 3, at 527 (“In law schools, women in ‘pink ghettos’ predominately occupy skills positions like legal writing, clinic, academic success, bar preparation, and the law library.”).

⁷⁴ See Wilson, *supra* note 43, at 20; Allen et al., *supra* note 3, at 526 (“In academia, women most often engage in non-promotable, service-related activities, while men engage in promotable tasks like research and scholarship.”).

⁷⁵ ALWD/LWI *Legal Writing Survey 2020–2021: Report of the Annual Legal Writing Survey*, LEG. WRITING INST. 123 (2021), <https://www.lwionline.org/sites/default/files/2020-2021-ALWD-and-LWI-Individual-Survey-report-FINAL.pdf>.

of legal writing professors were identified as male.⁷⁶ Six of the authors in my study worked primarily as legal writing professors at law schools: Judith D. Fischer, Jethro K. Lieberman, Beth McLellan, Jeanne Merino, Wayne Schiess, and Dennis Yokoyama. These six legal writing professors authored five of the books in my study, or 26%. The small percentage of legal writing professors—a group one might think would be authors of popular legal style books—is not surprising given the low status accorded such professors.⁷⁷

A quick glance at the list of books shows that the four most popular books are authored by Bryan Garner. Not only did Garner write the four most popular books in my study, but more than half of all the holdings in my study are for one of those four books.⁷⁸ These results are not surprising given his decades spent becoming the most influential figure in legal writing and perhaps judicial decisionmaking. Since 1995, Garner has been the editor of *Black's Law Dictionary*.⁷⁹ He is prolific and some of his books are uniquely useful, like his *Dictionary of Legal Usage* and *The Redbook: A Manual on Legal Style*. Several of his books are also uniquely influential. For example, Professor Amy Griffin recently analyzed *The Law of Judicial Precedent*, Garner's "unofficial codification" of rules that govern how courts use precedent.⁸⁰ Judges rely on this book in their decisionmaking, along with its more popular "sister treatise,"⁸¹ *Reading Law: The Interpretation of Legal Texts*, which Garner co-wrote with Justice Scalia.

3.2. How the books use experts

The use of experts varied across the nineteen books in my study. Three of them referred to no experts at all. At the other end of the spectrum is Garner's *The Winning Brief*, which calls on other writers' authority more than 600 times. Figure 3.2 lists the books from most expert mentions to least. The number of each type of mention—advice, hero, model—is also listed.

⁷⁶ Ass'n of Legal Writing Dirs. & Leg. Writing Inst., *2008 Survey Results*, LEG. WRITING INST. 45, A-1 (2008), [https://www--staging-mp6ykpkm7cbbg.us.platform.sh/sites/default/files/2008Surveyresults\(REVISED\).pdf](https://www--staging-mp6ykpkm7cbbg.us.platform.sh/sites/default/files/2008Surveyresults(REVISED).pdf).

⁷⁷ See L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 847 n.50 (summarizing ways to slice law school castes, with legal writing professors always being in the lower half of the described systems).

⁷⁸ Of the 6663 holdings in my study, 3672 of them are for one of Garner's four books.

⁷⁹ David Lat, *Black's Law Dictionary: An Interview with Bryan A. Garner*, ABOVE THE LAW (July 2, 2014), <https://abovethelaw.com/2014/07/blacks-law-dictionary-an-interview-with-bryan-a-garner/>.

⁸⁰ Amy J. Griffin, *If Rules They Can Be Called*, 19 LEGAL COMM. & RHETORIC 156, 168 (2022).

⁸¹ *Id.* at 166.

Figure 3.2

Books listed by expert mentions

Book	Author's Gender	Advice	Hero	Model	Total Mentions
Garner (Winning Brief)	M	571	6	44	621
Guberman	M	58	62	352	472
Goldstein & Lieberman	M	221	28	20	269
Garner (Elements)	M	118	20	123	261
Stark	M	84	9	45	138
Schiess (Legal Audience)	M	122	9	0	131
Scalia & Garner	M	80	14	3	97
Schiess (Nonlawyers)	M	77	0	0	77
Buckley	F	28	3	27	58
Parrish & Yokoyama	M	47	0	2	49
Garner (Plain English)	M	4	25	7	36
Armstrong & Terrell	M	6	1	11	18
Fischer	F	8	0	0	8
Bahrych, Merino & McLellan	F	4	1	0	5
Espenschied	F	5	0	0	5
Wydick	M	3	0	1	4
Oster	F	0	0	0	0
Richmond	F	0	0	0	0
Kracker	F	0	0	0	0

When arranged this way, it's easy to see that the books by women mention few experts. Of the seven books by women, six of them have fewer than ten expert mentions. The seventh, *The Lawyer's Essential Guide to Writing* by Marie Buckley, has fifty-eight. Only three of the twelve books by men have fewer mentions than Buckley's book. This distribution invites the question of why female authors don't refer to experts at the same rate as their male counterparts. I don't know the answer (or even how I would figure it out), but one possible reason is that the women wrote with more self-assurance that their advice was self-recommending. This makes some sense for the authors who taught legal writing for many years, like Bahrych, Fischer, McLellan, and Merino. However, this reason is at odds with the many studies showing that "women and people of color often need to provide more evidence of competence than majority men in order to be seen as equally competent."⁸²

82 YOU CAN'T CHANGE WHAT YOU CAN'T SEE, *supra* note 2, at 11 (describing the Prove-It-Again bias).

Of the expert mentions in my data set, advice mentions were by far the most common. For example, advice makes up 92% of the 621 mentions in *The Winning Brief* and 82% of the 269 mentions in *The Lawyer's Guide to Writing Well*. This makes sense because advice is the easiest of the three types of mentions to incorporate. All it requires is a quote on a relevant topic. You don't need to read the document from which the quote was taken or apply judgment to the quote itself. By contrast, a model mention requires the style book author's judgment that the quoted model is a good one. Gathering models is also more challenging unless they are well known, like the facts passage of *Palsgraf v. Long Island Railroad*.⁸³ Otherwise, finding models requires knowing where to look for them, culling passages that don't make the cut, and articulating how the chosen passages model particular writing points. Like quoting models, naming heroes requires judgment. Although it's certainly possible to name a hero based on no evidence at all, presumably the authors of the style books in this study had evidence to support their claims—and that evidence was gained by the authors' own assessment of the hero's writing or by researching others' assessments of the hero's writing.

One book breaks strongly from this pattern: Ross Guberman's *Point Made*. That book is dominated by models—75% of the 472 mentions are excerpts from real briefs filed in real courts. This breakdown aligns with (1) the book's stated purpose of taking a "more empirical" approach than simply telling the reader how Guberman thinks they should write, and (2) its methodology of "identifying dozens of the most renowned and influential advocates" by consulting ratings and lists that rely on expert judgment.⁸⁴ *Point Made* stands out not just because the overwhelming majority of its mentions are models but also because it provides nearly *all* the female-written models in this study. As seen in Figure 2.1.2, only 79 of the 634 model mentions are to women. Of those 79, 66 are in *Point Made*. Similarly, of the 23 female hero mentions, 15 of them are in *Point Made*.

3.3. Gender breakdown of experts in books is worse than in real life

As explained in this paper's introduction, women don't make up a majority of any of these elite law jobs: federal judges, tenured law professors, or Supreme Court advocates. The percentage of women in these positions has increased over time, but none of them is even approaching fifty percent, even though women have made up about half of

⁸³ See Chew, *supra* note 30, at 845.

⁸⁴ ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES* xxx (2d ed. 2014).

all J.D. candidates for the past twenty years. However, women have made up a third of all J.D. candidates only for the past forty-five years or so, and the percentage of federal judges and tenured law professors who are women has crept up on one-third.

Given this well-documented reality, I expected that far fewer than half of the expert mentions (and mentioned experts!) in my study would be women. At best, I thought it would be even with the proportion of female federal judges or tenured law professors, about one in three. At worst, I thought it would be even with the proportion of women who gave oral arguments at the Supreme Court in the 1990s, about one in six.

As it turns out, the proportion of female experts in legal writing books is only one in seven, much lower than the proportion of women in federal judgeships and tenured professorships. And lower even than the proportion of women giving Supreme Court oral arguments during the original run of *Walker, Texas Ranger*.⁸⁵

Yikes!

This is concerning because there's so much discretion in who a book author can include as a writing expert. Even assuming that some experts must be included because they are true legal writing heroes—men like Oliver Wendell Holmes or Bryan Garner—over eighty percent of the experts are mentioned only once and could, theoretically, be subbed out for a female expert saying the same thing.⁸⁶

This bias towards men as experts in legal writing matters because these books both represent legal culture and create legal culture. As Professor Frug observed about casebooks, readers might “draw their sense of current legal culture” from the books they read and interpret the absence of women in ways that the authors didn't intend.⁸⁷ Frug found so few women in the contracts casebook she studied that readers who might “look for women among the authors and in the casebook language because they need and seek some assurance that women or womanly people are

⁸⁵ *Walker, Texas Ranger* (CBS television series 1993–2001); see *supra* note 15 for the 1993–2001 study period for oral arguments.

⁸⁶ That the crowd of one-off experts named in these books could be gender-swapped reminds me of actor Geena Davis's research into gender disparities in movies. She looked at the crowd scenes in family-rated films and found that the percentage of female characters in those crowd scenes was seventeen percent, and that this had been the gender composition of the usual movie crowd since 1946. I think she was on to something when she suggested that gender ratios in life might follow gender ratios in movies: “Couldn't it be that the percentage of women in leadership positions in many areas of society—Congress, law partners, Fortune 500 board members, military officers, tenured professors and many more—stall out at around 17 percent because that's the ratio we've come to see as the norm?” See Geena Davis, *Geena Davis's Two Easy Steps to Make Hollywood Less Sexist*, HOLLYWOOD REP., Dec. 11, 2013, <https://www.hollywoodreporter.com/news/general-news/geena-davis-two-easy-steps-664573/>.

⁸⁷ Frug, *supra* note 35, at 1097 (emphasis omitted). Frug also noted that “the casebook conveys the mistaken impression that legal authors are exclusively male.” *Id.* at 1096.

not excluded from the profession” would not be reassured.⁸⁸ That discouragement could also confirm other readers’ “view[s] that women are as unimportant in the legal world as they are (or should be) elsewhere.”⁸⁹

3.4. Replication of elite educational hierarchies is as expected

The legal profession’s affection for elite hierarchies is well documented,⁹⁰ and the results of my study mark another data point showing that expert lawyering positions tend to be dominated by lawyers who graduated from elite law schools. Of the forty-one most-mentioned experts who received their legal training in the United States, sixty-three percent attended one of these five schools: Harvard (10), Columbia (5), Yale (5), Chicago (4), or Stanford (2). If we include Michigan (2), Minnesota (1), Texas (1), and UCLA (1) as elite law schools, the percentage increases to 76%.

Of the most-mentioned lawyers who did not attend one of these elite (or elite-ish) law schools, only one was born in the last 100 years: Ohio Judge Mark Painter, who was born in 1947 and graduated from the University of Cincinnati College of Law. Here are the other nine, their titles, where they received their legal training, and their year of birth:

- John Minor Wisdom (Tulane), born in 1905
- Judge Roger J. Miner (New York Law School), born in 1834
- Justice John Marshall Harlan (Transylvania University), born in 1833
- Attorney John W. Davis (Washington & Lee), born in 1873
- Professor William Prosser (Minnesota), born in 1898
- Judge Ruggero J. Aldisert (Pittsburgh), born in 1919
- Justice Thurgood Marshall (Howard), born in 1908
- Justice Robert H. Jackson (Albany drop-out), born in 1892
- President Abraham Lincoln (self-taught), born in 1809

3.5. Replication of elite employment hierarchies is as expected

Also unsurprising in my results was the replication of elite employment hierarchies. Of the forty-one most-mentioned U.S. lawyers,

.....

⁸⁸ *Id.* at 1097.

⁸⁹ *Id.*

⁹⁰ See, e.g., Nunna, Price & Tietz, *supra* note 62, at 75 (“Legal academia is obnoxiously hierarchical.”); John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1111 (1978) (“The best-known studies [of the legal profession] examine lawyers at the extremes of the profession’s prestige hierarchy . . .”).

59% are federal judges (24), and more than half of those judges are U.S. Supreme Court justices (13). The next biggest grouping (24%) was tenured professors at law schools, of which there were ten. As shown in the list below, the mentioned law professors were mostly employed at elite schools:

- Karl Llewellyn (Columbia Law School)
- David Mellinkoff (UCLA)
- William Prosser (Berkeley, Hastings, and Harvard)
- Laurence Tribe (Harvard)
- Charles Alan Wright (Minnesota)
- Richard C. Wydick (UC Davis)
- Ronald Dworkin (NYU and Yale)
- Lawrence M. Friedman (Harvard)
- Joseph Kimble (WMU Cooley)
- Frank Rodell (Yale)

Yet again, Judge Mark Painter of the Ohio Court of Appeals was in a category all his own. In addition to being the only most-mentioned expert who attended a non-elite law school (Cincinnati), he is also the only most-mentioned expert who is a state judge. This reflects a general snobbery towards both state law and state judges, a snobbery that is cultured in law schools.⁹¹

This group of forty-one most-mentioned experts has between four and six practitioners, depending on how you count them. Bryan Garner and Steven Stark, who are also authors of books in this study, practiced law. However, they both have worked mainly as writers and writing coaches rather than as practicing attorneys. The other four all practiced law, but one was Abraham Lincoln, who is better known for being a U.S. President.

Two of the other three practitioners, John W. Davis and Frederick B. Wiener, argued numerous cases at the U.S. Supreme Court. Davis was the Solicitor General under President Woodrow Wilson, and as a private attorney he won the casebook classic *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Supreme Court in 1952 ruled against President Harry Truman's seizure of the nation's steel plants.⁹² Like Davis, Wiener

⁹¹ By the way, in 2023, there were about 500 women state appellate judges. That's a lot of lady legal writers to choose from! See NAT'L ASS'N OF WOMEN JUDGES, *2023 Representation of United States State Court Women Judges*, www.nawj.org/statistics/2023-us-state-court-women-judges (citing FORSTER-LONG, LLC, *THE AMERICAN BENCH 2023* (2023)).

⁹² See generally WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973).

successfully argued a landmark case at the Supreme Court: *Reid v. Covert*.⁹³

The last of the remaining practitioners, Frank E. Cooper, worked as a lawyer in Detroit but also held a part-time professorship at Michigan Law School.⁹⁴ He wrote several books about legal writing as well as a book for law students called *Living the Law* in which he discussed vital skills for the practicing attorney that were not taught in law schools: predicting how controversies will be decided, legal planning, negotiation, draftsmanship, and advocacy.⁹⁵ By most accounts, Cooper was a delightful writer, as shown by the closing sentence of one book review: “Mr. Cooper’s intelligent and very readable treatment of these subjects serves as an appetizer to the student for the adventure which lies ahead.”⁹⁶

3.6. Race also looks bad

Of the sixty-five most mentioned experts, only one appears to be a person of color: Justice Thurgood Marshall. Coding the experts by race is fraught and beyond the scope of this paper, but most of the experts in the top sixty-five were well-known enough to assign a race to. This result was also expected, given how many obstacles have limited people of color’s access to legal education, licensure, and elite lawyering jobs.

It appears that the only non-white “hero” mentions—declarations that so-and-so is a great legal writer—appear in one book: Ross Guberman’s *Point Made*. Indeed, his book includes excerpts from eight non-white lawyers. In addition to three mentions of Thurgood Marshall, Guberman cites the following non-white lawyers, none of whom are mentioned in the other books: Morgan Chu (12 mentions), Miguel Estrada (9), Eric Holder (8), Barack Obama (5), Sri Srinivasan (5), John Payton (7), and Ted Wells (7). As with gender, this inclusion is likely the result of Guberman’s empirical approach described in section 3.2 above. When Guberman went looking for “the most renowned and influential advocates,” he looked beyond federal judges and solicitors general and to plaintiffs’ lawyers, specialists, and the legal directors of the NAACP and ACLU.⁹⁷ Indeed, several of his Black experts led the NAACP’S Legal Defense Fund.

As is usually the situation, an intersectional peek at the data looks worst of all. Of the sixty-five most mentioned experts, none are women

93 354 U.S. 1 (1957); see Frederick B. Weiner, *Persuading the Supreme Court to Reverse Itself: Reid v. Covert*, 14 LITIG., Summer 1988, at 6.

94 Allan F. Smith, *In Memoriam; Frank E. Cooper*, 1 U. MICH. J. L. REFORM (1968).

95 John P. Dawson, Book review of *Living the Law*, by Frank E. Cooper (1958), 58 MICH. L. REV. 615, 618 (1960).

96 Book review of *Living the Law*, by Frank E. Cooper (1958), 13 VAND. L. REV. 432, 432 (1959).

97 GUBERMAN, *supra* note 84, at xxxi.

of color. Of the seven non-white lawyers that *Point Made* introduces to the dataset, none are women. Justice Sonia Sotomayor, the most obvious non-white female expert because she has been a justice on the Supreme Court for a decade, appears in the dataset just once: *The Lawyer's Guide to Writing Well* uses one of her sentences as a model of memorable writing.⁹⁸

That women of color are missing from these books means that legal style is one more space where “the idea of women of color as authority figures, as people with expertise and knowledge gained from study” is “foreign.”⁹⁹ Recently, the Rutgers Law Review organized a symposium around Professor Meera Deo’s groundbreaking work on this topic, *Unequal Profession: Race and Gender in Legal Academia*.¹⁰⁰ This book drew on Professor Deo’s national empirical study of law faculty using an intersectional framework, the first of its kind.¹⁰¹ The essays that emerged from this symposium illustrated Professor Deo’s findings that legal culture throws up many barriers to women of color being viewed as experts.

However, in those essays I also saw another kind of fraternity of legal style emerging—one in which women of color drew on each other’s words, calling attention to each other’s eloquence. For example, Professor Kimberly Mutcherson (a Black woman) wrote an essay for the colloquium about the work of Meera Deo (a South Asian woman) and quoted the words of Professor Khiara M. Bridges (a Black woman) to make the dispiriting observation that the dearth of women of color in the legal academy means that many lawyers “have never had the chance to bear witness to a nonwhite woman’s unparalleled expertise.”¹⁰² And now, as a legal writing professor writing about legal style, I (an Asian American woman) can spotlight these three women’s words.

Conclusion

To be blunt, I think the results of my study suck. In the world of writing books for lawyers, more women should be recognized as experts. As should more people of color and people who live outside the gender binary. As should more writers who are not federal judges or tenured law

98 GOLDSTEIN & LIEBERMAN, *supra* note 58, at 203.

99 Kimberly Mutcherson, *Taking Our Space: Women of Color and Antiracism in Legal Academia*, 73 RUTGERS L. REV. 869, 872 (2021).

100 MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

101 Swethaa S. Ballakrishnen & Sarah B. Lawsky, *Law, Legal Socializations, and Epistemic Injustice*, 47 LAW & SOC. INQUIRY 1026, 1029 (2022) (“[Deo’s] book is the first formal mixed-method study of the law faculty experience that focuses on women of color and includes professors from all stages of their careers.”).

102 Mutcherson, *supra* note 99, at 872 (quoting Khiara M. Bridges, *The Nerve: Women of Color in the Legal Academy*, in *WOMEN & LAW* 65, 68–69 (2020) (joint publication of the top sixteen law reviews), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=womenandlaw>).

professors or graduates of so-called elite law schools. Great legal writing is everywhere, not just in elite spaces or streaming from the fingers of elite lawyers. Moreover, everyone who writes legal words can be a great legal writer. Writing is a skill, learned like any other, not a magical attribute that some people are born with.

The books in my study, particularly the most popular ones, create a reality of legal writing expertise. Just as the words in a contract create obligations for real people to carry out in the real world, the words in legal style books create experts from the real people who are presented as advisors, heroes, and models. That legal style books overwhelmingly elevate men to expert status contributes to the discursive gender disparity in law both by sharing more male discourse within their pages and by suggesting that readers replicate male discourse in their own writing.

My suggestion for changing the situation is obvious: people who write about legal style should research harder. For example, when looking for models of good legal writing, follow Ross Guberman's lead and look beyond federal judges, federal prosecutors, and solicitors general. Given the abundance of great legal writing there in the world, I feel confident that there are plenty of new models to discover. And as for finding writing advice from women and non-binary writers, I suggest looking beyond "classic" style books that were published when only men got to publish style books. There are books about writing by women¹⁰³ of course, even some classic ones,¹⁰⁴ but we can also find writing advice in other genres that are easier to publish. For example, legal writing professor Margaret Hannon recently published a bibliography of legal style,¹⁰⁵ which includes many articles by women. And online sources such as blogs¹⁰⁶ and tweets¹⁰⁷ and interviews¹⁰⁸ offer instant access to advice by a huge variety of writers.

103 See, e.g., ANNE M. ENQUIST, LAUREL CURRIE OATES & JEREMY FRANCIS, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* (6th ed. 2021); HELEN SWORD, *WRITING WITH PLEASURE* (2023).

104 See, e.g., ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* (1994); NATALIE GOLDBERG, *WRITING DOWN THE BONES: FREEING THE WRITER WITHIN* (1986).

105 Margaret C. Hannon, *Legal Writing Mechanics: A Bibliography*, 19 *LEGAL COMM. & RHETORIC* 185, 186 (2022) (gathering scholarship on legal writing mechanics and best practices to "serve as a resource for any legal writer, whether practitioner, academic, law student or judge").

106 For example, "Friends don't let friends go unedited." Marie Buckley, *Step Three of Deep Editing: Synthesize*, A LAWYER'S GUIDE TO WRITING: MARIE BUCKLEY'S BLOG (June 20, 2012), <https://mariebuckley.com/step-three-deep-editing-synthesize/>.

107 For example, this tweet nicely summarizes a core challenge of writing compelling legal arguments: "ANYONE CAN WRITE A SEEMINGLY WINNING LEGAL BRIEF IF THEY CAN MAKE UP CONTROLLING AUTHORITY THAT PROVIDES AN UNARGUABLE ANSWER, but this is not actually useful in a world that lacks that controlling authority." Courtney Milan, TWITTER (Mar. 1, 2023), <https://twitter.com/courtneymilan/status/1631066612567801856>. Courtney Milan is the pen name of Heidi Bond, a bestselling author who also clerked for judges on the Ninth Circuit and U.S. Supreme Court.

108 For example, in an interview with Nicole Chung, Amy Tan described an excellent editor "[w]ho would look for me in the writing and not say 'This is a crappy sentence,' but instead say, 'You're not in the sentence, I don't hear you.'" Nicole Chung, *Amy Tan on Writing and the Secrets of Her Past*, SHONDALAND (Oct. 16, 2017), <https://www.shondaland.com/inspire/books/a12919749/amy-tan-interview/>.

My suggestion is unradical, and if executed it will just nibble around the edges of the discursive gender disparity I've described in this paper. Yet at the same time, it's not very hard. It's easier, for example, than elevating more women to real positions of authority.

LC&R
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Negative Language in Legal Writing

Maria Termini*

Introduction

The musical *Into the Woods* begins by weaving together several traditional fairy tales with their usual focus on clear-cut binaries of good and evil, light and dark, love and hate, heroes and villains.¹ We meet many familiar characters and watch their stories intersect: Jack (of “and the Beanstalk”); Little Red Riding Hood; Cinderella, Rapunzel, and their princes; a couple longing for a child. There are, of course, also villainous characters: a witch, a wolf, and a giant. The heroes aren’t all good: they are sometimes vain, self-centered, and impatient; their actions sometimes hurt the villains and each other. The villains aren’t all bad: they can be caring and protective, and some of their harmful acts are in response to harm caused by the heroes. The heroes travel from the light of a safe village to the darkness of a dangerous wood. They encounter obstacles—many caused by the villains, some brought on themselves or caused by other heroes—but they struggle, persist, and ultimately triumph. That brings us to happily ever after, at least for the heroes, and the end of Act I.²

After the intermission, we see that things are not so simple. Act II of *Into the Woods* explores what happens after the “happy ever after” of a

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¹ Linguists have noted that positive terms tend to come first in phrases such as these that show opposite terms. Paul Rozin & Edward B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 PERSONALITY & SOC. PSYCH. REV. 296, 314 (2001). This is true across many languages and word pairings. *Id.*

² Quite literally: The last musical number in the first act is “Ever After,” and the last words of that song are “happy ever after!” STEPHEN SONDHEIM & JAMES LAPINE, *Ever After*, on INTO THE WOODS (RCA Victor 1988).

fairy tale. We see the characters regretting some of the choices they made in the first act. As Stephen Sondheim said, “The second act deals with the consequences of what [the heroes] did to get there.”³ The binaries break down. The characters learn what we already began to see in the first act: “heroes” aren’t always good, and “villains” aren’t always bad.⁴ There is no happy ever after, but the characters realize they can learn from their experiences.⁵

A similarly familiar binary plays out in legal writing: whether to put a point positively or negatively. As was the case in *Into the Woods*, the traditional story is fairly simple: positive is generally good and negative is generally bad.⁶ Recent scholarship has taken up another story—one based on science, but still simple: negative is generally good.⁷ As the second half of *Into the Woods* reminds us, though, things are usually more complicated. The choice between the positive and the negative in legal writing is not simple, and choices have consequences. How to make the choice can be informed not only by the conventional wisdom—what we’ve always been told to do (or not to do)⁸—but by theory and the results of research,⁹ and by practical considerations.¹⁰ These, distilled, generate six principles that can help a legal writer decide when and how to use negative expression.¹¹

I. The positive-negative binary in legal writing

We begin, as in the first act of *Into the Woods*, with a relatively simple binary. Where the musical tells a tale of heroes and villains, this legal writing story begins with a choice between positive and negative. Conventional wisdom has been that we should root for the heroes and that writers should aim for positive statements. And so experts often advise legal writers to, in most situations, strive for positive statements rather

3 STEPHEN SONDHEIM, *LOOK, I MADE A HAT: COLLECTED LYRICS (1981–2011) WITH ATTENDANT COMMENTS, AMPLIFICATIONS, DOGMAS, HARANGUES, DIGRESSIONS, ANECDOTES AND MISCELLANY* 57 (2011).

4 SONDHEIM & LAPINE, *No One Is Alone, on INTO THE WOODS*, *supra* note 2 (“People make mistakes . . . / Witches can be right / Giants can be good”).

5 SONDHEIM & LAPINE, *Finale: Children Will Listen, on INTO THE WOODS*, *supra* note 2 (“The way is dark / The light is dim / But now there’s you, me, her and him / The chances look small / The choices look grim / But everything you learn there / Will help when you return there”).

6 See *infra* section I.A.

7 See *infra* section I.B.

8 See *infra* section II.A.

9 See *infra* section II.B., C.

10 See *infra* section II.D.

11 See *infra* section III.

than negative ones.¹² Negative statements are considered confusing,¹³ and double (or triple) negatives are doubly (or triply) worse.¹⁴ This preference for positive statements over negative statements is not limited to the legal field: the venerable *Elements of Style* also recommends that writers “[p]ut statements in positive form.”¹⁵

Yet legal writing scholars have started to explore implications of research from psychology and related fields that identifies benefits of negativity.¹⁶ They have found evidence of a “negativity bias,” the phenomenon that people are more sensitive to—more easily persuaded by—negative information¹⁷ and “tend to weigh [it] more heavily than positive information.”¹⁸

A. “A Very Nice Prince”:¹⁹ The conventional wisdom that positive writing is better (except when it isn’t)

Experts agree, nearly universally,²⁰ that legal writers should use positive or affirmative statements, expressions, or terms rather than negative ones:²¹ “Write in the affirmative, not the negative”;²² “[S]tate . . . ideas affirmatively.”²³ To explain this advice, the experts note that negative

¹² E.g., CATHY GLASER ET AL., *THE LAWYER’S CRAFT* 197 (2002) (recommending that legal writers use affirmative statements rather than negative ones); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25, 54 (2009) (advising drafters to “[t]ry to put statements in positive form”).

¹³ E.g., GERTRUDE BLOCK, *EFFECTIVE LEGAL WRITING FOR LAW STUDENTS AND LAWYERS* 89 (1999).

¹⁴ E.g., MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 247 (5th ed. 2010) (advising writers to avoid multiple negatives because they are “hard to read”); Kimble, *supra* note 12, at 54–56 (“Avoid multiple negatives . . .”).

¹⁵ WILLIAM STRUNK JR. & E. B. WHITE, *THE ELEMENTS OF STYLE* 19 (4th ed. 2000).

¹⁶ See Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effect of Negativity Bias*, 14 LEGAL COMM. & RHETORIC 1 (2017) [hereinafter Chestek, *Fear and Loathing*]; Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 606 (2015) [hereinafter Chestek, *Of Reptiles and Velcro*]; Michael R. Smith, *Going Negative in Policy Arguments*, WYO. LAW., Aug. 2018, at 50; Michael R. Smith, *The Sociological and Cognitive Dimensions of Policy-Based Persuasion*, 22 J.L. & POL’Y 35 (2013) [hereinafter Smith, *Sociological and Cognitive Dimensions*].

¹⁷ Daniel J. O’Keefe, *Generalizing about the Persuasive Effects of Message Variations: The Case of Gain-Framed and Loss-Framed Appeals*, in *BENDING OPINION: ESSAYS ON PERSUASION IN THE PUBLIC DOMAIN* 117, 118 (T. V. Haafte, H. Jansen, J. D. Jong & W. Koetsenruijter eds. 2011).

¹⁸ David E. Kanouse, *Explaining Negativity Biases in Evaluation and Choice Behavior: Theory and Research*, in 11 NA—ADVANCES IN CONSUMER RESEARCH 703, 703 (Thomas C. Kinnear Provo, UT: Association for Consumer Research eds., 1984).

¹⁹ SONDEHEIM & LAPINE, *A Very Nice Prince*, on INTO THE WOODS, *supra* note 2.

²⁰ Some authors acknowledge a few caveats. See, e.g., BLOCK, *supra* note 13, at 89.

²¹ See *id.*; DEBORAH E. BOUCHOUX, *ASPEN HANDBOOK FOR LEGAL WRITERS: A PRACTICAL REFERENCE* 83 (2005); Kimble, *supra* note 12, at 54 (“Try to put statements in positive form.”).

²² GLASER ET AL., *supra* note 12, at 197.

²³ BLOCK, *supra* note 13, at 88.

writing is less forceful,²⁴ more wordy than putting the point positively,²⁵ and more confusing or more difficult for the reader to process.²⁶

This confusion is particularly apparent when negative terms are used in syllogisms—the foundation for deductive reasoning. “Positive premises offer much stronger bases for deductive reasoning,” Professors Sonya G. Bonneau and Susan A. McMahon assert, and they urge caution in formulating rules because a negative premise in a syllogism can lead to a logical fallacy.²⁷ For example: “Minors cannot enter into valid contracts. Sondra is not a minor. Therefore, Sondra entered into a valid contract.”²⁸ The authors note that, even though it is possible to avoid a fallacy, a negative premise often leads to a necessarily narrow conclusion in order to avoid the fallacy: “Minors cannot enter into valid contracts. Sondra is not a minor. Therefore, the contract is not invalid on account of Sondra’s age.”²⁹

Double or multiple negatives are considered especially confusing and problematic.³⁰ Professor Bouchoux notes that legal writers often use “expression[s] that make[] an assertion by denying its opposite, as in *not unmindful*,” but that such expressions “usually force[] the reader to stop and think through what has been said.”³¹ For example, “[t]he phrase *not unimportant* must be converted to *important*.”³²

Double-negative statements can be useful, however, in limited situations. Professors Veda R. Charrow, Myra K. Erhardt, and Robert P. Charrow point out that such double negatives can convey a sense in the middle ground between two extremes, such as in the phrase *not unhappy*, which is not the same as *sad* but rather carries a sense somewhere between *happy* and *sad*.³³ Similarly, Professor Gertrude Block suggests,

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²⁴ See BOUCHOUX, *supra* note 21, at 83 (“[N]egative words . . . are not as forceful as affirmative expressions . . .”); DAVID F. HERR, ROGER S. HAYDOCK & JEFFREY W. STEMPEL, *FUNDAMENTALS OF LITIGATION PRACTICE* § 27:3.2 (2019 ed.) (“Affirmative statements make more of an impact than neutral or negative statements.”).

²⁵ See BOUCHOUX, *supra* note 21, at 83 (“[N]egative words . . . are generally wordier than affirmative expressions.”).

²⁶ See VEDA R. CHARROW, MYRA K. ERHARDT & ROBERT P. CHARROW, *CLEAR AND EFFECTIVE LEGAL WRITING* 178 (4th ed. 2007) (“Negative statements . . . are generally more difficult for readers to process than positive statements.”); RAY & RAMSFIELD, *supra* note 14, at 247 (“Negative statements are harder to understand than positive ones, so state things positively whenever possible.”).

²⁷ SONYA G. BONNEAU & SUSAN A. MCMAHON, *LEGAL WRITING IN CONTEXT* 70 (2017).

²⁸ *Id.*

²⁹ *Id.*

³⁰ GLASER ET AL., *supra* note 12, at 197 (“Using a double negative is always confusing, almost always ambiguous, and almost always unnecessary.”); CHARROW, ERHARDT & CHARROW, *supra* note 26, at 179 (“More than two negatives make a clause exceedingly difficult or even impossible to understand.”); BOUCHOUX, *supra* note 21, at 83 (“The overuse of negatives is often confusing for the reader.”); RAY & RAMSFIELD, *supra* note 14, at 247 (“Multiple negatives are also hard to read, so avoid them.”).

³¹ BOUCHOUX, *supra* note 21, at 83.

³² *Id.* For research exploring why this is so, see *infra* section II.B.1.

³³ CHARROW, ERHARDT & CHARROW, *supra* note 26, at 178. This phenomenon does not require a double negative: the phrase *not sad* conveys a sense between *happy* and *sad* in the same way *not unhappy* does. See also Ye Tian & Richard

“deliberately ambiguous negatives do have a virtue—they can convey lukewarm enthusiasm. . . . ‘I do not oppose the chairman’s motion’ does not mean that I favor it. The instructor who says that a student’s writing is not bad does not mean it is good.”³⁴ Though these expressions do not involve explicit double negatives, they do have one explicit negative and one word with negative connotations.³⁵

Writers “may *occasionally* want to use double negatives to make a command or prescription more forceful.”³⁶ Professors Charrow, Erhardt, and Charrow note that the following negative sentence might be preferable to its positive counterpart:

Negative: “No client letter is to be sent out *unless* a senior partner has approved it.”³⁷

Positive: “A client letter is to be sent out *only after* a senior partner has approved it.”³⁸

Although the authors do not say so, it may be that phrasing the instruction as a prohibition emphasizes that an associate who disregards it is breaking a rule.

Looked at together, the advice from these experts indicates that negative statements should generally be avoided, particularly negative premises in syllogisms and double negatives. Under some circumstances, however, double negatives can be effective in conveying a middle state between two extremes and because they might make an order stronger.

B. “Giants in the Sky”:³⁹ The newer, science-based advice that negative writing is better (except when it isn’t)

Negativity can have other benefits, too, besides conveying subtleties or forcefulness through double negatives. Some legal writing scholars have discussed the science showing the *benefits* of negativity more broadly.⁴⁰

Breheeny, *Negation*, in *THE OXFORD HANDBOOK OF EXPERIMENTAL SEMANTICS AND PRAGMATICS* 195, 202 (Chris Cummins & Napoleon Katsos eds., 2019).

³⁴ Gertrude Block, *Language for Lawyers*, *FED. LAW*, Mar. 2012, at 54.

³⁵ See section ILC.

³⁶ CHARROW, ERHARDT & CHARROW, *supra* note 26, at 179 (emphasis added).

³⁷ *Id.*

³⁸ *Id.*

³⁹ SONDEHEIM & LAPINE, *Giants in the Sky*, on *INTO THE WOODS*, *supra* note 2.

⁴⁰ A pragmatic argument in favor of negativity came from Professor Helena Whalen-Bridge, who considered situations when an advocate might strategically choose to portray the client in a negative light. Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 *LEGAL COMM. & RHETORIC* 151, 152 (2019).

Negativity bias is our inclination to be more strongly affected “by negative experiences and information” than by positive ones.⁴¹

Negativity bias should affect a legal writer’s choices when “addressing adverse information,” “making policy arguments,” “choosing themes,” and “choosing tone,” advises Professor Kenneth D. Chestek.⁴² In an empirical study focused on “theme,” he asked judges to consider a hypothetical case that involved a dispute between a small business and the government.⁴³ The judges read one of nine different preliminary statements, some of which presented positive themes and others which presented negative themes.⁴⁴ After the judges read one of the nine preliminary statements, a neutrally written statement of stipulated facts, and a brief synopsis of the applicable law, they were asked to indicate which party they were inclined to rule in favor of and why.⁴⁵ Judges who read positively themed preliminary statements were more likely to focus on the law when explaining why they were inclined to rule for a given party, while judges who read negatively themed preliminary statements were more likely to focus on the facts in their explanations.⁴⁶ Further, when the preliminary statements focused on policy arguments, those stated negatively (a ruling for the other party would be bad for society) were more likely to result in a favorable outcome for the party than those stated positively (a ruling for my client would be good for society).⁴⁷ Thus, the results “confirm[ed] empirically the theoretical claim that policy arguments are more powerful if stated in the negative (that is, in terms of avoiding loss rather than providing gain).”⁴⁸

Professor Chestek’s empirical findings support the scholarship of Professor Michael R. Smith, who has recommended framing policy arguments negatively in order to take advantage of negativity bias and the related concepts of loss aversion and the endowment effect.⁴⁹ Loss aversion is our “tendency . . . to be . . . motivated [more] by the fear of loss than . . . by the prospect of gain.”⁵⁰ The endowment effect is, similarly, our “tendency . . . to experience more pain in giving up something . . . than the

⁴¹ Smith, *Sociological and Cognitive Dimensions*, *supra* note 16, at 77 (“Negativity bias refers to the tendency of people to be more impacted by negative experiences and information than they are by positive experiences and information.”). For the science behind the negativity bias phenomenon, see *infra* section I.I.C.

⁴² Chestek, *Of Reptiles and Velcro*, *supra* note 16, at 622, 624, 625, 629 (capitalized headings made lowercase here).

⁴³ Chestek, *Fear and Loathing*, *supra* note 16, at 8.

⁴⁴ *Id.* at 15–16.

⁴⁵ *Id.* at 15–17.

⁴⁶ *Id.* at 26.

⁴⁷ *Id.* at 31.

⁴⁸ *Id.* at 34.

⁴⁹ Smith, *Sociological and Cognitive Dimensions*, *supra* note 16, at 77–78.

⁵⁰ *Id.* at 77.

pleasure . . . in acquiring the same thing.”⁵¹ Together—negativity bias, loss aversion, and the endowment effect—“strongly suggest[],” Professor Smith concluded, “that legal advocates should phrase their policy arguments in terms of avoiding loss.”⁵² An example would be “[s]tat[ing] the argument in terms of avoiding the infringement or diminishment of the rights . . . rather than as protecting those rights.”⁵³

Not all science-backed scholarship favors negativity, however. Based on Professor Chestek’s study, a positively themed preliminary statement would be helpful to an advocate who wanted the judge to focus more on the law than the facts.⁵⁴ Further, preliminary statements based on character (the “good” character of the client or the “bad” character of the other party) were more successful when framed positively than negatively.⁵⁵ For one party, using a negative character preliminary statement backfired significantly: only 23.5% of participants who read that preliminary statement favored the government in a dispute between the government and a small business.⁵⁶

At least one scholar has addressed the potential problems with negating or refuting an opposing argument, which is a different type of negativity than the negative themes and frames supported by the research on negativity bias. Professor Adam G. Todd considered “scholarship based on neuroscience, neuropsychology, and related empirical studies [about] judicial decision making”⁵⁷ As part of that examination, he discussed the problems with “[t]rying to negate an assertion made by an opposing party”⁵⁸ Specifically, negations can sometimes reinforce the assertion being negated due to the way the negations are processed and held in memory.⁵⁹ Further, negations can be subject to “the backfire effect” when the negation challenges a reader’s “deeply held pre-existing position.”⁶⁰ Think, for example, of someone who believes strongly that vaccines are harmful. Showing that person evidence that vaccines are not harmful is likely to “backfire” and cause the original views to become even more entrenched.

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⁵¹ *Id.*

⁵² *Id.* at 77–78.

⁵³ *Id.* at 78.

⁵⁴ See Chestek, *Fear and Loathing*, *supra* note 16, at 26.

⁵⁵ *Id.* at 21.

⁵⁶ *Id.* at 29. Professor Chestek theorized that this was because we tend to root for an underdog, and that preference is triggered by a negative personal attack, but not by negative policy arguments since those are focused on society and thus “there is no ‘underdog.’” *Id.* at 30.

⁵⁷ Adam G. Todd, *An Exaggerated Demise: The Endurance of Formalism in Legal Rhetoric in the Face of Neuroscience*, 23 LEGAL WRITING 84, 85 (2019).

⁵⁸ *Id.* at 113.

⁵⁹ *Id.* at 113 & nn.162–63.

⁶⁰ *Id.* at 113.

Looking at yet another, broader type of negativity, Professor Kathryn Stanchi has taken a deep look at how to deal with “negative information,” meaning information that is adverse to the client’s interest or unfavorable for the client’s position.⁶¹ As relevant to language choices, Professor Stanchi discusses refutation as one possible way of handling negative information.⁶² To make a clear refutation, negation⁶³ will often be necessary.⁶⁴ For example, to refute an argument based on a statutory provision, an attorney might argue that the provision is not applicable for certain reasons.⁶⁵ Professor Stanchi concluded, among other things, that “overall, it is advantageous to preemptively disclose and refute adverse information” and that the benefits of refutation are clearest when it involves direct negation.⁶⁶

Lawyers and legal writers can benefit from the negativity bias, as these scholars have argued. Framing policy arguments negatively can be particularly useful. Negative arguments based on character might backfire, however, when they are made against an underdog. Further, using negation carries risks, though direct negations are the best way to refute adverse information.

II. Negative language and its consequences

The choice to use positive or negative language involves distinguishing two types of negative language: negation and negative valence—that is, (1) words or phrases that include “not” or its equivalent, whether explicitly (*not safe, unsafe*) or implicitly (*dangerous*); and (2) words or phrases with a negative or “bad” meaning (*weapon*). All three examples have negative valence, or meaning, only the first two have negation. Research can help us think through the consequences of choosing to use one or the other. Practical considerations should weigh in that choice, as well.

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

62 *Id.* at 388.

63 See *infra* section II.A for a definition of “negation” for purposes of this article.

64 Stanchi, *supra* note 61, at 429 (noting that “refutation” in the scientific literature includes things such as “arguing that a negative fact is simply not true or is not relevant to the issue, or arguing that an adverse authority is inapplicable or not actually adverse”).

65 Professor Stanchi’s examples of refutation include, “You may hear that the plaintiff was drinking, but his drinking is irrelevant to this dispute,” which has an explicit negation (*irrelevant*), and “While the Jones case has some facts in common with the current case, it is distinguishable on the key relevant facts,” which has an implicit negation (*distinguishable or not analogous*). *Id.*

66 *Id.* at 424, 429. Professor Stanchi noted, however, that it is not always possible to directly refute bad facts or bad law and thus lawyers may take more indirect paths: “[L]awyers who cannot directly negate a bad authority may reframe the question . . . or may read the authority broadly or narrowly to support their view. Lawyers seeking to deal with bad relevant facts may juxtapose them to more positive facts in order to blunt their force.” *Id.* at 430.

A. “Our Little World”:⁶⁷ Identifying negative language

What is negative language? Though we all likely have an intuitive understanding of what counts as “negative language,” the concept is somewhat difficult to pin down;⁶⁸ distinctions between types of negativity can even overlap in a single word. Authors tend to explain it by example rather than definition. The clearest examples are explicit: *no* and *not*, along with words with related prefixes such as *non-* or *un-*.⁶⁹ In addition, various legal writing textbooks and guides include the following in their lists of negative words: “*unless, without,*”⁷⁰ “*prohibit[], . . . refus[e], none, . . . never, . . . except, limit, preclude, refuse, . . . void,*”⁷¹ “*neglect to, . . . hardly, scarcely,*”⁷² “*failure, absent, and deny.*”⁷³

Many of these examples fall into the category of **negation**, either explicit (“not”) or implicit (“absent,” which is the equivalent of the explicit negation “not present”). The most straightforward example of negation is a statement that explicitly includes the word *not*.⁷⁴ As a matter of propositional logic, the definition ends there.⁷⁵ For any statement (or proposition) *A*, the negation is $\sim A$,⁷⁶ which is read as *not A*,⁷⁷ and understood to mean *it is not true that A*.⁷⁸ Therefore, if *A* is true, then $\sim A$ is false, and if *A* is

67 SONDEHEIM & LAPINE, *Our Little World, on INTO THE WOODS, supra* note 2.

68 See A.J. Ayer, *Negation*, 49 J. PHIL. 797, 797 (1952) (pointing out the ambiguity of a definition of positive and negative statements that relies on the presence or absence of words such as *no* or *not*: “the statement that Mt. Everest is the highest mountain in the world is to be classified, according to this principle, as affirmative and the statement that Mt. Everest is not the highest mountain in the world is to be classified as negative. But to say that Mt. Everest is the highest mountain in the world is to say that there is no mountain in the world which is as high as Mt. Everest, a statement which we have now to regard as negative, and to say that Mt. Everest is not the highest mountain in the world is to say that there is some mountain in the world which is higher than Mt. Everest, a statement which we have now to regard as affirmative. It would seem, therefore, that each of these statements is both affirmative and negative according to the means chosen for expressing it.”).

69 Kimble, *supra* note 12, at 54 (listing as examples of negative words “*no, not*, and words with negative prefixes (*in-*, *un-*, *non-*”); Ayer, *supra* note 68, at 797 (“In practice, one tends to regard a statement as negative if it is expressed by a sentence which contains such English words as *not, no, nobody, nowhere, nothing*, or the corresponding words in other languages.”); RAY & RAMSFIELD, *supra* note 14, at 247 (including “*unless [and] not unlike*” in a list of negative words).

70 Kimble, *supra* note 12, at 54.

71 BOUCHOUX, *supra* note 21, at 83.

72 RAY & RAMSFIELD, *supra* note 14, at 247.

73 CHARROW, ERHARDT & CHARROW, *supra* note 26, at 179.

74 Tian & Breheny, *supra* note 33, at 196 (referencing *no* and *not* as examples of negation).

75 See, e.g., G.E. HUGHES & M.J. CRESSWELL, *A NEW INTRODUCTION TO MODAL LOGIC* 4 (1996) (introducing the symbol for negation, which is read as “not,” and indicating that use of the negation symbol is negation).

76 One symbol used for negation is “ \sim .” See LAURENCE R. HORN, *A NATURAL HISTORY OF NEGATION* 79 (2001); GREG RESTALL, *LOGIC: AN INTRODUCTION* 26 (2006); HUGHES & CRESSWELL, *supra* note 75, at 4. Another symbol used for negation is “ \neg .” See IAN CHISWELL & WILLFRID HODGES, *MATHEMATICAL LOGIC* 24 (2007); Ye Tian & Richard Breheny, *Dynamic Pragmatic View of Negation Processing*, in *NEGATION AND POLARITY: EXPERIMENTAL PERSPECTIVES* 21, 21 (P. Larrivée & C. Lee eds., 2016); Sangeet Khemlani, Isabel Orenes & P. N. Johnson-Laird, *Negation: A Theory of Its Meaning, Representation, and Use*, 24 (5) J. COGNITIVE PSYCH. 541, 550 (2012).

77 HUGHES & CRESSWELL, *supra* note 75, at 4.

78 RESTALL, *supra* note 76, at 26.

false, then $\sim A$ is true.⁷⁹ Negation in propositional logic can be a part of complex reasoning,⁸⁰ but it is, at least, easy to define.⁸¹

In a natural language like English, defining negation is necessarily more complicated,⁸² though English negation sometimes looks much like negation in propositional logic. For example, for the positive statement *it is Monday*, the negation can be formed by inserting the word *not* to create the statement *it is not Monday*. The two statements carry opposite meanings. Linguists would say the two sentences have the opposite “truth value.”⁸³ If *it is Monday* is true, then *it is not Monday* must be false and vice versa.⁸⁴ Negation is, however, difficult to define;⁸⁵ explicit negation with the word *not*—or similar words and prefixes such as *no*, *un-*, and *non-*—is just the start.

Implicit negation in words or phrases lacks such explicit components. “With implicit negation, objects or actions are not directly denied, but rather their absence needs to be inferred from the statement.”⁸⁶ For example, “*doubt* and *ignore*” show implicit negation; they “correspond to *not believe* and *not attend to*.”⁸⁷

79 HORN, *supra* note 76, at xiii; see also HUGHES & CRESSWELL, *supra* note 75, at 4–5 (showing the truth values for a statement and its negation in a “basic truth-table,” which indicates when one is true the other is false).

80 One conclusion logicians will make about negated statements is that $\sim\sim A$ is equivalent to A . HORN, *supra* note 76, at xiii. In other words, double negatives are equivalent to the original positive statement.

81 See *id.* (describing the “simplicity” of negation in propositional logic); NOA P. CRUZ DÍAZ & MANUEL J. MAÑA LÓPEZ, NEGATION AND SPECULATION DETECTION 7 (2019) (stating that “negation in logic is well defined and syntactically simple”).

82 See HORN, *supra* note 76, at xiii (“[T]he form and function of negative statements in ordinary language are far from simple and transparent.”); DÍAZ & LÓPEZ, *supra* note 81, at 7 (“[I]n natural language [negation] is complex.”).

83 See Liuba Papeo & Manuel de Vega, *The Neurobiology of Lexical and Sentential Negation*, in THE OXFORD HANDBOOK OF NEGATION 740, 741 (Viviane Déprez & M. Teresa Espinal eds., 2020); Tian & Breheny, *supra* note 33, at 198 (“[N]egation reverses the truth value of a proposition.”).

84 Looked at in this light, the line between a positive sentence and a negative sentence might become muddy, since one is simply the opposite of the other.

85 See Papeo & de Vega, *supra* note 83, at 740 (noting the “lack of consensus among philosophers, linguists, psycholinguists, and cognitive scientists on the definition of negation”); Guillermo Eduardo Macbeth, María del Carmen Crivello, Mauro Bruno Fioramonti & Eugenia Razumiejczyk, *Chronometrical Evidence Supports the Model Theory of Negation*, SAGE OPEN (June 21, 2017), <https://journals.sagepub.com/doi/10.1177/2158244017716216> (“The meaning of negation seems to be clear in mathematical logic” but “less clear in pragmatics” and “much more unclear in psychology, particularly in the field of reasoning research.”); cf. MALIN ROITMAN, THE PRAGMATICS OF NEGATION: NEGATIVE MEANINGS, USES AND DISCURSIVE FUNCTIONS VII (2017) (“Negation is one of the most complex phenomena in language, seen from a formal linguistic perspective as well as from a functional, pragmatic perspective.”).

86 Józef Maciuszek, Mateusz Polak & Martyna Sekulak, *There Is No Item vs. I Wish There Were an Item: Implicit Negation Causes False Recall Just as Well as Explicit Negation*, PLoS ONE, at 2 (Apr. 12, 2019), <https://doi.org/10.1371/journal.pone.0215283>.

87 Ken Ramshøj Christensen, *The Neurology of Negation: fMRI, ERP, and Aphasia*, in THE OXFORD HANDBOOK OF NEGATION 725, 727 (Viviane Déprez & M. Teresa Espinal eds., 2020); accord Barbara Kaup & Carolin Dudschig, *Understanding Negation: Issues in the Processing of Negation*, in THE OXFORD HANDBOOK OF NEGATION 635, 637 (Viviane Déprez & M. Teresa Espinal eds., 2020) (describing “forgot, absent, few” as implicit negation); Khemlani, Orenes & Johnson-Laird, *supra* note 76, at 550 (using *open* as an example of implicit negation since it implicitly denies *closed*). For research exploring readers’ difficulty in grasping implicitly negative statements, see *infra* section II.B.1.

Some examples of negative language on the lists of legal writing scholars are words with **negative valence**, which are words with negative connotations. The valence of a word “is its quality of being perceived as ‘good’ versus ‘bad.’”⁸⁸ Words like “defeat, despair, sorrow, gloom, misery, sadness, tragedy, and weep” have negative valence, while words like “cheer, pleasure, delight, fun, humor, joy, comedy, and comfort” have positive valence.⁸⁹ A word’s valence can be negative (“crisis, weapon”), neutral (“ticket, member”), or positive (“friendship, courage”).⁹⁰

These two types of negative language are not mutually exclusive. Both negation and negative valence can appear in a single word or phrase. A word with negation can also have negative valence (e.g., *unhappy*). And a word with negative valence can be negated (e.g., *not grumpy*). The two types of negative language are also not coextensive. Some words with negative valence are not negations, implicit or explicit. *Fault*, for example, has negative valence but is not an implicit negation of another word.

B. “No More”:⁹¹ Research and theory about negation

The common wisdom about avoiding negative statements is now supported by research showing that subjects have more difficulty processing statements that use negation than statements without negation.⁹² This processing difficulty is seen in several different ways: people take longer to respond to questions with negation, are less accurate in their responses, and have poorer recall later.⁹³

One theory about why statements with negation are harder to process is that, in order to understand a statement with negation, people first mentally construct the positive version of that statement and then negate it.⁹⁴ For example, someone hearing *it is not Monday* will first process the

88 Kent C. Berridge, *Affective valence in the brain: modules or modes?*, 20(4) NATURE REV. NEUROSCIENCE 225, 225 (2019).

89 Christian Unkelbach, William von Hippel, Joseph P. Forgas, Michael D. Robinson, Richard J. Shakarchi & Chris Hawkins, *Good Things Come Easy: Subjective Exposure Frequency and the Faster Processing of Positive Information*, 28 SOC. COGNITION 538, 542–43 (2010).

90 Fumiko Gotoh, Tadashi Kikuchi & Ulrich Olofsson, *A Facilitative Effect of Negative Affective Valence on Working Memory*, 51 SCANDINAVIAN J. PSYCH. 185, 186 (2010).

91 STEPHEN SONDEHEIM & JAMES LAPINE, *No More, on INTO THE WOODS*, *supra* note 2.

92 See P.C. Wason, *The Processing of Positive and Negative Information*, Q. J. EXPERIMENTAL PSYCH., May 1959, at 92; Philip B. Gough, *Grammatical Transformations and Speed of Understanding*, 4 J. VERBAL LEARNING & VERBAL BEHAV. 107, 109 (1965); Larry Sowder & Guershon Harel, *Toward Comprehensibility Perspectives on the Learning and Teaching of Proof*, in SECOND HANDBOOK OF RESEARCH ON MATHEMATICS TEACHING AND LEARNING, 805, 826 (Frank K. Lester ed. 2007) (“Humans do not seem to process negative statements as readily as affirmative statements.”); Tian & Breheny, *supra* note 33, at 196 (“Negative sentences are found to be more difficult to process than positive sentences,” e.g., “The door is not open.” versus “The door is open.”).

93 See the studies described *infra* section II.B.1.

94 Tian & Breheny, *supra* note 33, at 202. *But see* Marco Tettamanti, Rosa Manenti, Pasquale A. Della Rosa, Andrea Falini, Daniela Perani, Stefano F. Cappa & Andrea Moro, *Negation in the Brain: Modulating Action Representations*, 43

positive version, *it is Monday*, and then apply the negation, *not*. That extra step could explain the slower processing time for negation. It could also explain why people sometimes misremember negated information.

Another theory is that negation is harder to process because it can require more context.⁹⁵ This is because statements with negation “are often used to deny or contradict a positive proposition.”⁹⁶ When the negation is taken out of context—presented without the corresponding positive information that it is contradicting—it is hard for the reader or listener to process.⁹⁷

The processing difficulty of negation may stem from its demands on working memory.⁹⁸ “[W]orking memory resources are required to process text as we read it, but there is a limit to how much we can hold in our working memory. If more resources are required to process text than are currently available for a reader, difficulties will arise.”⁹⁹ As someone reads a sentence, even a relatively simple one such as the first sentence of this paragraph, that person has to hold many pieces of information in working memory in order to relate the words and phrases to each other and understand the complete sentence.¹⁰⁰ That task becomes even harder with a more complex sentence such as the preceding one. And adding the word “not” increases the difficulty further because it requires additional processing.¹⁰¹

No matter the cause or theory, this processing difficulty has consequences for the reader’s attitude towards the writing or the propositions in the text: when readers struggle to understand what they are reading,

NEUROIMAGE 358, 370 (2008) (noting that their “results do not support the hypothesis of a greater processing load associated to negative sentences, and are in line with the idea of a reduced access to the negated information”).

⁹⁵ Tian & Breheny, *supra* note 33, at 207 (“Out-of-context negative sentences are more difficult to process than positives, and their positive counterparts are often represented in the early stage of processing.”). On the other hand, context can ameliorate or counteract the effects of negation. See *infra* section II.B.2.

⁹⁶ *Id.* at 204.

⁹⁷ *Id.* (“[N]egative sentences out of appropriate context are often infelicitous, and therefore hard to process.”).

⁹⁸ Sara J. Margolin, *Older Adults’ Comprehension of Transformational and Deactivation Negation*, 41 EDUC. GERONTOLOGY 604, 605 (2015) (noting negation may overtax working memory).

⁹⁹ *Id.*; see also Andrew M. Carter, *The Reader’s Limited Capacity: A Working-Memory Theory for Legal Writers*, 11 LEGAL COMM. & RHETORIC 31, 36 (2014) (“A foundational precept of working-memory theory is that working memory is a limited capacity resource. . . . Indeed, our ability to hold and process new information can strike one as surprisingly paltry.”).

¹⁰⁰ Marcel Adam Just & Patricia A. Carpenter, *A Capacity Theory of Comprehension: Individual Differences in Working Memory*, 99-1 PSYCH. REV. 122, 122 (1992) (“A listener or comprehender must be able to quickly retrieve some representation of earlier words and phrases in a sentence to relate them to later words and phrases.”).

¹⁰¹ Margolin, *supra* note 98, at 605. Though a few different theories address how negation is processed by the reader, they all indicate that negation increases the complexity of the processing. *Id.* at 604–05. One theory, for example, is that someone reading a sentence with negation first processes the positive version of the sentence and then adds the negation. *Id.* at 604.

they are less likely to trust what it says,¹⁰² are less likely to be persuaded by it,¹⁰³ and are more likely to have a lower opinion of the writer.¹⁰⁴

1. The difficulty with negation

People are slower to process statements with negation. In one study, participants were shown a simple picture of a star and a plus sign and a statement about the picture.¹⁰⁵ Participants were asked to indicate whether the statement (e.g., “star is above plus” or “star isn’t below plus”) was true or false.¹⁰⁶ Participants took longer to respond to the negative statements than to the positive statements.¹⁰⁷

Statements with multiple negatives are even more difficult for a reader to process.¹⁰⁸ In one study, participants read sentences with zero, one, two, three, or four negatives, and then were asked to decide whether the sentence was reasonable or unreasonable.¹⁰⁹ One sentence used in the study read, “Because he often worked for hours at a time, no one believed that he was not capable of sustained effort.”¹¹⁰ Readers’ response times and error rates both increased with the number of negatives used in the sentence.¹¹¹

Researchers have found similar results when the negation was implicit rather than explicit.¹¹² In one study, participants responded to a question that included either a positive statement (“John remembered to let the dog out.”) or its implicit negation (“John forgot to let the dog

¹⁰² Julie A. Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. REV. 287, 288 (2011) (“[T]he more ‘fluent’ a piece of written information is, the better a reader will understand it, and the better he or she will like, trust and believe it.”).

¹⁰³ Cf. Todd, *supra* note 57, at 117 (“Good organization of an advocate’s argument is persuasive because it lightens the readers’ cognitive load and permits them to easily follow the writer’s paradigm or theme in a way that favorably influences the readers.”).

¹⁰⁴ Lawrence M. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J.L. & POL’Y 7, 17 (2013) (“In other words, the harder it is to understand a passage, the less we think of the ability of the person writing it, and the more complex the passage turns out to be.”).

¹⁰⁵ Herbert H. Clark & William G. Chase, *On the Process of Comparing Sentences against Pictures*, 3 COGNITIVE PSYCH. 472, 483 (1972).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 484.

¹⁰⁸ See Mark A. Sherman, *Adjectival Negation Multiply and the Comprehension of Negated Sentences*, 15 J. VERBAL LEARNING & VERBAL BEHAV. 143, 148 (1976) (“A second negative adds considerably to comprehension time [but] the most dramatic increase in difficulty does indeed occur upon addition of a third negative Taken as a whole the 3-negative sentences used here were clearly beyond normal comprehension ability.”).

¹⁰⁹ *Id.* at 146, 147.

¹¹⁰ *Id.* at 146.

¹¹¹ *Id.* at 147.

¹¹² Marcel Adam Just & Herbert H. Clark, *Drawing Inferences from the Presuppositions and Implications of Affirmative and Negative Sentences*, 12 J. VERBAL LEARNING & VERBAL BEHAV. 21, 23–25 (1973).

out.”).¹¹³ Researchers also tested similar sentences with either “thoughtful” or “thoughtless.”¹¹⁴ Participants took longer to respond to sentences with implicit negation: response times were longer for “forgot” than “remember” and longer for “thoughtless” than “thoughtful.”¹¹⁵

People also have more difficulty *understanding* statements with negation. This is what participants in another study reported, having read short paragraphs that contained either a single negation or no negation.¹¹⁶ In addition, they answered comprehension questions about the paragraphs with negation less accurately.¹¹⁷ Although rereading the text led to more accuracy in the comprehension questions, the improvement was not significantly different for the paragraphs with negation than for those without it.¹¹⁸

Further, people can misremember negative information. Even when subjects’ immediate recall of negative information is accurate, as more time passed, the same subjects mistakenly recalled the positive version of the negative information: the “not” got lost when they tried to remember the information later.¹¹⁹ Participants in another study viewed a room filled with items and then were asked whether or not specific items had been in the room.¹²⁰ Participants’ initial recall was accurate, but they later incorrectly reported items had been present that they previously said were not.¹²¹

2. Reducing the difficulty with negation

People seem to have less difficulty with negation in narrative text (stories) than in expository text (essays), though negation in either type of text was still more difficult than text without negation. In one study, participants read short paragraphs that were either narrative or expository and that included either no negation, one negation, or two negations.¹²²

113 *Id.* at 24.

114 *Id.*

115 *Id.* In these word pairs, the negative words are implicit negations of the positive words, but they are also words with negative valence, which will be discussed in section I.C.

116 Sara J. Margolin & Natasha Snyder, *It May Not Be That Difficult the Second Time Around: The Effects of Rereading on the Comprehension and Metacomprehension of Negated Text*, 41 J. RES. READING 392, 396, 397 (2018).

117 *Id.* at 397.

118 *Id.* at 397, 398.

119 Susan Jung Grant, Prashant Malaviya & Brian Sternthal, *The Influence of Negation on Product Evaluations*, 31 J. CONSUMER RES. 583, 583 (2004) (“Respondents made accurate immediate discriminations but after a delay mistakenly reported items that they had earlier identified as not present.”). For experiments revealing this “lost *not*” tendency, see *infra* section II.B.2.

120 Klaus Fiedler et al., *Do You Really Know What You Have Seen? Intrusion Errors and Presuppositions Effects on Constructive Memory*, 32 J. EXPERIMENTAL SOC. PSYCH. 484, 506 (1996).

121 *Id.*

122 Sara J. Margolin & Paige A. Hover, *Metacomprehension and Negation: Assessing Readers’ Awareness of the Difficulty of Negated Text*, 32 READING PSYCH. 158, 161–62 (2011).

Participants read the paragraphs with negation more slowly, reported that those paragraphs were harder to understand, and answered comprehension questions about those paragraphs less accurately.¹²³ In addition, the effects of negation on comprehension were more pronounced in expository texts than in narrative texts.¹²⁴ Although the author did attempt to explain the reasons for these differences in the results, others have theorized that—negation aside—narrative text is easier to understand and remember than expository text because of the characteristics of stories: “Stories are more familiar than essays in many ways, including their resemblance to everyday experience [and] prevalence throughout human history In addition, stories are often more emotional than essays, and emotion can aid memory.”¹²⁵ Though those authors did not consider negation, they concluded more generally that their meta-analysis of other studies showed that “people had an easier time comprehending and recalling narrative texts compared to expository ones.”¹²⁶

Theories about context do not provide a complete explanation for why statements with negation are more difficult to process,¹²⁷ yet providing context does seem to aid readers with the processing task. Most studies about negation processing did not provide context for the negative statements.¹²⁸ When they did, however, readers’ difficulty in processing “diminish[ed] or disappear[ed].”¹²⁹ In one study, participants read a very short story that concluded with a positive or negative statement, e.g., “the water was warm” or “the water was not warm.”¹³⁰ Earlier in the story, participants had seen a sentence that either provided some explicit context or did not provide explicit context, e.g., the protagonist “wondered whether the water would be warm” or she “wondered what the water would be like.”¹³¹ Researchers measured how long it took participants to read each sentence in the story.¹³² They found that the explicit context did not significantly affect the reading times for the positive sentences, but

123 *Id.* at 163–65.

124 *Id.* at 166 (“[T]he adverse effect of negation on reading comprehension . . . was particularly substantial for expository text.”).

125 Raymond A. Mar et al., *Memory and Comprehension of Narrative Versus Expository Texts: a Meta-analysis*, 28 PSYCHONOMIC BULL. & REV. 732, 733 (2021).

126 *Id.* at 745.

127 Tian & Breheny, *supra* note 33, at 204 (acknowledging open questions about the context explanation for the difficulty of processing negation).

128 *Id.* at 199–200.

129 *Id.* at 200, 207.

130 Jana Lüdtké & Barbara Kaup, *Context Effects when Reading Negative and Affirmative Sentences*, 28 PROCEEDINGS OF THE ANNUAL MEETING OF THE COGNITIVE SCIENCE SOCIETY 1735, 1736 (2006).

131 *Id.*

132 *Id.*

did improve the reading times for the negative sentences.¹³³ When explicit context was absent (she “wondered what the water would be like”), the participants took significantly longer to read the negative sentence.¹³⁴ In another study, which used eye-tracking data to analyze the participants’ information processing, the researchers found that, while context “can indeed aid the processing of negation, the latter still remained more difficult to process than affirmation, regardless of context.”¹³⁵

The difficulty with negation may also be reduced or eliminated when negation is used with specific types of words and concepts. In one study, the researchers presented participants with descriptions of people using descriptive words that were “uni-polar” or “bi-polar.”¹³⁶ Bipolar descriptions come in pairs where each word in the pair is an easy-to-think-of opposite of the other word.¹³⁷ Unipolar descriptions are words that do not have an obvious opposite counterpart.¹³⁸ The words *tidy* and *messy* are a bipolar pair because they have opposite meanings and are commonly understood to be opposites.¹³⁹ The word *responsible* is unipolar because there is no word that is commonly understood to be the opposite of *responsible* aside from the explicit negation *irresponsible* or *not responsible*.¹⁴⁰

The participants in this study read a description of a person with either a bipolar descriptive word or a unipolar one.¹⁴¹ Each description, whether bipolar or unipolar, was either positive (“Tom is a tidy person.”) or negative (“Tom is not a tidy person.”)¹⁴² Participants then read another sentence about the same person and indicated whether the second sentence logically fit with the information in the first sentence, did not

133 *Id.* (“[T]he processing of the negative sentences was greatly facilitated when the negated proposition was explicitly mentioned in the prior text.”).

134 *Id.* at 1737; see also Elena Albu, Oksana Tsaregorodtseva & Barbara Kaup, *Contrary to Expectations: Does Context Influence the Processing Cost Associated with Negation?*, 50 J. PSYCHOLINGUISTIC RSCH. 1215, 1234 (2021).

135 Isabel Orenes, Linda Moxey, Christoph Scheepers & Carlos Santamaría, *Negation in Context: Evidence from the Visual World Paradigm*, 69 Q. J. EXPERIMENTAL PSYCH. 1082, 1089 (2016).

136 Ruth Mayo, Yaacov Schul & Eugene Burnstein, *“I Am Not Guilty” vs “I Am Innocent”: Successful Negation May Depend on the Schema Used for Its Encoding*, 40 J. EXPERIMENTAL SOC. PSYCH. 433, 440 (2004).

137 *Id.*

138 *Id.* The researchers identified the words for each list through a pretest in which participants were given descriptive words and asked “to write down the first word with an opposite meaning that came to mind.” *Id.* at 441. Where pretest participants identified pairs of words as opposites of each other, e.g., “[t]idy/messy,” the researchers classified those words as a bipolar pair. *Id.* Where pretest participants could not think of a word meaning the opposite of the original word or merely used negation to give the opposite meaning of the original word, e.g., “talented,” the researchers classified that word as unipolar. *Id.*

139 *Id.* at 436–37, 441.

140 *Id.* at 441.

141 *Id.*

142 *Id.* at 437, 441.

fit, or whether it was “impossible to tell.”¹⁴³ With the Tom example, these participants (who had first read either that Tom was tidy or not tidy) then saw one of the following three sentences and asked to indicate whether the second sentence logically fit with the first sentence:

Tom’s clothes are folded neatly in his closet.
 Tom forgets where he left his car keys.
 Tom likes to have long conversation on the phone.¹⁴⁴

A unipolar example is the description “Maya is responsible” or its negation “Maya is not responsible.”¹⁴⁵ With one of those as the first sentence, participants might have seen one of the following three sentences next.

Maya pays her bills on time.
 Maya frequently misses deadlines at work.
 Maya likes to read.

After that initial phase of the experiment, in which participants had to answer the question about fit, there was a five-minute “filler task,” then participants were tested on their memory of the descriptions.¹⁴⁶

When the statements involved bipolar descriptive terms, participants answered the fit question faster for statements that logically fit with the first, whether the original description was a positive statement or a negative one.¹⁴⁷ For example, some participants read about Tom being tidy or not tidy. Those who read the positive version were quicker to answer the fit question when the second sentence was “Tom’s clothes are folded neatly in his closet,” which logically fits with the first sentence about Tom’s tidiness. Those who read the negative version, that Tom was not tidy, were quicker to answer the fit question when the second sentence was “Tom forgets where he left his car keys,” which logically fits with the first sentence about Tom’s lack of tidiness.

When the statements involved unipolar descriptions, however, the results showed a difference depending on whether the first statement was positive or negative. For positive statements involving unipolar descriptions, participants were faster to answer the fit question when the

143 *Id.* at 436, 441.

144 *Id.* at 437.

145 “Responsible” is on the list of unipolar descriptive words used in the study. *Id.* at 441. The sentences in this example are mine.

146 *Id.* at 442.

147 *Id.* at 442–43.

second sentence did logically fit than when it did not.¹⁴⁸ For the unipolar statements with negation, participants answered more quickly when the second sentence did not logically fit with the first sentence.¹⁴⁹ As an example, if participants read a sentence like “Maya is responsible,” they were quicker to answer about logical fit when the second sentence was something like “Maya pays her bills on time,” which logically fits with the first sentence. If, on the other hand, participants first read “Maya is not responsible,” they were quicker to answer about logical fit when the second sentence was something that did not logically fit, such as “Maya meets deadlines at work.”

On the memory task, participants had the best recall of positive statements.¹⁵⁰ They remembered statements such as “Tom is tidy” and “Maya is responsible” better than the negated versions of each, “Tom is not tidy” and “Maya is not responsible.” Participants also “were more accurate in remembering the meaning of bi-polar negations . . . than uni-polar negations.”¹⁵¹ Participants were more likely with unipolar negation to make a memory mistake when they forgot the “not,” “e.g., remembering ‘not responsible’ as ‘responsible.’”¹⁵²

The researchers concluded that negation “may activate associations . . . opposite to the intended meaning of the negation,” causing the reader to “remember the message as if it had not been negated.”¹⁵³ Yet these effects occur only in situations such as the unipolar descriptions lacking “readily available schema with an opposite meaning” of the negated term.¹⁵⁴ In situations such as the bipolar descriptions, on the other hand, when there is “an alternative opposite schema that can capture the meaning of the negation, then the effect of negation is similar to that of affirmation.”¹⁵⁵ Whereas readers have a tendency to misremember negated unipolar descriptions, such as reading “not responsible” and remembering “responsible” instead, those types of mistakes are less likely to occur with negated bipolar descriptions such as “not tidy,” which they can easily replace with “messy.”

¹⁴⁸ *Id.* at 438, 443.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 444.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

C. “Agony”:¹⁵⁶ Research and theory about negative valence

Like negation, words with negative valence can be harder for people to process. This processing difficulty may, however, be offset by the fact that words with negative valence tend to grab attention.

Researchers have found that people process positively valenced words more quickly than negatively valenced words.¹⁵⁷ One study used the words “cheer, pleasure, delight, fun, humor, joy, comedy, and comfort” and “defeat, despair, sorrow, gloom, misery, sadness, tragedy, and weep.”¹⁵⁸ Participants were shown the words in a random order and asked, for each word, to indicate whether the word was positive or negative.¹⁵⁹ The researchers analyzed how long it took participants to classify the words and found that “positive words were . . . classified faster than negative words.”¹⁶⁰

One theory is that the processing difficulty of negative valence may be because words with negative valence are attention grabbing, so the brain has less attention available to devote to other processes.¹⁶¹ This attention-capturing characteristic partly explains the pull of negativity bias.¹⁶²

Negativity bias is a psychological principle: “[I]n most situations, negative events are more salient, potent, dominant in combinations, and generally efficacious than positive events.”¹⁶³ “[B]ad is stronger than good.”¹⁶⁴ We are more likely to pay attention to negative information,¹⁶⁵ including words with negative valence,¹⁶⁶ and are therefore more likely

156 SONDEHEIM & LAPINE, *Agony*, on INTO THE WOODS, *supra* note 2.

157 Unkelbach et al., *supra* note 89, at 542–43.

158 *Id.* at 542.

159 *Id.*

160 *Id.* at 543; see also Christian Unkelbach, Klaus Fiedler, Myriam Bayer, Martin Stegmüller & Daniel Danner, *Why Positive Information Is Processed Faster: The Density Hypothesis*, 95 J. PERSONALITY & SOC. PSYCH. 36, 39 (2008).

161 Ken Kihara & Naoyuki Osaka, *Early Mechanism of Negativity Bias: An Attentional Blink Study*, 50 JAPANESE PSYCH. RES. 1, 1 (2008) (“Negativity bias occurs because of an attentional bias toward negative stimuli. Therefore, negative stimuli, once having reached awareness, should interfere with other attentional processes.”).

162 For legal-writing scholars’ take on negativity bias, see *supra* section I.B.

163 Rozin & Royzman, *supra* note 1, at 297. “There are exceptions to this claim, but they constitute a minority of cases and often involve special circumstances.” *Id.*

164 Roy F. Baumeister, Ellen Bratslavsky, Catrin Finkenauer & Kathleen D. Vohs, *Bad is Stronger than Good*, 5 REV. GEN. PSYCH. 323, 323 (2001). So expressed by psychologists based on a broad review of evidence related to positive and negative events.

165 Elizabeth Gale-Bentz, Naomi E. S. Goldstein, Lindsey M. Cole & Kelley Durham, *Impact of Community-Based Provider Reports on Juvenile Probation Officers’ Recommendations: Effects of Positive and Negative Framing on Decision Making*, 43 LAW & HUM. BEHAV. 193, 194 (2019) (“[P]eople attend more to negative information, stimuli, and events than to positive information, stimuli, and events, and they remember the negative more than the positive.”); Kihara & Osaka, *supra* note 161, at 1 (“Negativity bias occurs because of an attentional bias toward negative stimuli. Therefore, negative stimuli, once having reached awareness, should interfere with other attentional processes.”).

166 Fumiko Gotoh, *Influence of Affective Valence on Working Memory Processes*, 43(1) INT’L J. PSYCH. 59, 60 (2008) (“[R]esearch has revealed that threat-related words (e.g., death, disease, failure) are more likely to capture attention than emotionally neutral words.”).

to remember and be influenced by that information.¹⁶⁷ Think about the last time you had a difficult commute. You probably remember plenty of details about the terrible traffic, crowded trains, rude drivers, and how frustrated or upset you were. When your commute is perfectly smooth and uneventful, on the other hand, you might not even notice, even if a stranger does something helpful like holding a train door or letting you merge.

This is of course true for readers of legal writing, as well. If words with negative valence are attention-grabbing, then this is no less so for negative information, generally.¹⁶⁸ And it goes beyond catching attention: “People engage[] in more thinking and reasoning about bad than good events.”¹⁶⁹ And deeper thought means that more is retained. Readers will recall “sentences describing people’s undesirable behaviors . . . better than sentences describing desirable or neutral behaviors”;¹⁷⁰ they “show[] better recognition memory for negative than positive items,” as well as for their sources, and “negative words more successfully than positive words.”¹⁷¹ Readers displayed “slower responses and more eyeblinks” with negative words, “both of which indicate greater conscious processing.”¹⁷² For these study participants, “bad information about a stimulus person or new acquaintance [also] carried more weight and had a larger impact on impressions than good information.”¹⁷³

This negativity bias may offset the slower processing associated with negative valence. Whereas negative valence “can impair working memory performance,”¹⁷⁴ “it is still possible that negative valence could facilitate working memory by attracting attention to critical stimuli.”¹⁷⁵ Further, negative valence helps with recall: “Because we are prone to processing bad information more extensively, we are more likely to remember bad things.”¹⁷⁶ In one study, participants were shown a word and asked to state

¹⁶⁷ Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1066 (2018) (“Research on cognitive biases indicates that negative information is more influential on behaviors and cognitions than equivalent positive information.”); Chestek, *Of Reptiles and Velcro*, *supra* note 16, at 606 (“[O]ur brains are more apt to process, and retain, negative information as opposed to positive information.”); Smith, *Sociological and Cognitive Dimensions*, *supra* note 16, at 77 (“Negativity bias refers to the tendency of people to be more impacted by negative experiences and information than they are by positive experiences and information.”).

¹⁶⁸ Rozin & Royzman, *supra* note 1, at 300.

¹⁶⁹ Baumeister, Bratslavsky, Finkenauer & Vohs, *supra* note 164, at 341.

¹⁷⁰ *Id.* at 343.

¹⁷¹ *Id.* at 343–44.

¹⁷² *Id.* at 344.

¹⁷³ *Id.*

¹⁷⁴ Gotoh, Kikuchi & Olofsson, *supra* note 90, at 185.

¹⁷⁵ *Id.*

¹⁷⁶ Chestek, *Of Reptiles and Velcro*, *supra* note 16, at 610. *But see* Rozin & Royzman, *supra* note 1, at 305 (“[T]he existence of a negativity bias (negative potency) in memory is controversial. . . . Our own consideration of the literature inclines us to support a positivity bias view in memory.”).

the color the word was printed in.¹⁷⁷ The words represented desirable and undesirable personality traits (e.g., “sadistic, honest, and outgoing”).¹⁷⁸ The researchers found that response times were longer for undesirable personality traits than for desirable personality traits.¹⁷⁹ When the researchers repeated the experiment and asked participants at the end to list as many of the words as they could, participants tended to recall more undesirable than desirable traits.¹⁸⁰

D. “Stay with Me”:¹⁸¹ Practical considerations about negative language

There are, of course, times when negative language is not just desirable because of negative bias, but necessary. Denial is one of the main functions of negation,¹⁸² and it can require explicit negation. A criminal defendant and the defendant’s lawyer will both want to deny that the client is guilty.¹⁸³ Although implicit denial is possible,¹⁸⁴ and the defendant and lawyer can avoid the explicit negation altogether by saying the client is innocent, that may not be feasible in every situation. When entering a plea, the client will need to say, “Not guilty.” Similarly, if the burden of proof is on the plaintiff, the defendant will want—or even need—to say, “The plaintiff did not meet the burden of proof.” The defendant might choose instead to say, “The plaintiff failed to meet the burden of proof.” But that would be implicit negation (*failed to* is the equivalent of *did not*) and involve negative valence (*failed*), and so would likely be even more difficult for the reader to process than the explicit denial with explicit negation.

Linguists, like legal writing scholars, have discussed the use of negation in such ambivalent phrases as *not unmindful* and *not unhappy*.¹⁸⁵ And sometimes, to indicate an emotion somewhere between its opposites,

¹⁷⁷ Felicia Pratto & Oliver P. John, *Automatic Vigilance: The Attention-Grabbing Power of Negative Social Information*, 61(3) J. PERSONALITY & SOC. PSYCH. 380, 381 (1991).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 383.

¹⁸⁰ *Id.* at 385.

¹⁸¹ SONDEHEIM & LAPINE, *Stay with Me*, on INTO THE WOODS, *supra* note 2.

¹⁸² Tian & Breheny, *supra* note 76, at 28 (“[A] main function of negation in natural language is denial.”); see also Bart Geurts, *The Mechanisms of Denial*, 74 LANGUAGE 274, 274–75 (1998) (providing examples of sentences where “negation is used to make a denial”).

¹⁸³ Geurts, *supra* note 182, at 275 (describing “[t]he cook is not guilty” as a “proposition denial” because it is a denial of the proposition “[t]he cook is guilty”).

¹⁸⁴ Michael P. Jordan, *The Power of Negation in English: Text, Context and Relevance*, 29 J. PRAGMATICS 705, 720–21 (1998) (discussing examples of implicit denial).

¹⁸⁵ See *supra* notes 33–34 and accompanying text; HORN, *supra* note 76, at 298 (“[A] man may be not unhappy because he is happy or because he is situated in the nonexcluded middle between the two contrarily opposed terms.”).

the doubly explicit, self-neutralizing phrase (such as *not unhappy*) might be necessary.¹⁸⁶

Negations may also be necessary at times to avoid excessive wordiness. “Negations,” note some cognitive psychologists, “can be a parsimonious way to communicate information.”¹⁸⁷ They give the following example:

Speaker A: How did that soccer team you coach do last season?

Speaker B: Fine; but we lost every game when the team did not have a striker.¹⁸⁸

“No parsimonious affirmative way exists to refer to a team without a striker,”¹⁸⁹ they say. Speaker B might say, “We lost every game when the team lacked a striker,” which would eliminate the explicit negation only by introducing implicit negation (*lacked*). The implicit negation version is somewhat more “parsimonious,” but no more affirmative than the original.

III. Six principles for using negative language

Deciding whether and when to use negative language is not easy, but it can be easier if we apply the lessons researchers have taught us. Distilled, these lessons suggest six principles to consider in using negative language in legal writing.

Principle 1: Use negation to make an explicit denial.

Although statements with negation can be more difficult for a reader to process,¹⁹⁰ legal writers might still choose to use negation in order to make an explicit denial.¹⁹¹ Lawyers may want—or even need—to use explicit negation in order to argue that a defendant is not guilty or that the other side has not met a burden.¹⁹² Thus in their brief before the Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen*,¹⁹³ the

¹⁸⁶ See *id.* at 299 (“[A] not unhappy person is normally interpreted as ‘a slightly-to-moderately happy person.’”). In word pairs such as *happy* and *sad*, the positive term in the pair usually “defines the dimension.” Rozin & Royzman, *supra* note 1, at 313. When we want to discuss how happy or sad something is, we refer to that as happiness rather than sadness. *Id.* Further, “the marked (negated) positive term usually represents the negative end of the dimension, whereas the marked (negated) negative term represents the neutral point. Thus, unhappy means sad, whereas unsad means neutral.” *Id.* at 313–14.

¹⁸⁷ Khemlani, Orenes & Johnson-Laird, *supra* note 76, at 550.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* section II.B.1.

¹⁹¹ See *supra* section II.D.

¹⁹² See *id.*

¹⁹³ 142 S. Ct. 2111 (2022).

respondents explicitly argued, negatively, that the petitioners had not made a necessary showing: “New York’s ‘proper cause’ requirement falls well within the mainstream of historical restrictions on carrying firearms in public. . . . Petitioners thus cannot show that New York’s law is an ‘extreme’ outlier akin to the ban on home handgun possession invalidated in *Heller*.”¹⁹⁴

Similarly, legal writers often need to refute an argument made by the other side, and negation may be the best and clearest way to do so.¹⁹⁵ The respondents in *Bruen* used negation in this way as well. The respondents first noted that, due to extremely high population density in New York City, the requirements for carrying a handgun there are stringent.¹⁹⁶ Then came the negation: “This more exacting showing is not required elsewhere in New York State, contrary to petitioners’ suggestion.”¹⁹⁷ The respondents used explicit negation—*not*—to directly address a point made in the petitioners’ brief. The phrase, “contrary to petitioners’ suggestion” no less explicitly indicated the respondents’ rejection and refutation of the petitioner’s argument.

It is difficult, or even impossible, to imagine how the respondents in *Bruen* could have avoided negation in these situations. To argue something is “not required,” an attorney will need to say exactly that. And Professor Stanchi’s scholarship indicates that this type of direct response is the best way to refute adverse information when it is possible.

Principle 2: Use negation when no concise positive version is equivalent.

There may be times when negation is needed, despite the potential downsides, because there is no other way to make the point, at least without excessive wordiness.¹⁹⁸ In the fact section of petitioners’ brief in *Bruen*, petitioners noted that “[e]fforts to disarm disfavored groups were not limited to the postbellum South.”¹⁹⁹ *Disarm* and *disfavored* seem necessary here. Although both terms involve negation in the form of the prefix *dis-*, it is difficult to think of alternate positive terms to use, or to think of a way to rework the sentence to make the same point without negation.²⁰⁰

¹⁹⁴ Brief for Respondent at 21, *N.Y.S. Rifle & Pistol Ass’n, Inc., v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (internal citation omitted).

¹⁹⁵ See *supra* notes 61–66 and accompanying text.

¹⁹⁶ Brief for Respondent at 9–10, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

¹⁹⁷ *Id.* at 10.

¹⁹⁸ See *supra* section II.D.

¹⁹⁹ Brief for Petitioner at 13, *N.Y.S. Rifle & Pistol Ass’n, Inc., v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

²⁰⁰ The phrase *not limited*, however, could be avoided: Efforts to disarm disfavored groups existed beyond the postbellum South.

Extra caution is needed, however, in these situations. If there is no clear way to rephrase a statement to avoid negation, it may be that one or more words are unipolar,²⁰¹ and unipolar words run the risk that the reader will forget the negation and think instead of the positive version.²⁰² The words *arm* and *avored* seem to be unipolar: for both, there is no word that springs to mind that means their opposite, aside from the negations *disarm* and *disavored*. A reader might misremember *arm* and *avored*, instead.²⁰³ (With this particular sentence, however, it is difficult to imagine that the sentence would be misunderstood or misremembered.)

Principle 3: Use negation when needed to convey a middle ground between two opposites.

Legal writers might choose to use the “*not un-* . . .” kind of formula to communicate a sense somewhere between two extremes. One item in the table of contents for the petitioner’s brief in *Kennedy v. Bremerton School District*,²⁰⁴ seems particularly difficult to parse: “Declining to Prohibit Private Religious Exercise Does Not Create Establishment Clause Concerns.”²⁰⁵ The sentence includes three different words of explicit or implicit negation: *declining*, *prohibit*, and *not*. The negation likely makes it hard for the reader, who wants to untangle the negatives, to process the sentence.²⁰⁶ On the other hand, the authors of the brief might have used that phrasing strategically to convey a meaning somewhere between *allowed* and *prohibited*. Just as most readers understand that *not unhappy* is not the same as *happy*,²⁰⁷ readers probably understand that *declining to prohibit* is not the same as *permitting*, which implies more of an active role on the part of the school district. The choice of *declining to prohibit* makes the petitioner’s position seem softer and therefore easier to agree with: schools do not have to actively permit the private exercise of religion; they should merely refrain from prohibiting it.

In their brief in *Bruen* the petitioners used the “*not un-*” construction in a similar way.²⁰⁸ In discussing the history of the right to bear arms, the brief’s authors note that “the English right was not unfettered.” This indicates to the reader that, in historical England at least, the state of

.....

²⁰¹ I.e., words without an opposite (*talented*), that must be negated (*untalented*), versus bipolar words, e.g., (*tidy*, *messy*). See *supra* section II.B.2.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ 142 S. Ct. 2407 (2022).

²⁰⁵ Brief for Petitioner at iv, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (No. 21-418).

²⁰⁶ See *supra* section II.B.1.

²⁰⁷ See *supra* notes 186–87 and accompanying text.

²⁰⁸ Brief for Petitioner at 5, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

the law was somewhere in the middle ground between complete prohibition and complete free-for-all. There were limitations. That rephrasing, however, seems to be a reasonable alternative to the double negative. The authors could have instead said “the English right had limitations.” In fact, they used the word *limitations* in the very next sentence of the brief,²⁰⁹ indicating that they saw it as having the same or similar meaning to *not unfettered* in this context.

These two examples illustrate the nuances involved in so many of these choices about positive or negative language. Both briefs used the *not un-* construction, but only one did so in a way that seems necessary and useful. The petitioner’s brief in *Kennedy* used *declining to prohibit* to indicate the middle ground between *prohibit* and *permit*. More than that, though, the phrase conveys a sense that the school district’s role was less active than either prohibition or permission. There seems to be no affirmative alternative that would get the same meaning across. The petitioner’s brief in *Bruen*, in contrast, used *not unfettered* when *had limitations* would have conveyed the same meaning.

Principle 4: Use negative valence to draw attention.

Although words with negative valence can be more difficult for a reader to process, that is at least partially offset by the fact that words with negative valence capture attention, via negativity bias.²¹⁰ Legal writers can, then, choose to use words with negative valence for their attention-capturing effect. In *Bruen*,²¹¹ the petitioners’ table of contents included this point heading:

New York’s Restrictive Carry Regime Violates The Second Amendment²¹²

The words *restrictive* and *violates* have negative valence. So do the words *contrary* and *distorts* in the table of contents for the petitioner’s brief in *Kennedy*:²¹³

The Ninth Circuit’s Contrary Conclusion Distorts the Record, This Court’s Cases, and the Constitution²¹⁴

209 *Id.*

210 See *supra* section II.C.

211 142 S. Ct. 2111 (2022).

212 Brief for Petitioner at iv, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

213 142 S. Ct. 2407 (2022).

214 Brief for Petitioner at iv, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

Both these examples avoid negation but use negative valence. While the words with negative valence may be harder for the reader to process, they also capture attention. The phrases “restrictive carry regime violates” and “contrary conclusion distorts” both seem to be effective in drawing the reader’s focus.

Principle 5: Use more caution with negation when there is little context.

In an appellate brief, the table of contents is often the first place the readers of the brief will see any substantive information about the case.²¹⁵ It is, therefore, the place in the brief where the reader likely has the least context to help make sense of any negation. Consider the Argument section of the Table of Contents for the petitioner’s brief in *Kennedy*,²¹⁶ and, in particular, the point heading for Part II of the Argument:

- I. The Free Speech And Free Exercise Clauses Doubly Protect Coach Kennedy’s Religious Exercise
 - a. The First Amendment Robustly Protects the Religious Exercise and Expression of Public-School Employees
 - b. Kennedy’s Religious Exercise Was Not the District’s Speech
- II. The Establishment Clause Does Not Compel Public Schools To Purge From Public View All Religious Exercise Of Coaches And Teachers
 - a. Declining to Prohibit Private Religious Exercise Does Not Create Establishment Clause Concerns
 - b. The Ninth Circuit’s Contrary Conclusion Distorts the Record, This Court’s Cases, and the Constitution²¹⁷

Point I, which addresses the free-speech and free-exercise clauses, is substantively distinct from Point II, which is about the establishment clause. So context cannot help the reader process the negation in Point II (“does not compel”).²¹⁸ The authors of the brief might have instead written, affirmatively, “Public Schools May, Consistent with the Establishment Clause, Allow Coaches and Teachers to Engage in some Religious Exercise even in Public View.” On the other hand, the negatively valenced *purge* is powerful here. Had they been considering their use of negative language, the authors may have chosen to leave Point II as-is despite the difficulty

²¹⁵ See HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* 376 (7th ed. 2018) (“Because the point headings appear in the Table of Contents at the beginning of the brief, they are often the reader’s introduction to the substance of the Argument.”).

²¹⁶ 142 S. Ct. 2407 (2022).

²¹⁷ Brief for Petitioner at iv, *Kennedy*, 142 S. Ct. 2407 (No. 21-418) (all words capitalized as in the brief).

²¹⁸ *Id.*

readers may have with the out-of-context negation. Alternatively, if the authors revised Point II to be phrased affirmatively as I've suggested, they might also revise II.a to include *purge* and explicit negation. The context provided by an affirmative Point II would help ease the reader's processing of negation in II.a.

Principle 6: Use more caution with negation in expository text.

Text with negation is harder for readers to process in most situations, but the effect of negation seems to be larger in expository text than in narrative text.²¹⁹ In the context of legal writing and persuasive briefs, that would indicate that negation is less negative in the statement of facts than in the argument. In the brief for respondents in *Kennedy*,²²⁰ the discussion of the factual background of the case includes this sentence: "The District assured Kennedy . . . that it did 'not purport to control [his] private conduct, including exercise of his religious rights' while 'not on duty' . . ." ²²¹ Though that sentence is hard to parse, especially with the multiple negatives,²²² the effect on the reader is likely reduced by the fact that it is narrative text; it's part of a story. There is a similarly confusing sentence in the argument section of the brief: "To say that the District was forbidden to step in is not just legally unsupported, but cruel to the students, and disrespectful to their parents."²²³ In a non-narrative context, such a sentence is likely more difficult for the reader. The authors could help their readers understand the point more quickly and easily by eliminating some of the negation: "The District had the authority and ability to step in. Any argument to the contrary is legally unsupported, cruel to the students, and disrespectful to their parents." Though this new version does not eliminate all negation (*unsupported* and *disrespectful* remain), it does remove the particularly confusing double negative of "not just legally unsupported" and should be easier for the reader than the original version.

Conclusion

This journey "into the woods" of linguistic research and theory should help legal writers decide when, and when not, to use negative language. The distinction between negation and negative valence, and the research on each type of negative language, can guide writers on how to think

²¹⁹ See *supra* notes 122–26 and accompanying text.

²²⁰ 142 S. Ct. 2407 (2022).

²²¹ Brief for Respondent at 7, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (No. 21-418).

²²² See *supra* notes 94–97 and accompanying text.

²²³ Brief for Respondent at 7, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

through the choice to use negative or positive language. Yet the principles distilled from this research are surely not the last word on negative language in legal writing. Linguists, psychologists, and others will no doubt continue to shape our understanding of when and how to use negation and negative valence in writing. We might need to reconsider or refine the principles laid out in this article. We might discover reasons to add new principles to the list. The choices and consequences are not simple, but it is worthwhile to think them through.

Do Client Narratives Belong in Attorney Ethics Hearings?

Amy H. Soled*

I. Introduction

Client after client testified that the attorney failed to appear at proceedings, did not return phone calls, and repeatedly assured them that settlements had been reached when, in fact, they had not.¹ The lawyer for the accused attorney began his opening statement with his client's story, a story about a troubled wife who worked in the law office and a father-in-law who had committed suicide while living with the couple. The lawyer skillfully wove this story throughout the hearing, providing reasons for why his client did what he did.² The attorney's story had two goals: (1) to create empathy, and (2) to suggest that the attorney did not knowingly fail in his obligations (it was his wife's fault), and, therefore, he was not responsible for the missteps in his cases.

But the story did not produce its desired effect in that it neither created empathy nor convinced the hearing panel—composed of two attorneys and a lay person—that the attorney satisfied his professional responsibility. The hearing panel was troubled because regardless of why the attorney did or, in this case, did not do what he should have done, his behavior harmed his clients, and the panel feared he could hurt

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¹ As members of New Jersey's District XB Ethics Committee, the author, another attorney, and a lay person were assigned to hear this case. The hearing lasted approximately two weeks and the panel considered ethics complaints filed by several clients against the same attorney. The different complaints had been consolidated so that the matter could be heard before one hearing panel. The transcript of the proceedings is not public. The panel's findings were issued in a sealed report dated November 19, 2021.

² For example, the accused attorney did not attend his client's court hearing because his wife had hidden the court letter notifying him of the hearing date.

other clients as well. The layperson on the panel was especially outraged, stressing that there was no excuse for innocent clients to suffer at their lawyer's hands. She did not consider this defendant an outlier; rather, she feared other attorneys could behave the same way, and she wanted the attorney to be held accountable. In essence, the narrative did nothing to evoke empathy for the defendant because the defendant was not the only one on trial, rather the entire profession was being judged.

The primary purposes of attorney discipline are “to protect the public, maintain the integrity and professional standards of the bar, and preserve the public’s confidence in the bar.”³ By minimizing an attorney’s accountability, the story undermines these objectives. There has been scholarship on the importance of storytelling, how and why it works.⁴ And there has been scholarship on the ethics of telling a story that the client does not want told.⁵ In considering the ethics of the narrative, both scholarly and practical approaches consider the concern to represent the “truth.”⁶ No scholarship, however, has addressed the role the narrative plays in attorney ethics hearings or examined whether the narrative should even serve a role.

This article addresses this question and finds that narratives should play only a limited role in ethics hearings: Attorneys should not rely on storytelling techniques for the liability stage of ethics hearings. That is, when it comes to defending clients accused of violating their professional ethics, attorneys should refrain from introducing the narrative to deny wrongdoing. Instead, the narrative should only serve a role in terms of sanctions and challenges to the ethical rules themselves. Section II of this article will provide background regarding the history of monitoring the legal profession and the attorney disciplinary process. Section III will discuss the storytelling movement and the role of narratives in advocacy. Section IV will examine the role narratives have played in ethics hearings.

³ Jane J. Whang, *Improving Attorney Discipline*, 6 GEO. J. LEGAL ETHICS 1039, 1040 (1993).

⁴ See, e.g., Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459 (2001); Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399 (2011).

⁵ See generally Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 LEGAL COMM. & RHETORIC 151 (2019) (opining that negative client portrayals are sometimes the most persuasive); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000) (arguing that clients should play a larger role in developing and choosing case theory and how to tell their stories); Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010) (noting that while there are aspects of storytelling that could make it manipulative, storytelling is consistent with existing norms about the ethical practice of law); Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEGAL WRITING 163 (2010) (recognizing value in using tools of fiction in legal writing but noting that attorneys can only succeed if they use these tools with a blend of narrative and analysis).

⁶ See generally Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229 (2010).

Section V will consider whether the narrative should play a role in these hearings. Section VI will conclude.

II. The history of monitoring the legal profession and the attorney disciplinary process

Professional standards guide the practice of law, and a disciplinary system enforces these standards.⁷ Attorneys who do not abide by them can be disbarred, suspended, reprimanded, or censured.⁸ These standards are not stagnant but are a continual work in progress, driven by “changes in the practice of law and expectations of society”⁹ and are reflected in ethical rules. A historical review of these rules reveals that the driving force behind each rule or its modification was for the public to perceive the legal profession more positively. Not only were the rules designed to win the public’s favor, but the hearing process¹⁰ similarly reflects the Bar’s desire to ensure the public’s faith in the profession.

A. Historical overview of attorney ethics rules

In 1964, the public thought less of lawyers than any other profession, propelling the American Bar Association (ABA) to create a committee to evaluate ethical standards and recommend alterations¹¹ to better guide lawyers and “to protect the public interest and assure clients that lawyers possessed sufficient professional skill and fidelity.”¹² ABA president-elect Lewis F. Powell Jr.¹³ noted that “[w]hile surely no one wishes punitive

7 See, e.g., MODEL R. FOR LAWYER DISCIPLINARY ENFORCEMENT 10 (Am. Bar. Ass’n 2020). State bar committees or state courts are responsible to enforce the disciplinary rules. See Whang, *supra* note 3, at 1041.

8 See *id.* at 1043. By adopting professional standards that serve as models for the regulatory law governing the legal profession, the American Bar Association (ABA) has provided leadership in legal ethics and professional responsibility. In 1908, the ABA promulgated Canons of Professional Ethics, which were derived from the Alabama State Bar Association’s Code of Ethics, adopted by Alabama in 1887. The ABA’s original Canons of Professional Ethics were guidelines that addressed what attorneys should not do, and they were written to advise attorneys rather than punish them. From 1908 to 1969, the ABA adopted new canons and amended others. John M. Tyson, *A Short History of the American Bar Association’s Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility: 1908-2008*, 1 CHARLOTTE L. REV. 9, 10, 13 (2008).

9 *Id.* at 18.

10 Disciplinary hearings take place so that an ethics panel can hear evidence to determine whether the charges are true. Whang, *supra* note 3, at 1042.

11 Responding to changes in “[m]any aspects of the practice of law” as well as attorney dissatisfaction with the adequacy of discipline in the profession, the ABA created a special committee to evaluate ethical standards and recommend alterations. Tyson, *supra* note 8, at 14 (quoting *Proceedings of the House of Delegates to the 1964 Annual Meeting*, 89 A.B.A. REP. 365, 381 (1964)).

12 *Id.* at 15–16 (noting “the public’s opinion of the ‘general reputation’ of lawyers ranked below the reputations of other major professions”).

13 Justice Powell ultimately became an Associate Justice of the U.S. Supreme Court.

action, it must be remembered that the bar has the privilege of disciplining itself to a greater extent than any other profession or calling.”¹⁴

The committee’s work resulted in a new set of ethical provisions called the Model Code of Professional Responsibility. This code embodied three parts: (1) canons (what attorneys should do), (2) ethical considerations (what attorneys should aspire to do), and (3) disciplinary rules. The canons generally state what conduct is expected of lawyers “in their relationship with the public, with the legal system, and with the legal profession.”¹⁵ Canons are the basis from which the ethical considerations and disciplinary rules are derived. The ethical considerations are the objectives to which members of the profession should strive, guiding lawyers in many specific situations. And, the disciplinary rules are mandatory, providing the minimum level of attorney conduct, and if a lawyer falls below such level, the lawyer is subject to disciplinary action.¹⁶

In 1970 public dissatisfaction with the bar was intense.¹⁷ Concerns with the code led to another commission, which produced the Model Rules of Professional Conduct, adopted by the ABA in 1983 and by more than forty jurisdictions.¹⁸ Unlike their predecessor, these rules were **not** intended to reflect “the lowest common denominator of the standards that must apply to all practicing lawyers.”¹⁹ Rather, the Model Rules of Professional Conduct marked a clear shift from collegial norms to a body of judicially enforced regulations.²⁰

These rules remained untouched for nearly two decades until the ABA sought to improve the disciplinary system’s procedures by promoting national uniformity and consistency²¹ and recognizing changes in

¹⁴ Tyson, *supra* note 8, at 14 (quoting *Proceedings of the House of Delegates at the 1964 Annual Meeting*, 89 A.B.A. REP. at 382). The Committee on Ethical Standards studied the effectiveness of the Canons and concluded that the existing Canons should be amended and there should be a newly drafted code of professional responsibility. *Id.*

¹⁵ *Id.* at 16 (quoting MODEL CODE OF PROF’L RESPONSIBILITY PRELIMINARY STATEMENT (1983)); see also Louis Parley, *A Brief History of Legal Ethics*, 33 FAM. L.Q. 637, 642–43 (1999).

¹⁶ While the drafters did not intend for the Canons and Ethical Considerations to be enforced through disciplinary measures, see Parley, *supra* note 15, at 642, many state courts, bar associations, and disciplinary agencies interpreted and enforced the Model Code as one integrated set of rules.

¹⁷ See Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 15 J. PROF. LAW. 359, 369 (2008). The distrust of the legal profession was amplified because attorney advertising was now permitted under *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (holding Arizona’s ethical rule banning attorney advertising as unconstitutional).

¹⁸ See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 640 (2005).

¹⁹ Tyson, *supra* note 8, at 18 (quoting *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. REP. 763, 778 (1983)).

²⁰ *Id.*

²¹ Significant variations in particular rules from jurisdiction to jurisdiction caused uniformity problems. See Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 442 (2002).

technology. The ABA formed the “Ethics 2000” commission, charged to study and evaluate the Model Rules of Professional Conduct.²² Once again, the Commission was mindful of the public’s perception of the legal profession and the “heightened public scrutiny of lawyers.”²³ In doing its work, the commission opened its meetings to the public, communicated with a 250-member advisory council, reached out to special interest groups, and shared discussion drafts and meeting minutes on the Internet.²⁴ Ultimately, and with the public’s input, it advocated for district ethics proceedings to be public²⁵ to “assure integrity of the disciplinary process in the eyes of the public.”²⁶ The Commission achieved its goal: The ethics process in most states is open to the public from the time of the person’s initial contact with the disciplinary agency until the matter is closed.

Additionally, the commission proposed several new rules and provided additional guidance in interpreting and applying the rules. The Commission, though, did not include suggestions for good practice to follow each rule, as the Commission concluded that such recommendations “would be out of place in a disciplinary code,”²⁷ which contained mandatory rules that if not followed would require discipline. In February 2002, the ABA adopted almost all the Commission’s recommendations,²⁸ and over half of the states adopted some version of the 2000 revised model rules.²⁹

This historical review of the ethical rules reveals that the public’s perception of the legal profession stimulated every review and amendment to the ethical rules. The legal profession wants the public to trust it, and ethical rules were designed to garner this trust and promote public confidence in the profession.

B. How the hearing process works

Legal ethics establish legally binding standards.³⁰ Each state is responsible for investigating and disciplining its own attorneys.³¹ All

22 *Id.* at 441.

23 *Id.* at 442.

24 *Id.* at 443. The commission held fifty-one full days of meetings. *Id.*

25 Whang, *supra* note 3, at 1042.

26 Devlin, *supra* note 17, at 376 (citation omitted).

27 Love, *supra* note 21, at 443.

28 *Id.* It did not include the recommended changes to two rules that were still under review by another Commission, the Commission on Multijurisdictional Practice. *Id.* at 444.

29 See generally Pera, *supra* note 18 (providing a comprehensive review of what jurisdictions adopted which revised rules).

30 Lawrence K. Hellman, *When Ethics Rules Don’t Mean What They Say: The Implications of Strained Legal Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 321 (1997).

31 Whang, *supra* note 3, at 1041.

fifty states have professionally staffed disciplinary organizations with statewide jurisdiction that closely monitor attorneys. The disciplinary process begins when someone files a complaint.³² Next, the state’s disciplinary review board investigates the grievance by interviewing witnesses and reviewing documents.³³ The board then determines whether the attorney violated the rules of professional responsibility and recommends sanctions.

If the attorney does not accept the finding of wrongdoing, a hearing takes place. Attorneys charged with ethical violations are entitled to due process, including the right to legal representation and to present arguments and defend against charges.³⁴ The hearing panel hears the case and determines whether the attorney violated particular ethical rules. While the number of people on each hearing panel varies by state, all panels include lawyers and nonlawyer members. At the end of the hearing, the hearing panel issues its report, which is reviewed by the disciplinary board and, ultimately, the state’s highest court.³⁵

While judicial in nature—briefs are filed, opening and closing statements are made, and witnesses are examined and cross-examined—attorney ethics hearings are neither civil nor criminal. Anyone who believes that an attorney behaved unethically in practice can file a grievance,³⁶ but a client can additionally file a civil suit for malpractice or, if there is a criminal wrong, alert the prosecutor. Indeed, a malpractice or criminal case against the attorney does not preempt an ethics hearing, evidencing that ethics hearings are neither criminal nor civil. Furthermore, the burden of proof in district ethics hearings, “clear and convincing,” is higher than the “preponderance of evidence” used in civil cases but not as stringent as the “beyond a reasonable doubt” standard used in criminal cases.³⁷

Finally, unlike criminal hearings, which are meant to punish wrongdoers, and civil hearings, which are meant to compensate someone for a wrong committed, attorney ethics hearings are primarily designed to uphold a standard in the profession, thereby protecting and promoting

32 *Id.*

33 Each jurisdiction differs in the amount of information it requires in the investigation. *Id.* at 1042.

34 MODEL R. FOR LAWYER DISCIPLINARY ENFORCEMENT 18 (Am. Bar. Ass’n 2020).

35 Attorney discipline differs from other professions because state supreme courts oversee disciplinary agencies, whereas other professions are regulated by agencies within the executive branch. See Devlin, *supra* note 17, at 378. The ABA believed that the states’ highest courts’ involvement would promote public confidence in the judicial system. *Id.* at 386.

36 Sometimes adversaries or their clients will file an ethics complaint.

37 MODEL R. FOR LAWYER DISCIPLINARY ENFORCEMENT 10.

the legal profession's reputation.³⁸ Ethics hearings are more about the legal profession than the attorney. Consequently, advocates in disciplinary hearings need to consider whether their advocacy skills used in civil or criminal litigation—specifically, the skill of relying on storytelling techniques—will serve the same purpose when representing a client in a disciplinary action. The next section will provide background on the Applied Legal Storytelling movement, a discipline that studies the role storytelling plays in advocacy.

III. The Applied Legal Storytelling movement

Stemming from the law and literature movement, Applied Legal Storytelling “examine[s] the use of stories—and of storytelling or narrative elements—in law practice, in law-school pedagogy, and within the law generally.”³⁹ The Applied Legal Storytelling movement grew from a 2005 conference at the University of Gloucester, entitled *Power of Stories: Intersections of Law, Culture, & Literature Symposium*. While the conference primarily focused on the related field of law and literature, participants wanted to sustain the conversation. Thus, in 2007, Scholars Ruth Anne Robbins and Brian Foley held another conference entitled *Once Upon a Legal Time: Developing the Skills of Storytelling in Law*, specifically designed to focus solely on storytelling.⁴⁰ And hence a movement began.

Applied Legal Storytelling recognizes that stories are an integral part of legal persuasion.⁴¹ Effective advocacy requires presenting facts in a way that compel both judge and jury, something that stories can do.⁴² Often the story tells what happened through the client's eyes, explains away bad

³⁸ Ostensibly, the hearings are also designed to protect the public from unscrupulous attorneys. See Tyson, *supra* note 8, at 16.

³⁹ J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 14 LEGAL COMM. & RHETORIC 247, 248 (2015); see also J. Christopher Rideout, *Applied Legal Storytelling: An Updated Bibliography*, 18 LEGAL COMM. & RHETORIC 221, 222 (2021). Legal education has recognized the importance of literature. In the early twentieth century literature was thought to be “one field that could supplement, enrich, or correct legal principles” because novels show life's characters and lawyers must know human nature. Judith D. Moran, *Families, Law, and Literature: The Story of a Course on Storytelling*, 49 U.S.F. L. REV. 1, 7 (2015). In 1973 the modern law and literature movement formally began, and law schools began offering classes specifically designated law and literature. *Id.* at 8. The purpose behind the law and literature course was to provide students with more opportunities to write and to read good writing. Further, it was thought that literature would encourage students to understand stories—character, plot, setting—and thereby learn how to tell stories. *Id.* at 8–9.

⁴⁰ See Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING 3, 4 (2008) (indicating the applied legal storytelling movement dates to a conference on the “Power of Stories,” held at the University of Gloucester in 2005).

⁴¹ J. Christopher Rideout, *Discipline-Building and Disciplinary Values: Thoughts on Legal Writing at Year Twenty-Five of the Legal Writing Institute*, 16 LEGAL WRITING 477, 487 (2010).

⁴² See Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 LEGAL COMM. & RHETORIC 1, 18 (2010) (revealing that judges preferred and ruled in favor of parties who submitted briefs that told stories compared to briefs that simply provided the legal standard).

facts, provides context for the client’s perspectives, and communicates on an emotional level, often revealing the impact the law has on individuals.⁴³ By explaining and justifying client behavior, the story persuades because it does “what analytical reasoning alone cannot: resonate with a listener’s emotion.”⁴⁴

While law schools do not yet require special classes devoted to the art of storytelling, many advocate for such.⁴⁵ And, while storytelling is not a mandatory part of the legal curriculum, most law students learn to write their client’s story.⁴⁶ Law professors commonly assign students persuasive writing assignments like appellate and pretrial briefs, and oral exercises like appellate court arguments, all of which incorporate aspects of storytelling. Legal writing texts routinely include segments on persuasive writing and factual renderings, and professors commonly advise and encourage students to personalize clients, making them likeable and relatable.⁴⁷

Applied Legal Storytelling scholarship abounds⁴⁸ as scholars analyze the persuasive use of storytelling.⁴⁹ Scholars have done empirical research,⁵⁰ analyzed how humans respond to stories,⁵¹ explored psychological concepts to understand how stories persuade,⁵² examined the ethical limits of storytelling,⁵³ and even questioned the ethical implications of telling stories that might differ from those the client wants told.⁵⁴ Applied Legal Storytelling scholars have also tried to distinguish between stories and narrative, recognizing that while interrelated, stories convey what events happened whereas narratives generally provide a broader theme or meaning to events.⁵⁵ Narratives build upon the raw

43 *Id.* at 9; see also Moran, *supra* note 39, at 10 (noting that the study of literature in law school helps create more empathetic and client-centered attorneys).

44 Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 981 (2006).

45 K. Jane Childs, *(Re)Counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in the Legal Curriculum*, 29 B.U. PUB. INT. L. J. 315, 317 (2020).

46 *Id.* at 327.

47 See Whalen-Bridge, *supra* note 5, at 153.

48 See Rideout, *Applied Legal Storytelling: An Updated Bibliography*, *supra* note 39.

49 See Whalen-Bridge, *supra* note 5, at 156.

50 See generally, Chestek, *supra* note 42, at 18 (providing empirical evidence that storytelling briefs persuaded judges better than briefs that did not tell stories).

51 Jessica Lynn Wherry, *(Not the) Same Old Story: Invisible Reasons for Rejecting Invisible Wounds*, 17 LEGAL COMM. & RHETORIC 15, 18 (2020) (looking to storytelling to understand why military boards failed to embrace liberal consideration for veterans petitioning for discharge relief due to mental health conditions).

52 See generally Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 LEGAL COMM. & RHETORIC 27 (2021) (recognizing that the cognitive psychological concept of narrative transportation is what makes stories persuade).

53 See Johansen, *supra* note 44, at 961.

54 See Miller, *supra* note 5, at 4.

55 *Id.* at 1.

material of personal experience.⁵⁶ Applied Legal Storytelling scholars have suggested that narratives need not always be positive, and sometimes a narrative that negatively portrays a client is a persuasive strategy.⁵⁷ They have also opined that in telling a client's narrative, attorneys might need to balance the client's need with the longer-term needs of a group the client represents.⁵⁸

But until now no scholarship has suggested that an attorney simply refrain from telling a story. Applied Legal Storytelling scholars must recognize that storytelling techniques simply do not work to anyone's advantage at the liability stage of an attorney ethics hearing. Rather, stories undermine the primary purpose of the proceeding—to protect the public and garner its trust—and they will not relieve a client of liability. Indeed, attorney ethics hearings are one forum in which attorneys should not rely on the narrative to challenge liability. The next section examines the limited role the narrative has played in attorney ethics hearings.

IV. The role the narrative has played in attorney disciplinary hearings

Often tales of human frailty and failure,⁵⁹ narratives in attorney ethics hearings do not help excuse those accused of ethical violations from culpability. Rather, they only serve to either limit sanctions or challenge the disciplinary rule itself.

A. Limiting sanctions

Attorneys who violate ethical rules are disciplined. The type of discipline depends on the offense and can range from admonition to disbarment.⁶⁰ In determining discipline, the hearing panel or court considers things such as the attorney's mental state and mitigating influences.⁶¹ The narrative is the vehicle through which these factors are expressed. For example, when the narrative proposes that the attorney will be rehabilitated, or if it describes mental health issues, suggesting that such issues likely caused the behavior, some courts have reduced

56 *Id.*

57 See Whalen-Bridge, *supra* note 5, at 177.

58 JoAnne Sweeny and Dan Canon, *The Language of Love v. Beshear: Telling a Client's Story While Creating a Civil Rights Case Narrative*, 17 LEGAL COMM. & RHETORIC 129, 133 (2020) (discussing how civil rights attorneys might be constrained by dual roles of advising their clients and advocating for civil rights).

59 See Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 486 (2014).

60 Whang, *supra* note 3, at 1043. The type of sanction for a specific type of misconduct might vary from state to state. *Id.*

61 *Id.*; see also MODEL R. FOR LAWYER DISCIPLINARY ENFORCEMENT 10.

sanctions.⁶² Yet, regardless of how well the narrative encompasses the mitigating factors, it is only effective if it connects the factors to the misconduct;⁶³ and, if the misconduct is severe, mitigating facts will be ignored,⁶⁴ making the narrative worthless.

B. Challenging the disciplinary rules

Narratives have and can play a role in challenging specific disciplinary rules but only when the narrative concerns the public good, not just the attorney's individual plight. Consider the narrative's role in *Bates v. State Bar of Arizona*,⁶⁵ where the U.S. Supreme Court held that the ethical rule barring attorney advertising⁶⁶ was unconstitutional.⁶⁷ In that case, two Arizona-licensed attorneys who had worked for Arizona Legal Aid began their own law firm to provide modestly priced legal services to financially strapped people who did not qualify for governmental legal aid. Calling the firm a clinic, the attorneys' narrative discussed their goal of helping the poor navigate the legal system and providing services to those who could not afford most legal fees but did not qualify for legal aid. The attorneys depended on advertising to inform the public of their services as the firm needed high volume to keep its fees low and doors open.

Because Arizona's disciplinary rule banned attorney advertising, the Arizona disciplinary board charged the attorneys with an ethical violation.⁶⁸ The attorneys did not deny the charge but rather challenged the rule's constitutionality. The attorneys' narrative—they provide services to the under trodden and could only continue to do so if the public knows their services exist—swayed the Court. The narrative suggested that the

⁶² If the court is convinced that the attorney will be rehabilitated, then it is likely to accept the mitigating factors and limit sanctions. Whang, *supra* note 3, at 1060–62 (illustrating the different outcomes in different jurisdictions, with some courts recognizing the effect of mental health on misconduct and other courts refusing to do so). Even in jurisdictions that consider the effect of mental health on behavior, there must be a nexus between the health and the behavior, and if the behavior is criminal there will be no mitigation. *Id.* at 1062.

⁶³ *Id.* at 1056.

⁶⁴ See *id.* (citing *In re Davis*, 603 A.2d 12 (N.J. 1992), in which the court upheld disbarment for misappropriation despite evidence of alcoholism).

⁶⁵ 433 U.S. 350 (1977).

⁶⁶ Prior to 1977, the American Bar Association held the traditional view that advertising for lawyers was “in bad taste and harmed the profession.” Wyn Bessent Ellis, *The Evolution of Lawyer Advertising: Will It Come Full Circle?*, 49 S.C. L. REV. 1237, 1239 (1998). Reflecting this view, Canon 27 of Professional Ethics declares it “unprofessional to solicit professional employment by circulars, advertisements, . . . or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, . . . and all other self-laudation, offend the traditions . . . of our profession and are reprehensible.” *Id.* at n.11. In 1969, the American Bar Association adopted the Model Code of Professional Responsibility, which also prohibited attorney advertising. *Id.* at n.12.

⁶⁷ *Bates*, 433 U.S. at 384.

⁶⁸ *Id.* at 355 (noting that Arizona Disciplinary Rule 2-101B was being challenged).

disciplinary rule harmed the public by limiting the attorneys' ability to represent disadvantaged people. The narrative became the basis of the Court's opinion, an opinion that transformed the practice of law.

But it is unlikely that there would have been this transformation had the narrative been that the attorneys serviced high-paying clients, earned millions of dollars, and wanted the public to know of its talents so they could garner greater profits.⁶⁹ Indeed, consider how one of the dissenting and concurring opinions in *Bates* framed the facts: "[T]wo young members of the Arizona Bar placed an advertisement in a Phoenix newspaper apparently for the purpose of testing the validity of Arizona's ban on advertising by attorneys."⁷⁰ This opinion never mentioned the attorneys' legal aid background or the clientele the attorneys had hoped to attract. Rather, the dissent focused only on the attorneys being "young" and desiring to "challenge"⁷¹ acceptable standards, suggesting that they were rogue, unseasoned attorneys who, like rebellious teenagers, wanted to defy their parents' orders.

As predicted by the dissent, the *Bates* Court opened the door for more challenges to the Bar's restrictions to attorney advertising, and more cases landed before the Court confronting this regulation of commercial speech by attorneys.⁷² In these cases, once again, the narrative influenced whether ethical rules related to attorney advertising could withstand the Court's scrutiny, not the determination of whether the attorney committed the infraction. Consider the following three cases, where the enforcement of the disciplinary rules served to prevent underserved members of the communities from exercising their legal rights. In two of the cases, both of which originated in the South, the narrative, like that in *Bates*, encompassed the public good and persuaded the Court to have the ethical rule revisited.

First, in *In re Primus*, cooperating with the American Civil Liberties Union (ACLU), a South Carolina lawyer advised women of their legal

⁶⁹ The Court recognized "many of the problems in defining the boundary between deceptive and [non-deceptive] advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." Matthew Garner Mercer, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel*, 39 BRANDEIS L.J. 713, 713 (2001) (quoting *Bates*, 433 U.S. at 364).

⁷⁰ 433 U.S. at 389 (Powell J. with Stewart J., concurring in part and dissenting in part).

⁷¹ *Id.*

⁷² See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 628 (1985) (examining whether a state may discipline an attorney for soliciting business by running newspaper advertisements containing legal advice); *In re R.M.J.*, 455 U.S. 191, 206–07 (1982) (holding disciplinary rules violated First Amendment where there was no showing that the advertising was misleading); *In re Primus*, 436 U.S. 412, 426–29 (1978) (holding South Carolina's application of its disciplinary rules for solicitation violated the First and Fourteenth Amendments); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (affirming that a state may constitutionally bar attorney solicitation if it is in person, for pecuniary gain, or dangerous circumstances that the state has a right to prevent).

rights resulting from their having been sterilized as a condition of receiving public medical assistance.⁷³ The lawyer sent a follow-up letter, indicating that the ACLU provided free legal assistance. The South Carolina disciplinary board charged and determined that by sending the letter, the lawyer violated certain disciplinary rules because he had engaged in soliciting a client. Upon review, the U.S. Supreme Court held the disciplinary rule that prevented this attorney to write on behalf of the ACLU was unconstitutional.⁷⁴

In the second case, *Shapiro v. Kentucky Bar Association*,⁷⁵ a Kentucky disciplinary review board enforced an ethical rule that prohibited lawyers from soliciting legal business for pecuniary gain when the lawyer sent letters to potential clients who faced foreclosure suits and were on the cusp of losing their homes.⁷⁶ The U.S. Supreme Court found that the Kentucky Bar Association failed to show how the rule, which prohibited truthful mail solicitation for pecuniary gain, advanced the public's special interest. The Court remanded the matter for further proceedings as the Court was unable to determine whether the attorney's letter was overreaching.⁷⁷

Yet in a case where an attorney's narrative solely focused on his attempt to secure clients to sustain his practice, the Court upheld a disciplinary panel's finding that the attorney violated the ethical rule prohibiting the solicitation of clients.⁷⁸ The Court found that protecting the public from aspects of solicitation—fraud, undue influence, intimidation, and overreaching—is a legitimate and important state interest, so that certain forms of solicitation can be barred.⁷⁹ The attorney's narrative of sustaining his livelihood did not persuade the Court to revoke the bar's restriction of attorney solicitation.

The above-referenced cases reveal that in attorney ethics hearings, the narrative only influences a court in terms of sanctions or the rule's legitimacy, provided the narrative highlights the public's plight. When the narrative shows how an ethical rule negatively impacts the ability for a downtrodden client to learn about legal representation, the narrative serves to successfully challenge the rule. But when the narrative focuses

⁷³ 436 U.S. at 416.

⁷⁴ The Court found that the rule violated the First and Fourteenth Amendments. *Id.* at 439.

⁷⁵ 486 U.S. 466 (1988).

⁷⁶ *Id.* at 469.

⁷⁷ *Id.* at 480.

⁷⁸ *Ohralik*, 436 U.S. at 467 (finding attorney solicitation was rightfully barred where attorney went to great lengths to separately seek out a party injured in a car accident as well as her passenger and coerced them to sign a retainer agreement with him).

⁷⁹ *Id.* at 468.

solely on the attorney’s personal story, one that is unconnected to the client, the narrative fails to deliver.

V. The role the narrative should play in ethics hearings

The goal of the narrative is to persuade the factfinder to rule in the client’s favor.⁸⁰ It does this in two ways: First, it evokes sympathy and creates empathy for the client; second, it explains client behavior, revealing the fabric of the client’s life, not just telling a version of “what happened.”⁸¹ As noted in the prior section, the narrative plays a role in matters of attorney discipline, but should it?

In addressing this question, consider criminal defense attorneys who rely on the narrative to either exculpate and/or humanize their clients. A narrative can exonerate criminal defendants by showing why they could not have committed the crime in question.⁸² And by humanizing criminal defendants, the defense attorney creates empathy for the client and provides a context in which the jury could sympathize as to why the defendants did what they did.⁸³ One way to humanize the criminal defendant is through the “mitigation counter-narrative,”⁸⁴ a narrative told by defense attorneys in criminal capital cases to portray the defendant’s life in a way that convinces the jury that it is a life to be spared. In such cases, the narrative’s success means the difference between life and death, and it serves a role through every aspect of the criminal case.⁸⁵ The mitigation counter-narrative persuades not by recreating scenes but by constructing events in a way that enables the reader to understand the client’s psychology. Perhaps the jury recognizes that fault does not lie with the defendant but rather within our society and social systems.⁸⁶ By using

80 A narrative might also negatively portray a client if doing so could help the client’s case. See generally Whalen-Bridge, *supra* note 5, at 170–71 (opining that an attorney might argue that a client’s “flawed” personality would have prevented the client from committing the crime or wrongdoing).

81 Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 515 (1994).

82 Consider a criminal defendant accused of murder. The prosecution’s theory of his extensive planning was inconsistent with the defendant’s crass and disorganized personality, making it inconceivable that he could commit the crime. See Whalen-Bridge, *supra* note 5, at 166 (discussing the importance of negative client portrayals).

83 See Moran, *supra* note 39, at 43 (indicating how humanizing a defendant and telling a story from the defendant’s point of view—point-of-view narration—is a way to develop empathy for clients as it tells the story of what happened as the client experienced it).

84 Michael N. Bert, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 879 (2009).

85 *Id.*

86 Consider the case of Mrs. G., a welfare recipient charged with overpayment of benefits. At the hearing, her attorney had urged her to explain she had used the money for “life necessities,” something permitted under welfare law. Instead, the client spoke about buying her children Sunday shoes; that is, she had used the money to satisfy her own needs. The narrative illustrated the inherent problems within the welfare system where welfare recipients cannot really be heard. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 31 (1990).

the mitigation counter-narrative, defense attorneys empower the jury to become heroes who can rescue the helpless defendant.

But there is no jury in an ethics case, and there is no human life to be spared.⁸⁷ The basic storytelling technique of turning the client into “the main character of a story with a compelling plotline”⁸⁸ does not work within the context of an ethics hearing where the profession, not the accused attorney, is the main character. The primary purpose of the ethics hearing is to monitor the profession; hearing boards and judges are less concerned about the defendant as they aim to earn the public’s trust for attorneys. Unwarranted leniency affects other clients, which in turn affects the profession’s reputation.

Moreover, a client’s story and the theory of the case should integrate.⁸⁹ But this cannot happen in an attorney ethics hearing because no theory can excuse attorneys from shirking their professional obligations under the ethics rules. That is, attempts to explain behavior often appear in the realm of a story, but such justification of the behavior is irrelevant when it comes to whether the attorney violated a professional ethical duty.

Consequently, stories seemingly do not belong in attorney ethics hearings because permitting accused attorneys to share the details of their lives to challenge whether they violated their professional duties contradicts the very purpose of the ethical rules: To garner the public’s trust and confidence in the legal profession.⁹⁰ In an ethics hearing, when the story achieves its goals—lessening the attorney’s accountability and/or reducing sanctions—it undermines the hearing’s primary purpose to increase the public’s faith in the legal profession. That is, the narrative shifts the focus from protecting the public to protecting the attorney, something that is contrary to the ethics rules themselves.

But the ethical rules themselves require zealous advocacy⁹¹ for the client, not the legal profession, and there is an inherent conflict between

⁸⁷ Personal liberties are not at stake in attorney ethics hearings, only professional liberties. And the goal behind criminal laws differs from the goal behind ethics rules; the former is to punish a wrongdoer and protect society against further crimes, not to win the public’s trust, monitor a profession, or protect its reputation. But like criminal defense attorneys, defense attorneys in ethics violations want to protect their clients, see Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983) (discussing the different reasons criminal defense attorneys represent criminal defendants), and similarly want to protect a process. In the case of attorney ethics, it is a process that ensures the integrity of the profession.

⁸⁸ Kaiser, *supra* note 5, at 165.

⁸⁹ The theory of a case is composed of an interplay between the law and the facts, with theory informing the facts, and the facts giving meaning to the theory. Miller, *supra* note 81, at 489. Case theory reveals itself in the opening statement and is reiterated in the closing, but it “also shapes every aspect of the trial.” *Id.* at 494.

⁹⁰ The public would hear these narratives because more than fifty percent of states have disciplinary proceedings that are open to the public. See generally Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 19–20 (2007) (arguing for more transparency as the public is shielded from much of the disciplinary system).

⁹¹ Interestingly, some attorneys accused of ethical wrongdoing attempt to explain their behavior by invoking the concept of zealous advocacy and the ethics rules themselves contribute to this self-justification. See Leslie C. Levin & Jennifer K. Robbenolt, *To Err is Human, To Apologize Is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513, 531 (2021).

(1) advocating for your client (the attorney who committed the ethical violation) and (2) promoting the legal profession's reputation. While reconciling the tension between zealous advocacy and maintaining the standards of the profession is a subject for another article, practitioners need to recognize that to effectively advocate in the context of an ethics hearing, they should proceed with caution when using the narrative. By attempting to justify why an attorney may have shirked professional obligations, the narrative defeats the purpose of attorney ethics hearings. Moreover, no matter what the narrative reveals, courts strictly discipline attorneys who (1) practice dishonestly, fraudulently, deceitfully;⁹² (2) commingle and/or misappropriate client funds;⁹³ or (3) sexually engage with a client.⁹⁴

So, what should attorneys representing other attorneys accused of ethical violations do with their storytelling skills? Change the timeline. Unlike in other forms of litigation, the narrative should not be introduced at the liability stage of the hearing; rather, it should only be told at the sanction stage of the proceeding. That is, if attorneys find the evidence suggests that their clients violated the ethical rules, attorneys need to acknowledge the violation and/or encourage the client to apologize for the behavior rather than explain it away.⁹⁵ Only after doing so should attorneys share the story behind their clients' unethical acts.

First, it is okay and recommended to concede liability.⁹⁶ Admittedly this is often difficult to do because clients refuse to admit wrongdoing. One reason for clients not wanting to acknowledge wrongful conduct is they fear a malpractice lawsuit.⁹⁷ But most attorney misconduct is unlikely to serve as the basis for legal malpractice.⁹⁸ Another reason that lawyers fear admitting a mistake is because unethical behavior conflicts with "a core aspect of their identity as competent and ethical legal practitioners."⁹⁹ "Trying to square that incompatibility can lead people to deny,

92 Whang, *supra* note 3, at 1052.

93 *Id.* at 1054. In Florida and New Jersey, "knowing" misappropriations of funds automatically calls for disbarment. *Id.*

94 Strict liability applies regardless of the consensual nature of the sexual relationship. See *In re Lewis*, 415 S.E.2d 173, 174–75 (Ga. 1991) (suspending lawyer who had a sexual relationship with a client in a divorce-custody matter, even though the relationship began before the lawyer-client relationship, because court opined that the lawyer's sexual involvement subjected the client to risk alimony, custody, and attorney fees).

95 See Levin & Robbenolt, *supra* note 91, at 531. Note that regardless of when it is used, the narrative must relate to the ethical violation.

96 See generally *id.* (advocating to incorporate apologies into the lawyer discipline system to address lawyer misconduct).

97 See *id.* at 529.

98 *Id.* at 551–52. One option for states "might be to adopt a rule[,] which provides that apologies cannot be used against the respondent in subsequent discipline or legal malpractice proceedings." *Id.* Cases that result in diversion are unlikely to give rise to a lawsuit. *Id.* at 551.

99 *Id.* at 530.

recharacterize, or attempt to explain away their behavior, even to themselves.”¹⁰⁰ Yet attorneys representing these attorneys can confront these fears head on and acknowledge that justifying the behavior through the story will not excuse an attorney from misconduct but could undermine the entire purpose of the ethical rules.

Second, the story can and should affect what the appropriate sanction will be. Sanctions vary,¹⁰¹ with the same ethical violation warranting a different sanction depending on the facts. Attorneys should employ their storytelling skills only at the punishment stage of the hearing.

Attorneys should use narratives in ethics hearings cautiously and strategically. Attorneys should not just blindly tell their clients’ story but instead recognize when it is simply better to withhold a story because it will not only work against your client but the entire profession.¹⁰² Introducing the narrative to challenge findings of misconduct makes it appear as though there are reasons or justifications for the attorney to have shirked professional obligations, something that hurts the reputation of the profession and ultimately does not work to the accused attorney’s advantage regarding whether the attorney committed an ethics infraction. Withholding the story until after a finding of misconduct would instill more trust in the legal profession and probably would garner more empathy from the hearing board than would using the story to relieve the person of wrongdoing.

VI. Conclusion

Even in attorney ethics hearings, the story plays a role; however, attorneys need to be mindful of what that role is, know when and how to play it, and recognize its limitations.

The narrative will not relieve an accused from the burdens of the ethics rules, but it could affect sanctions. And if the story does not solely concern the attorney but shows how the violated ethics rule harms the public, the story could persuade the court to question the rule itself. That is, the story needs to show that (1) the public can trust the profession, and (2) this attorney cannot hurt the public. If not used cautiously, the

100 *Id.*

101 Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 461 (1991) (recommending a “comprehensive system for the sanctioning of lawyers” due to the inconsistencies in the administration of discipline of attorneys).

102 Stories should also not be told if they (1) steer the audience away from the legal merits of a matter or (2) promote stereotypes.

narrative will undermine ethical rules and damage the reputation of the legal profession.

While the narrative described at the start of this article troubled the hearing panel, it still positively affected the outcome in terms of sanctions.¹⁰³ Although the attorney was found to have violated several ethical rules, the panel considered the facts of his story in reducing the sanctions.¹⁰⁴ Perhaps if the narrative had acknowledged wrongdoing from the start,¹⁰⁵ there would have been a union of zealous advocacy and achieving the goals of the ethics rules; the sanctions would be reduced but the reputation of the profession would have been better protected. In cases when attorneys are charged with ethical misconduct, the story—character, problem, resolution—does not matter. In the public’s eye, why what happened simply is irrelevant. Therefore, attorneys representing those accused of ethical violations should hesitate to tell their client’s story, even when the client wants the story to be told. Just as clients have limitations, so do their stories, especially in the realm of attorney ethics.

¹⁰³ See *supra* note 1.

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* (noting that attorneys accused of wrongdoing should simply apologize for their behavior, possibly preventing a complaint from being filed in the first place and restoring confidence in the legal profession).

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How to Conclude a Brief

Brian Wolfman*

I. Introduction

A while back, I observed a fleeting discussion among a few appellate-litigation mavens in the #appellatetwitter crowd about what should go in the “conclusion” section of an appellate brief. This essay explores that issue and its relationship to problems of argument ordering in multi-issue appellate briefs.

A colleague suggested that these two topics are unrelated. I disagree, and here’s why. If, as I recommend and court rules prefer, the conclusion is short and does not summarize the arguments, the brief writer may be left with a problem: that the brief’s last argument is the least powerful or least important argument, causing the brief to end on a down note. The brief writer wants to avoid that (of course). The essay discusses how to avoid or mitigate that problem when it arises.

II. Conclusions in briefs: the rules and beyond

If you want to know what to include in a conclusion in an appellate brief, as with all parts of briefs, start with the court rules. They are generally a useful starting point because they are issued by the audience: judges. The rule makers have told us what they want. The Federal Rules of Appellate Procedure, or FRAP, call for “a short conclusion stating the precise relief sought.”¹ The Supreme Court rule doesn’t expressly demand

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¹ FED. R. APP. P. 28(a)(9).

brevity, but it similarly requires “[a] conclusion specifying with particularity the relief the party seeks.”²

So, what should you do?

A. Prefer short, relief-based conclusions

All but one participant in the Twitter discussion thought that a brief’s conclusion should be short and sweet. Yet, many briefs contain lengthy, repetitive, argumentative conclusions. I think those kinds of conclusions are a mistake and agree with the majority of the appellate Twitter folks. Here’s why.

First, at least for federal appeals, the rule says so. True, FRAP 28(a) (9) doesn’t expressly ban conclusions other than a statement of “the precise relief sought,”³ but its demand for a “short” conclusion seems to spit on anything more. Typically, it’s a good idea to follow rules that the court’s judges have themselves issued (duh), unless there’s an excellent case-specific reason to deviate and departures from the rule’s express commands are at least tolerated (that is, you know that nonconformity won’t cause the court clerk to bump the brief).

Second, the convention—particularly among first-rate brief writers—is to keep conclusions quite short. Top appellate advocates generally state only the relief sought (affirmance, reversal, and the like). For better or for worse (and I think better), keeping conclusions short will meet the judges’ expectations and not seem out of place or inconsistent with high-quality brief writing. All other things equal, that’s an important factor.

Third, as explained in more detail below, it is important to state precisely the relief your client desires, and if you lard up the conclusion with another summary of your arguments or an extended rhetorical flourish about the justice of your client’s position, the request for relief could get lost in the sauce. That’s taking quite a risk.

Finally, and relatedly, extended, argumentative conclusions are necessarily repetitive. By the time the judges (or law clerks) get to the conclusion, they may have already digested an (optional) introduction providing the gist of your positions. They would have already read your statement of the case, which likely will have included hints at your arguments. And the judges would, one would hope(!), already have read the summary of argument⁴ and the argument⁵ because the rules demand

² SUP. CT. R. 24.1(j).

³ FED. R. APP. P. 28(a)(9).

⁴ See FED. R. APP. P. 28(a)(7).

⁵ See FED. R. APP. P. 28(a)(8).

that they be there. Some brief writers also employ a variety of somewhat argumentative roadmaps and mini-introductions to sub-arguments. (I typically avoid those things out of concerns over repetition.) By the time the judges get to your conclusion, you should have made your points and made them well. You can't discuss appellate advocacy with a judge for more than a few minutes and not learn that judges think that briefs are too long and repetitive. Cut the judges a break at the end of the brief by telling them just what you want and nothing more.

B. Examples of no-muss, no-fuss conclusions

As indicated above, it's important that judges and law clerks know exactly what your clients want them to do. Put the other way around, it would be really bad if the only reason that your clients didn't get just what they wanted is that you did not ask for it with enough clarity or specificity. And remember that's just what's called for by the federal appellate rule ("precise relief sought") and the Supreme Court rule ("specifying with particularity the relief the party seeks").⁶

Sometimes stating the relief can be quite simple because the precise relief sought is no more than affirmance for the appellee or reversal and rendering of judgment for the appellant. Other times, it is sufficient (and adequately precise) to say that your client wants only a reversal and a remand for further proceedings.

Here are some examples of no-muss, no-fuss conclusions taken from briefs recently filed by Georgetown Law's Appellate Courts Immersion Clinic.⁷

- "The district court's judgment should be affirmed."⁸ (The district court had granted summary judgment to our client on all claims.)
- "The judgment of the district court should be reversed and remanded for a trial on the merits of Zicarelli's interference and retaliation claims against Defendants."⁹ (Summary judgment had been granted against our client on two claims, and we were specifying that reversal was required on both claims and that no further summary judgment proceedings were needed—that is, we were expressly indicating that, on remand, the case should simply go to trial.)

⁶ FED. R. APP. P. 28(a)(9); SUP. CT. R. 24.1(j).

⁷ Appellate Courts Immersion Clinic (@ImmersionClinic), TWITTER, <https://twitter.com/ImmersionClinic>.

⁸ Brief for Appellee at 38, *Sartori v. Schrodt*, 2021 WL 6060975, No. 19-15114-BB (11th Cir. Dec. 20, 2021), <https://www.law.georgetown.edu/wp-content/uploads/2020/12/12.14.2020-Appellee-Schrodt-brief.pdf>.

⁹ Opening Brief for Appellant at 29, *Zicarelli v. Dart*, 35 F.4th 1079 (7th Cir.) ECF No. 26, <https://www.law.georgetown.edu/wp-content/uploads/2020/10/26-Zicarelli-Opening-Brief-public-filing-10.16.20201.pdf>, cert. denied, 143 S. Ct. 309 (2022).

- “This Court should reverse the district court’s judgment and remand the case for further proceedings.”¹⁰ (The district court had granted our opponent’s motion to dismiss for failure to state a claim, so more pre-trial proceedings were necessary before any trial plausibly could occur.)
- “This petition for initial hearing en banc should be granted.”¹¹ (Because all we wanted the court to do was grant our request for en banc review before a panel even heard the appeal!)
- “The petition for a writ of certiorari should be denied.”¹² (Because all we wanted was for the Supremes to see the case our way and deny cert.)

C. More complex conclusions and a few examples

Sometimes more complex conclusions are needed to serve your clients and meet FRAP 28(a)(9)’s requirements. The situations demanding a complex conclusion are too numerous to list, and, besides, the specifics needed in any given conclusion generally will turn on the peculiarities of the case. But it’s fair to say that more complexity and nuance tend to be called for when (1) the relief sought or opposed varies across multiple claims; (2) there’s more than one party on one or both sides of the “v”; (3) relief is sought or opposed in the alternative; (4) threshold rulings will (or will not) make other relief necessary or sensible; (5) the standard of review is not the same across all issues; and (6) the issues decided below were not all decided at the same stage of the litigation (motion to dismiss, summary judgment, trial verdict, post-trial, etc.).

Below, I describe three appeals litigated by Georgetown Law’s Appellate Courts Immersion Clinic involving varied relief, multiple parties, procedural nuances, and other complexities. We felt that these factors required us to go beyond the no-muss, no-fuss conclusion. Note that, in each case, we tried to obey FRAP 28(a)(9)’s insistence on specificity, while not running afoul of its demand for brevity. That is, we were as specific as the circumstances required, but tried to be economical. And, as in the no-muss, no-fuss context, we concluded without repetitive argument.

¹⁰ Opening Brief of Plaintiffs-Appellants at 15, *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir.) (No. 21-10133), ECF No. 00515862647, <https://www.law.georgetown.edu/wp-content/uploads/2021/05/Opening-brief.pdf>, reh’g en banc granted, opinion vacated, 50 F.4th 1216 (5th Cir. 2022).

¹¹ Petition For Initial Hearing En Banc at 13, *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir.) (No. 21-10133), ECF No. 00515785411, <https://www.law.georgetown.edu/wp-content/uploads/2021/03/Petition-for-hearing-en-banc.pdf>, reh’g en banc granted, opinion vacated, 50 F.4th 1216 (5th Cir. 2022).

¹² Respondent’s Brief in Opposition at 37, *Bd. of Cnty. Comm’rs v. Exby-Stolley*, 141 S. Ct. 2858 (2021) (No. 20-1357), <https://www.law.georgetown.edu/wp-content/uploads/2021/06/Exby-Stolley-opposition-5.26.2021-ready-to-print.pdf>.

Case 1. In this appeal, all our clients’ claims—employment discrimination claims under Title VII of the Civil Rights Act of 1964 and an analogous state statute, a federal equal protection claim, and a couple of different retaliation claims under the same federal and state statutes—had each been thrown out by the district court on pre-trial motions. Our clients had sued two defendants—a city and an individual—but only the equal protection claim and the state statutory claims ran against the individual. Moreover, on the statutory discrimination and equal protection claims (but not on the retaliation claims), our clients argued below (and maintained on appeal) that they were entitled to partial summary judgment as to liability but not as to relief. So, in this appeal, our conclusion needed to be quite particularized:

This Court should reverse the district court’s judgment in favor of Defendants on Plaintiffs’ Title VII, Ohio Civil Rights Act, and Equal Protection Clause claims. It should also reverse the district court’s denial of Plaintiffs’ motion for partial summary judgment on their Title VII discrimination claims against the City and their Ohio Civil Rights Act and Equal Protection Clause claims against both Defendants and instruct the district court to grant judgment in Plaintiffs’ favor as to liability on those claims. Finally, the Court should remand the retaliation claims for trial.¹³

Case 2. Here our client was seeking alternative remedies. So, we couldn’t simply say that we wanted reversal or affirmance; we needed to spell out the alternatives. Our client was ordered removed from the U.S. in absentia without an inquiry into the merits of her asylum claim, and she wanted the Board of Immigration Appeals to rescind the removal order or, at the least, the Board to remand to give an Immigration Judge the opportunity to consider the case on its merits.¹⁴ Here’s how we put it: “This Court should grant the petition for review, reverse the Board’s order, and remand to the Board for rescission of the removal order. Alternatively, the Court should remand the case to the Board with instructions to return the case to the Immigration Judge for a ruling on the merits.”

Case 3. Finally, in a cross-appeal brief, we argued that the district court properly vacated our client’s sentence, but improperly re-imposed his supervised-release term, without providing any reasoning. On the former issue, we sought affirmance (of course). On the latter issue, we weren’t certain that we could get outright reversal, so, alternatively,

¹³ Opening Brief of Plaintiffs-Appellants at 53, *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021) (No. 20-4165), ECF No. 19, <https://www.law.georgetown.edu/wp-content/uploads/2021/01/Opening-Brief.pdf>.

¹⁴ The brief described is not publicly available (copy on file with author).

we sought remand with directions to the district court to justify any supervised release:

This Court should affirm the district court's grant of Mitchell's habeas motion and vacatur of Mitchell's sentence. But this Court should reverse the district court's imposition of three years of supervised release. Alternatively, this Court should remand and direct the district court to consider, with explanation, the supervised release term, if any, that is appropriate.¹⁵

III. The connection between conclusions and argument ordering in complex, multi-issue appeals

If you're litigating a simple, one-issue appeal, try to end your argument with a bang, and then move right into your simple, one-or-two-sentence conclusion (as just discussed in section II).

But there's a problem in many (if not all) complex, multi-issue appeals. Often, the writer is forced to end a brief with an argument that is weaker or less important than their other arguments or with an argument for which the relief is not optimal.

How should you order the arguments in, say, a three-issue appeal? The answer may be as simple as putting the strongest claim first, the next-strongest claim second, and the weakest claim last—with all arguments judged in terms of legal strength.

But there are often confounders. What if the client's strongest claims, legally, are the ones that get the client the least cash or the least desirable injunction? What if your client is a repeat player or ideological litigant who wants to lead with a particular argument because they care more about their long-term strategic interests than winning "big" in the particular case? And then, there may be a perceived need to lead with an argument that is relatively weak legally but that appears to be logically antecedent. That antecedent question may be something as deeply ingrained in our legal culture as a prerequisite to suit (such as standing or the statute of limitations) or something as quirky as a three-part doctrinal analysis that the case law happens to set forth in a particular order, such that any deviation would appear naïve, defensive, or suspicious.

The conundrum is that application of one ordering criterion (say, legal strength) may conflict with another (say, that prevailing on the strongest argument will give your client almost no bucks). There's no

¹⁵ Brief of Appellee/Cross-Appellant at 49, *United States v. Mitchell*, 905 F.3d 991 (6th Cir. 2018) (Nos. 17-5904/17-5905/17-5906), ECF No. 34, <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Mitchell-v.-USA-opening.pdf>.

easy answer for how to order arguments when the considerations I've just discussed point in different directions, and I'm not attempting to resolve the problem in this essay. Suffice it to say for now that, like most knotty appellate-writing problems, the key is not to wing it. Don't just throw up on the paper. Be conscious about the argument ordering problems just described, trying to ensure that you've properly balanced the competing considerations.

My principal concern in this essay, however, is different: the relationship between argument ordering and conclusions. As indicated, many times ordering conventions will require the advocate to end the brief with an argument that is less powerful or less important than their earlier arguments. In many cases, just the fact that the argument appears last will convey a message of weakness or lack of importance (often a reason, by the way, to keep back-end arguments as short as possible).

So, what's a brief writer to do? One always wants to end with a (relative) bang, not a whimper. But for the reasons already given in my discussion of conclusions, and as underscored by the rule makers' preferences for brevity and specificity, and their focus on stating the relief sought, the answer is not to lard up your conclusion with a summary of your earlier, favorite arguments or with some rant about why you're right. Judges won't go for that.

Here's what I suggest instead. Whenever possible, before the conclusion, come up with some effective way to end your secondary or tertiary arguments by drawing on the themes or substance of your earlier arguments. To make this technique work well, you need to make plausible connections, and sometimes that can't be done well. But often it is possible to conclude your last argument by creating a tie to an earlier one. Here are four examples, the first hypothetical and the latter three based on real briefs.

Case 1. You are handling a civil rights appeal for a plaintiff who claims, first, that the police conducted a warrantless search of her home in violation of the Fourth Amendment, and second, that after arresting her, the police obtained a coerced (and false) confession in violation of her due-process rights. Assume that your appellate brief pursues both claims, but sensibly argues the Fourth Amendment claim first because it is legally stronger and so ends with the weaker due-process claim. As noted, a good appellate advocate generally seeks a way to end with a bang, so tethering the due-process claim back to the Fourth Amendment claim through a theme of pervasive government intrusion and misconduct may be the way to go—after all, the same police department that conducted the warrantless search also allegedly coerced the confession. Perhaps there's even something that an officer said in conducting the search that

presaged the later misconduct at the police station. If so, you may want to use that as you end the brief.

Case 2. Those of you who've litigated Freedom of Information Act cases know that plaintiffs will argue, first, that they are entitled to government records because the government has not sustained its claim of a statutory exemption from disclosure, such as the exemptions protecting trade secrets, certain privileges, or personal privacy.¹⁶ But plaintiffs will often argue, as a fallback, that if they're not entitled to the records in their original, pristine form, the government must redact only the exempt parts and release the rest, as the statute requires when a record is "reasonably segregable."¹⁷ The latter argument is often important to unearthing at least some important government information, and the possible alternative—leaving empty handed—is worse. Your brief will of course start by arguing that you are entitled to everything, and it's a bummer to end a brief with the segregability argument because it presupposes that the government is right on the key legal issue—that the records are (at least in part) exempt from disclosure.

But the plaintiff's lawyer may be able to finesse this problem. The theme is government secrecy, including perhaps a government cover-up or avoidance of embarrassment, and you should be able to press that theme as to both arguments. That is, even though the government's right to an exemption and its ability to avoid segregation are legally and logically distinct, it should be possible to counter the government's argument that it is unable to "reasonably" segregate by pointing out its misguided interest in secrecy. In doing so, you may be able to briefly remind the reader of the government's earlier impermissible exemption claims, thus ending on a relatively high note.¹⁸

Case 3. We recently briefed an employment-discrimination appeal involving three legally distinct, but related issues: allegations of discrete, serious acts of discrimination, a hostile work environment, and the employer's retaliation against our client's workplace opposition to the alleged discrimination. We viewed each argument as quite strong and important. It made sense in our judgment to begin with the discrimination arguments and to end with the retaliation argument. After all, allegations of retaliation for someone's opposition to discrimination will be fully appreciated only after the allegations of the discrimination are

¹⁶ See 5 U.S.C. § 552(b)(4)–(6).

¹⁷ 5 U.S.C. § 552(b).

¹⁸ That's what we tried to do at the end of a summary judgment reply brief in a Freedom of Information Act case. See Plaintiff's Reply Memo in Support of His Motion for Summary Judgment at 11, *Benavides v. Bureau of Prisons*, 774 F. Supp. 2d 141 (D.D.C. 2011) (No. 09-2026), ECF No. 19, <https://perma.cc/X8NZ-EBYW>.

themselves understood. Some of the components of a retaliation claim can come across as dry and technical, which is not the ideal way to end a brief. But the doctrine also demands a connection between the employee's opposition and the employer's discriminatory acts, and by stressing the latter toward the end of the brief, we could end in a way that was legally germane to the retaliation claim while bringing the reader back to the alleged discrimination at the heart of the case.¹⁹

Case 4. We recently handled an appeal that presented unusual argument-ordering challenges. The case—arising under Title VI of the Civil Rights Act of 1964—involved allegations of serious racial harassment against our client by a coach and teammates on a university athletic team and the university's alleged failures to end or curtail the harassment. The university sought summary judgment, arguing both that our client's claim was barred by the applicable statute of limitations and that, even if the claim was timely, the harassment committed by its coach and students was not attributable to the university under Title VI. To oversimplify a bit, on the former issue, if a three-year limitations period applied, our client's claim was indisputably timely, but if a one-year period applied, our client's claim was timely only if we could show that the persistent racial harassment constituted a "continuing violation" that reached into the one-year limitations period.²⁰ The district court had tossed the case on the ground that a one-year (rather than a three-year) statute of limitations applied and that our client had not shown a continuing violation that extended into the one-year period.

On appeal, we pursued three arguments: (1) that the three-year limitations period applied; (2) that, even if it didn't, our client was the victim of a continuing violation that was timely pursued under the one-year limitations period; and (3) that, on the merits, the university had violated Title VI. The traditional way of briefing these issues would be to argue the two timeliness points first because statute-of-limitations questions are typically viewed as logically antecedent or "threshold" issues that must be addressed before the merits.

But we didn't want the case to be seen from this traditional perspective. That would require us to address the principal threshold issue first, and that question—whether a three-year or one-year limitations period applied—demanded a quite abstract, technical, and lengthy analysis of federal common law divorced from the gruesome allegations

¹⁹ Opening Brief of Plaintiff-Appellant, *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023) (No. 21-30482), ECF No. 00516074239, <https://perma.cc/HMA9-3694>.

²⁰ See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–18 (2002) (discussing the continuing violation doctrine and its relationship to claim accrual for limitations purposes).

of racial harassment and institutional indifference at the heart of the case. Moreover, we felt that the reader could not, as a legal matter, fully appreciate our back-up statute-of-limitations argument—based on a continuing violation—without understanding the full breadth of the racial harassment over a multi-year period.²¹

So, we took the non-traditional approach—one that might, at first, confound or even disturb the reader. We began with the merits of the Title VI claim²² and then dealt with the supposed “threshold” issues—first arguing that the three-year limitations applied and then arguing that, in any event, our client’s claim was timely under the continuing-violation doctrine, under which the limitations period in a harassment suit starts with the first occurrence in a series of related harassing events.²³ This allowed us both to start with what mattered to the client—hitting the reader between the eyes at the outset with the allegations of egregious harassment—and end with a summary of the same harassment because, as just noted, an understanding of the entire pattern of harassment was critical to our continuing-violation argument. With this approach, we avoided any concern of ending with a whimper. If you take this tack in a brief—bucking conventional argument ordering—you should first explain why you are doing it.²⁴

In all events, to counter the endemic problem of ending a multi-issue brief with a relatively weak or seemingly less-important argument, try to end on a high note by adjusting the order of the arguments, as we did in our Title VI case, or with the thematic approach I’ve described. And then glide right into your punchy, precise, relief-based conclusion, shorn of repetitive argument, as the federal rule makers prefer.

²¹ See Opening Brief for Plaintiff-Appellant at 4–13, *Stafford v. George Washington Univ.*, 56 F.4th 50 (D.C. Cir. 2022) (No. 22-7012), ECF No. 1949269, <https://perma.cc/F6GD-5VGX>.

²² *Id.* at 19–32.

²³ *Id.* at 32–49.

²⁴ *Id.* at 19.

Three Little Words

Reliable, Valid, and Fair

Shaping the Bar: The Future of Attorney Licensing

Joan Howarth (Stanford University Press 2022), 240 pages

Danielle Tully, rev'r*

Most lawyers have a bar exam story. Some have more than one. Mine goes like this: the summer before I sat for the NY bar exam, I packed up my apartment and moved back into my parents' house along with my husband and 18-month-old son. I had a job waiting for me in Asmara, Eritrea—one that did not require a license to practice law—but I knew that I should take the bar anyway. I had graduated from law school and the bar was the final gate I needed to clear before I could call myself a lawyer. I paid for BarBri and, because I was located 100 miles from a live BarBri site, I was able to complete the bar review course by listening to CDs. Yes, CDs. Each day, after breakfast with my family, I climbed the stairs, passed through a closet, and entered the room above my parents' garage to study. I created a rigid schedule and kept to it. Part determination, part fear. I came down for lunch, dinner, bedtime, and a daily run. Occasionally, summertime laughter or my son's cries shook my focus. But my entire team had one goal: pass the New York bar.

As the date approached, I became less confident that I would pass. I had given up so much for this exam and the thought of having to give up more hung around me. After the first day in a room filled with unfamiliar bodies, I walked out of the Albany convention center deflated. When I pushed open the doors I saw my dad, my husband, and my son waiting for me. I don't know who wrapped their arms around me first. My dad took my son back home and my husband stayed with me. Tension swirled in my hotel that night as nervous applicants tried to review outlines and prepare for day two. Then the electricity went out. Darkness. Unable to

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study, my husband and I found a local Friendly's where we ate dinner and hatched a plan to listen to the Democratic National Convention, which would be televised later that night. Armed with a battery-operated radio we bought at CVS, we listened to then-senator Barack Obama talk about his own improbable journey to that moment, to "faith in the simple dreams" and "insistence on small miracles."¹ I fell asleep hopeful, not about the bar, but about the world outside that exam.

When I left the convention center after the second day, certain that I had just written the worst essays any bar examiner had ever encountered, dread rather than relief flooded over me. I had already either failed or passed. There was nothing more I could do. Then, all the minutiae I had crammed into my brain began to evaporate. To this day, all I can remember about the bar, and the months of study leading up to it, are the two-mile stretch of road I ran each day, seeing my son waiting for me, the dinner at Friendly's with my husband, finding a single battery-operated radio at CVS, and Obama's speech. I don't remember a lick of law—and I passed.

For those who pass, bar stories form part of a mythic, cathartic rite of passage. Joan Howarth tells hers in the preface to her timely book *Shaping the Bar: The Future of Attorney Licensing*.² Our stories share some similarities: we both had jobs lined up, "[s]ympathy and kindness"³ surrounded us, and we had one thing to do—pass the bar. And we did. But what about those who don't? What about those law school graduates who, but for the antiquated and deeply discriminatory licensing machine, would have been excellent attorneys and who are now lost to the profession?

In four parts, Howarth's book takes up these questions and in so doing, it chronicles the legal profession's protectionist roots and ties them to ongoing gatekeeping that is based on mistaken ideas about attorney competence and how to measure it. Perhaps her most important contribution—which says a lot because the book contains so many—is her analysis of the interdependent relationship among law schools, the ABA, the NCBE, and the billion-dollar testing industry. This relationship perpetuates costly gaps between what law students learn in law school, what they need to do to pass the bar, and the work (and clients) they will actually face when they enter the profession. These gaps are costly for law students, for law schools, and for the legal profession. Most of all, she argues, they're costly to the public.

1 Barack Obama, Keynote Address at the 2004 Democratic National Convention, Boston, Mass. (July 27, 2004) (transcript at <https://www.presidency.ucsb.edu/documents/keynote-address-the-2004-democratic-national-convention>).

2 JOAN HOWARTH, *SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING* (2022).

3 *Id.* at ix.

While the title of this book points to the future, and the future is particularly significant with the NextGen bar (discussed below) looming just around the corner, much of its brilliance lies in the careful way Howarth has mined the legal profession's history. She starts in Part One, entitled "The Attorney Licensing Crisis and How We Got There," by laying the groundwork for her present-day critiques and building the framework for possible paths forward. In five crisply written chapters, she takes us through the whole historical arc of attorney licensing. She starts at the nascent American legal profession's "shaky beginnings," when lawyers were reviled. She then stops briefly in the first half of the eighteenth century—a period of conquest, expansion, and Jacksonian democracy, where new states adopted admission standards that included allowing any "voter" of "good moral character" to be an attorney. Then, while sketching out the rise of the modern licensing regime, she brings us through the mid-to-late nineteenth century when states began to require proof of formal education and an apprenticeship.

Howarth acknowledges that the haphazard and extremely local approach to admission had its obvious drawbacks, but focusses much of her critique on the later efforts to professionalize or reprofessionalize law practice in the newly formed and rapidly expanding United States—efforts that made the profession "more exclusive and rarified."⁴ In particular, she chronicles the steady move away from the apprenticeship model where prospective lawyers trained in law offices to a model chock full of requirements—requirements for an undergraduate degree; three years of curated law study at a law school with rigorous, high-stakes exams; and finally a written bar exam. Although many of these standards first emerged from law schools, most notably Harvard Law School under the leadership of Dean Christopher Columbus Langdell, rather than from the practicing bar or licensing bodies, both constituencies soon joined the push for higher barriers to entry.⁵

Howarth locates the initial race to add requirements in the growing distrust between licensers and law schools. But she argues it was their greater concern over a "common enemy," the less elite law schools providing "a pathway for ambitious immigrants and other outsiders to enter the profession," that ultimately propelled the push for more uniform and higher standards.⁶ She supports this point by mapping licensing

4 *Id.* at 19. Depending on your perspective, lawyers filled or littered the nation's founding. Howarth notes that twenty-five of the fifty-six signers of the Declaration of Independence were lawyers and thirty-one of the first fifty-five members of the continental congress. *Id.* at 15–16.

5 Howarth notes that the American Bar Association joined the movement for more formal and stringent licensing requirements in 1878. *Id.* at 19.

6 *Id.* at 24.

reforms onto changes in the post-Civil Rights era legal and educational landscapes. For example, she recounts how the last jurisdictions to abandon diploma privilege—the ability to practice law after successfully graduating from law school—did so right at the moment when more Black law students started being admitted to law schools.⁷ She also describes how disparate bar passage rates between Black and white applicants led to legal battles, but that court after court rejected them.⁸ Instead, courts found that although other workplaces had been forced to stop using tests to cull applicants unless the tests could be proven to be both related to the job and valid, states could continue to use bar exams because bar exams were related to assessing minimum competence for law practice.⁹ Here, Howarth demonstrates the legal folly unfolding in the courts by using quotes from circuit decisions, like one suggesting that any apparent relationship between a particular cut score and competence was “almost a matter of pure luck” rather than proof of actual of competence to practice law.¹⁰ She concludes by stating, “[i]n these cases, the federal courts deferred to bar examiners’ good faith instead of holding them accountable for shoddy practices and even blatant scoring discrepancies used to prevent African Americans from getting licenses to practice law.”¹¹

The final chapter in Part One sets out the “Pressure Points in Contemporary Licensing.” They include: the high cost of legal education, the ABA’s shift to permitting bar-related education in law school, the bar prep industry, bar exam consolidation under the NCBE, and the advocacy sparked in 2020 “when licensing as usual became impossible” due to the pandemic.¹² This chapter, on its own reads like a wake-up call and hits like a gut punch. Together the chapters in Part One demonstrate how the U.S. legal profession has “buil[t] barriers to entry as high as possible to enhance the prestige of the profession and stifle competition.”¹³ But these barriers, Howarth argues, have done little, if anything to protect the public. Despite the gloom, she ends on a glimmer by suggesting that this confluence of pressure points might just create the right equation for dramatic reform.

The three slim chapters of Part Two tackle the assessment debacle. Howarth begins with an obvious statement: “Professional licensing requirements should protect the public by attempting to ensure that

7 *Id.* at 37.

8 *Id.* at 35.

9 *Id.* at 36–37.

10 *Id.* at 37 (quoting *Richardson v. McFadden*, 540 F.2d 744, 749 (4th Cir. 1976)).

11 *Id.* at 38.

12 *Id.* at 39.

13 *Id.* at 3.

the newest members of the profession are at least minimally competent to practice their profession.”¹⁴ This simple statement, repackaged and sprinkled throughout the book serves as a mantra-like reminder: law schools and licensers must finally align their work and their rules to law practice. Howarth follows up this claim with a sharp rebuke: neither bar examiners nor law schools know very much about what minimum competence to practice law looks like. Even more striking, they don’t know how to assess it. These chapters offer no quarter to the forces that created this mess. Here she addresses familiar, evergreen arguments about the gap between legal education and law practice, the false hierarchy of doctrine over skills, and the elitist law school hiring proclivities that endure. Chapter Eight then turns to the wealth of research bar examiners (and law schools) could look to when trying to answer the question: what is minimum competency for a new lawyer anyway? Readers who are familiar with research on the legal profession, like the IAALS *Build a Better Bar* project led by Deborah Merritt,¹⁵ the NCBE testing task force reports,¹⁶ Marjorie Schultz and Sheldon Zedeck’s work identifying twenty-six attributes of successful lawyering,¹⁷ or on the decades of legal education reform literature¹⁸ could probably skip this section. But I wouldn’t. There is something comforting in rereading how much information already exists that we could rely on if we just put our minds (and our dollars) to it.

Part Three, which addresses Character and Fitness, begins with a question: Who Fits? Here, Howarth answers by calling out bar examiners for focusing on the wrong questions and for asking the right questions but at the wrong time. She argues that bar examiners should spend less time trying to keep people out by predicting who will break the profession’s ethical rules in the future and instead focus on monitoring and preventing actual attorney misconduct. As in the other sections, Howarth pays careful attention to how bar examiners have used licensing requirements to exclude applicants for specious, discriminatory, and at times even unlawful reasons. She also exposes how they have chilled speech and

14 *Id.* at 51.

15 DEBORAH JONES MERRITT & LOGAN CORNETT, *BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE* 63–66 (2020).

16 Kellie R. Early, Joanne Kane, Mark Raymond & Danielle M. Moreau, *NCBE Testing Task Force Phase 2 Report: 2019 Practice Analysis*, NAT’L CONF. OF BAR EXAM’RS (Mar. 2020), https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce_Phase_2_Report_031020.pdf.

17 Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620 (2011) (describing twenty-six factors of lawyering effectiveness).

18 See, e.g., Neil W. Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, THE BAR EXAM’R (Sept. 2014), <https://thebarexaminer.ncbex.org/article/september-2014/empirical-research-on-the-core-competencies-needed-to-practice-law-what-do-clients-new-lawyers-and-legal-employers-tell-us/>.

association, discouraged applicants from seeking mental health services, and punished applicants for their sexual orientation and gender identity. By educating the reader in this way, Howarth makes it nearly impossible to disagree with the challenge she levies at law schools in Chapter Nine: fix character and fitness by actually educating future lawyers for strong professional identities. While Part Three deftly illustrates how current pre-licensure requirements do little to protect the public, these two chapters almost feel like a separate beat—a scene from another story not fully fleshed out in this narrative. Selfishly, I hope this section of the book is just a trailer for a full-length feature still to come.

In Part Four, the book's concluding section, Howarth looks to the future. In five chapters she plots a hopeful course for legal education and professional licensing—a competence-based course that aligns learning, experience, and assessment with modern law practice. Building on the critiques from earlier chapters, this section first sets out twelve foundational principles to reform legal education and professional licensing. These principles range from aligning licensing requirements with actual lawyer competencies to making licenses portable from state to state. Some of the principles could be whole books themselves. And many of them require a radical departure from business as usual. For example, Howarth argues for a new licensing requirement: clinical residencies. She calls this “a single, relatively simple step that jurisdictions can take now to dramatically improve public protection.”¹⁹ At the same time, the framework she suggests seems far from simple to implement. In a clinical residency program, preferably one tied to law schools, students would represent clients under the direct supervision of a skilled attorney. While many law schools offer clinics that already provide this type of robust and carefully supervised educational experience, some do not. Additionally, few law schools have built their clinical teaching capacity to provide such an experience for every student. As a beneficiary and vocal advocate of clinical education, I support Howarth's inclusion of clinical residency as a licensing requirement for the future, but I wanted to know how we get there. As she notes, the cost of legal education is already keeping would-be lawyers from the profession. Adding high-touch clinical models will only add to the cost. On top of cost, law schools will have to grapple with the mismatch between faculty expertise and the experiential learning paradigm, a mismatch that is partly due to their deeply hierarchical staffing models. The clinical residency model requires an army of supervisors who are expert lawyers and expert teachers, and most current

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¹⁹ HOWARTH, *supra* note 2, at 101.

law professors are simply unprepared to teach and supervise actual law practice.

Howarth makes clear from the beginning: “Practicing law is difficult, so obtaining a license to practice law should be hard.”²⁰ She also acknowledges that licensing exams will continue to exist in at least some, if not most, jurisdictions. With this in mind, she suggests that states use performance tests, which are the most appropriate form of minimum competence assessment because they don’t rely primarily on memorization and “can test manipulation of facts, legal strategy, case evaluation and development, and other more sophisticated and realistic lawyering tasks.”²¹ Here, she calls on states to take more active responsibility for attorney licensing and to function as incubators—adapting requirements to the changing profession. This recommendation also faces a pinch point. For tests to be reliable, valid, and fair they must be carefully calibrated. While such calibration is possible, it is also costly and time-consuming. Further, if testing is to align with the needs of the profession and law school curricula, greater coordination among constituencies will be necessary. You can see how easy it might be for the gears of reform to stutter, stall, and then grind to a halt.

Still, I left Part Four hopeful, although not for the reasons I imagined when I began the book. As Howarth notes, “preparing students for competent practice has not been the historic mission of most U.S. law schools.”²² Neither has licensing. Yet for years, attorney licensing and bar exam pressure have been a driving force behind both inertia and reform in law schools. While advances in test design, administration, and scoring have stabilized what exam scores mean across exam administrations, the test itself has become (and may have always been) meaningless. Howarth notes that bar exams have been criticized for testing both too little and too much, of being too summary in some places and too detailed in others. Most importantly, they have failed to test the critical lawyering competencies that are actually required of new lawyers. In this section, rather than continue her critique on the impact that licensing requirements have had on law schools, Howarth seems to hope that their influence will continue. That’s because the NextGen bar is on the near horizon. The NextGen bar will test fewer doctrinal subjects and those it does test will be more contextualized. This drastic change will hopefully turn the focus from rote memorization to legal methods and analysis, which are the more complex cognitive skills required of new lawyers. Despite signaling

20 *Id.* at 3.

21 *Id.* at 138.

22 *Id.* at 59.

that the NCBE may finally be moving in the right direction, Howarth does point out that numerous flaws still endure—particularly the NCBE’s commitment to an “all-or-nothing one-shot exam using the familiar twice-a-year timing.”²³

One thing is certain: change is coming. And Howarth’s book sets out an ambitious vision for that change, one that would remake legal education, licensing, and the profession. The history she narrates though suggests that actual changes will be much more conservative. Even so, her book reminds us in each section that whatever changes we make, we must make them with “humility and constant self-scrutiny to ensure that our current motivation is to protect the public, not the profession.”²⁴ I, for one, hope her book is read widely and that the legal education and legal profession gatekeepers heed her wise counsel.

²³ *Id.* at 137.

²⁴ *Id.* at 115.

Good Medicine Doesn't Have to Taste Bad

The (Not Too Serious) Grammar, Punctuation, and Style Guide to Legal Writing

Diana J. Simon (Carolina Academic Press 2022), 203 pages

Wayne Schiess, rev'r*

Professor Diana Simon has achieved something you might think impossible: She has written a witty and engaging book about grammar, and that's grammar in the context of *legal writing*. It's quite an accomplishment. But the book is more than witty and engaging:

- It's exhaustively sourced—I found my grammar-nerd-self consulting the footnotes to learn more and to find out, “who says so?”
- It has lots of real-world examples, including from more than a dozen cases, to drive home the point that grammar matters—especially to lawyers.
- It's firm but reasoned. Professor Simon stands by traditional grammar and punctuation rules, but never resorts to “because I said so.”

The chapters grab your attention by describing the importance of the punctuation mark or grammatical matter under discussion. You then get historical background, some concrete practical rules on the subject, and thoroughly supported, practical, and reliable advice for making correct choices. For each topic, Professor Simon provides numerous before-and-after examples showing correct and incorrect use. Any lawyer, paralegal, law professor, or law student will enjoy the book and learn a lot, too. So what will you learn?

You'll encounter Professor Simon's theory of comma-splice proliferation in her students' writing, which is based on the Harry Potter

* Senior Lecturer, The University of Texas School of Law, and author of *LEGAL WRITING NERD: BE ONE* (2018). Thank you to Judy White for suggesting the title of this review.

novels.¹ Rowling’s novels use comma splices, particularly in dialogue: 474 times in *Harry Potter and the Deathly Hallows* alone.² (What were you thinking, J. K. Rowling?) The Harry Potter books, which many of Professor Simon’s students have read, have caused those students to think comma splices are okay. But do comma splices matter? Yes, and Professor Simon cites a case to prove it: a federal district court applying South Dakota law commented that the relevant legal standard was unclear because a state court had used a comma splice in stating the standard.³

You’ve heard about the case of the serial comma that cost millions?⁴ Now you’ll meet the semi-snobby semicolon: “Semicolons are like kale,” Professor Simon declares. “Some writers like them and some don’t, but they are good for you if you know how to use them.”⁵ After digesting the advice, you can read about the Hungarian manslaughter-deportation case that hinged on a semicolon.⁶

Nerdy enough for you yet?

Well, there’s a whole chapter on the apostrophe: The Double Life of the Apostrophe,⁷ in which Professor Simon tells the tale of an advocate’s misuse of apostrophes in an offer of settlement before trial. Result? The offer failed to satisfy the “particularity requirement,” and on appeal, the court reversed an award of attorney’s fees.⁸

And yes, the book acknowledges and offers advice for handling the recurring conundrum over where to place the apostrophe in “attorney’s fees” (attorney fees? attorneys’ fees?).⁹

The chapter on passive voice was enjoyed by me. There, you can review the appropriate roles that active and passive voice play in legal writing, and you can chuckle (if you dare) at the client whose due process claim was dismissed because a lawyer failed to identify who did the “assuring” in the following statement from the complaint: “[s]he was assured that she would continue on the job as long as she performed satisfactorily.”¹⁰

1 DIANA J. SIMON, *THE (NOT TOO SERIOUS) GRAMMAR, PUNCTUATION, AND STYLE GUIDE TO LEGAL WRITING* 9–12 (2022).

2 *Id.* at 12 (citing Alan Warhaftig, *No Wiz at Grammar*, *EDUC. WK.*, Sept. 24, 2007, <https://www.edweek.org/teaching-learning/opinion-no-wiz-at-grammar/2007/09>).

3 *Id.* at 14 (citing *Anderson v. W. Nat’l Mut. Ins. Co.*, 857 F. Supp. 2d 896, 903 (D.S.D. 2012)). The South Dakota court later corrected the splice and re-issued the opinion.

4 *Id.* at 39.

5 *Id.* at 21.

6 *Id.* at 31.

7 *Id.* at 53.

8 *Id.* at 63.

9 *Id.* at 61–62. Bottom line: there is no clear-cut answer. Follow any relevant style guide and otherwise be consistent.

10 *Id.* at 148.

But please don't think that this book just points out controversies and tells practical, sometimes scary real-world stories. If that's all it did, it would still be excellent. But it has entire chapters on recurring grammar problems and on basic grammar knowledge every legal writer needs. If students (and lawyers) want rules, this book has rules.

Beyond the practical, the book will hold your interest on a variety of topics:

- Chapter 4 on the serial comma includes an explanation of why it's sometimes called the "Oxford comma."
- Chapter 6 is about hyphens and em dashes and en dashes (oh my!).
- Chapter 7 addresses pronouns, with good advice for the singular *they*.
- Chapter 9 on quotations addresses how to use quotation marks correctly, as well as when to quote, when not to quote, and how to present a block quotation effectively.
- Chapter 12 contains a thorough discussion of transitions and cites research showing that transitions enhance readers' understanding.
- Chapter 13 presents a thorough discussion of explanatory parentheticals with good examples, poor examples, and practical advice for using them—and not using them.
- And more. The book does more than entertain; it teaches. Of course, I now have to ask myself if Professor Simon would approve of that semicolon.

But that's another great aspect of her book: it invites readers to question their own grammar and punctuation practices, a great habit that lawyers and law students should take up, and probably will, after reading the book. Readers will come to understand that these pesky rules actually matter, and they'll start to care.

I can't recommend this book highly enough. If you're a dedicated grammar nerd (often called a legal writing teacher), you'll love the thoroughness and the sources, the rules, and the examples. Yes, there's a teacher's manual. If you're a practicing lawyer, you'll learn plenty of good reasons to double- and triple-check your work for proper use of commas, apostrophes, semicolons, passive voice, transitions, and more. If you're a law student, you'll get a readable, engrossing introduction to the world of legal writing mechanics. And an important world it is.

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Reduce, Remove, Reveal

Subtract: The Untapped Science of Less

Leidy Klotz (Flatiron Books 2021), 304 pages

Jennifer Murphy Romig, rev'r*

Online pandemic teaching started out as an emergency lesson in teaching with less. When the classroom had been stripped of its whiteboard, chairs, and podium—indeed, its entire physical space—faculty were forced to ponder what exactly was left for teaching and learning. Since the start of the pandemic, some of those subtractions have turned out to be beneficial, fostering new channels for student participation, encouraging empathetic attendance policies, and opening up new possibilities for flexible online course content. Why did it take a global pandemic for these innovations to emerge? The creative promise of subtraction and the difficulty of seeing and implementing it are at the heart of the book *Subtract: The Untapped Science of Less*, by University of Virginia design and architecture professor Leidy Klotz. With insights and examples that should resonate with legal writers and legal writing professors, Klotz makes a fresh and well-developed case that “getting to less often means doing, or at least thinking, more.”¹

Klotz’s book is titled *Subtract*, but the subtitle’s focus on “less” does important work. This concept of “less” is a framework for subtracting both as an action and a state.² The action is subtracting, whether it be from a first draft or initial proposal or any other interim effort. The state is the superior result of a creative process that values both adding and subtracting. This concept of “less” encompasses personal efforts like the KonMari Method portrayed by Marie Kondo’s sweetly delivered

* Professor of Practice, Emory University School of Law. Professor Romig is grateful to Emmett Griner, Kay Murphy, Laura Romig, Matthew Sag, and Nantiya Ruan for feedback on this book review.

¹ LEIDY KLOTZ, *SUBTRACT: THE UNTAPPED SCIENCE OF LESS* 16 (2021).

² *Id.*

and utterly ruthless home edits in her book and Netflix series.³ Beyond the personal realm, Klotz draws from a wide range of interdisciplinary examples from engineering, architecture, and business, to make his argument for processes, ideas, and products valuing “less.” An urban waterway removes 70s-era concrete building cover in favor of greenspace, diminishing downstream flooding risk. A toddler bike without gears and pedals helps kids intuitively learn to balance and coast (instead of adding training wheels). A concrete block fabricated with hollow pockets of air turns out to be better construction material than a heavy, solid brick. (Every concrete block you’ve ever seen is fabricated based on this idea, originated by Pennsylvania’s first female architect, Anna Keichline.) With the power of storytelling about these and other examples, Klotz touts the creative promise of “less” as an innovative solution to various professional and societal challenges.

But just as “less” is valuable across contexts, it is also overlooked, unrecognized, and undervalued across contexts. Study participants asked to improve a piece of writing were three times more likely to make it longer than to cut it down. In a follow-up study, participants asked to improve their own writing were even less likely to reduce its length. When given a complicated draft itinerary for a day of sightseeing in Washington, D.C., and asked to improve it, “[o]nly one in four participants removed activities from the packed original.”⁴ The human mind’s tendency to find solutions with “more” rather than “less” is further supported by studies in visual and spatial contexts (such as working with patterns and Lego-like blocks).

Klotz takes pains to show that the tendency to think of “more” as a solution is not just a preference but rather a cognitive tendency. It’s not that people can’t or won’t subtract, but they just don’t think of it as much; Klotz calls this “mental accessibility.”⁵ To prime a wider variety of solutions that include subtracting, removing, and streamlining, experiment designers add explicit cues such as, “[k]eep in mind that you could potentially add things . . . as well as take them away.”⁶ When their instructions included this reminder, participants were much more likely to think of subtractive improvements. If it’s that simple to bring subtraction to mind, why is subtraction such an unusual strategy? Cognitive overload is part of the problem. When participants were given more cognitive tasks layered

3 See MARIE KONDO, *THE LIFE-CHANGING MAGIC OF TIDYING UP: THE JAPANESE ART OF DECLUTTERING AND ORGANIZING* (2014); *Tidying Up with Marie Kondo* (Netflix 2019).

4 KLOTZ, *supra* note 1, at 29.

5 *Id.* at 35.

6 *Id.* at 41.

onto the real test condition of solving a problem, those cognitive stresses made “less” even harder to see. Basically, “stress correlates with adding objects.”⁷

These experimental studies test cognition in artificial lab settings, but their findings resonate in the real world. Evolutionary and economic forces such as the drive for acquisition and the need to show competence push individuals and groups towards “more” and away from “less.” The bias toward more certainly coheres with basic tenets of capitalist accumulation, but studies finding the brain’s bias toward more are also “robust across groups and situations.”⁸ “[O]ur subtraction neglect has deep and tangled roots in our nature and nurture,” Klotz writes, roots which can’t really be pulled up and discarded, but which can be studied and confronted so we can become better at “finding the delight of less.”⁹

After making the case for why “less” is so difficult to see, Klotz explores practical approaches to prompt subtraction-related ideas and solutions. As noted earlier, explicit cues about adding and subtracting can help. Simply telling someone—or yourself—“you can improve this by either adding or subtracting” helps bring subtraction to mind. Because multitasking is the enemy of recognizing “less” as a promising solution, preserving mental bandwidth can help designers and writers set themselves up to think of subtraction. And sharing one’s work with a neutral audience can certainly help, because the writing studies show that writers are even less likely to subtract from their own drafts compared to editing other people’s work.¹⁰ It turns out that the tried-and-true approach of asking someone to look at your work is another way to seek “less.”

Sometimes having fresh eyes isn’t an option, and Klotz also recommends that individuals try to think creatively by using different ways of looking at problems—literally. When viewing a shape, some eyes and brains focus more on the shape itself (the object), whereas others focus more on the field behind the shape (the background). This is a simple articulation of the cognitive and, arguably, cultural¹¹ concept of “field dependence.”¹² The more focus on the foreground object, the less likely one is to notice movement in the background field, a way of perception that is relatively “field independent.” More alertness to the background,

⁷ *Id.* at 55 (citing Brian D. Vickers and Stephanie D. Preston, *The Economics of Hoarding*, in OXFORD HANDBOOK OF HOARDING AND ACQUIRING 221–32 (Randy O. Frost & Gail Steketee eds., 2014)).

⁸ *Id.* at 100.

⁹ *Id.* at 45.

¹⁰ *Id.* at 158 (citing Gabrielle S. Adams et al., *People Systemically Overlook Subtractive Changes*, 592 NATURE 258 (2021)).

¹¹ *Id.* at 89–90.

¹² *Id.* at 87.

such as noticing when the entire perspective has altered slightly, means “field dependence.” This spatial concept could correlate to the balance of text and white space on a document. Thinkers who are field independent may focus on what the text says, whereas those more attuned to the field may notice that a paragraph is incredibly long (leaving no white space) or another paragraph is noticeably shorter (leaving more white space around it and thereby perhaps suggesting less support for the content).¹³

White space on a page is just one example of seeing what’s not there—the negative space. Just as design students are taught to work with those negative spaces, legal skills include listening for what is *not* said, researching for gaps in the law, and noticing missing facts and omitted legal authorities in an otherwise lengthy and detailed legal analysis. Thus, the background or “field” of law offers strategic possibilities such as asserting that the opponent’s argument is discordant with the “field” of legal precedent behind it, or that a case of first impression should be decided a certain way in harmony with the “field” of precedent. Conversely, a legal argument might utilize “field independence” to assert that one single fact out of a complex situation is the sole dispositive fact. These are not new legal tactics, but the vocabulary of field dependence explored in *Subtract* provides another way of understanding, teaching, and using such tactics.

One challenge with implementing “less” is the legitimate worry that readers such as senior lawyers and judges won’t appreciate the work, and will in fact see it as small or incomplete. Just as the most readily accessible solution is to add more, audiences may use “more” as a readily accessible mental proxy for “better.” To address this concern, it first bears repeating that Klotz is absolutely *not* advocating for turning in first drafts or underdeveloped work with the rationalization that revising and editing won’t really improve it. Work that is sufficient but not great has a name in the literature—what economist Herbert Simon called “satisficed,” a portmanteau of “satisfied” and “sufficed.” Klotz acknowledges that some work should be satisficed because of time or resource limitations. But *Subtract’s* aspirations reach for solutions beyond what is merely good enough.

Because of our brains’ attraction to more as well as experiences with work that is “satisficed” rather than superb, the concept of subtraction needs good marketing. It’s a big challenge because even the word “subtraction” has a negative “psychological valence.”¹⁴ But subtraction

¹³ See generally Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 124 (2004) (“Effective use of white space . . . affects legibility”).

¹⁴ Psychological valence means the inherent attractiveness or averseness of an event, object, or idea, as well as the word or words used to describe it. KLOTZ, *supra* note 1, at 165.

and “less” can be reframed with positive valence. Marie Kondo markets the fun of decluttering one’s house in her famous question, “Does it spark joy?”¹⁵ Promotional material for an award-winning urban design project touted four key verbs: “reveal,” “clean,” “carve,” and “connect.”¹⁶ Librarians refer to removal of unnecessary information from the library as “weeding.”¹⁷ Most grandly, Klotz argues that skillful subtraction can bring one to the “flow state” made famous by Mihaly Csikszentmihalyi: “Taking away words to transform what’s already there may not be our first instinct. But editing is a challenge that matches our ability. That kind of challenge can be divine.”¹⁸

Some of Klotz’s own phrasings are clunky and do not roll off the tongue, like “post-satisfied less” and “more-ality.” Klotz connects subtraction to seemingly every situation from cleaning one’s house to ending apartheid. Yet he does succeed in showing the breadth of his argument. The economic, cognitive, and design-based principles and anecdotes throughout the book make it a fairly easy and certainly a richly cross-disciplinary read.

Subtract offers a number of possibilities for legal writing. The book reinforces numerous lessons already being taught in legal writing classrooms: A first draft is just a start. Great work has to be edited and streamlined. Say more with fewer words. Don’t use a big word when a small word does the job. Don’t take readers on a journey of discovery tracking your research; rather, give them only what is important for understanding your ultimate answer. Klotz of course invokes the concept attributed to various writers such as Blaise Pascal, Ernest Hemingway, and Mark Twain: “I had to write you a long letter because I didn’t have time to write a short one.” The one pop-culture anecdote conspicuously absent from this book is Coco Chanel’s famous advice about subtraction: “Before you leave the house, look in the mirror and take one thing off.”¹⁹

This difference between “satisfied” (good enough) work and what Klotz refers to as “post-satisfied” (truly great) work is a distinction legal writing professors should acknowledge. The truth is that due to time pressure and client-resource limitations, most lawyers need to know how to produce “satisfied” legal writing. This is not to say satisfied writing is bad or sloppy, because basic attention to conciseness and clarity

15 *Id.* at 161.

16 *Id.* at 166.

17 *Id.* at 232.

18 *Id.* at 164.

19 *The Most Inspiring Coco Chanel Quotes to Live By*, VOGUE AUSTRALIA (Aug. 16, 2018), <https://www.vogue.com.au/fashion/news/the-most-inspiring-coco-chanel-quotes-to-live-by/image-gallery/b1cb17be7e20734d0b255fbd5a478ed4>.

is required for all projects. But not every client or project calls for the “divine.”²⁰ Professors can connect the classroom to the realities of practice by acknowledging that professionally effective work ranges from good enough to nothing-but-the-best. Law students will, ideally be prepared to produce either type with efficiency and equanimity.

Subtract also reinforces personal and professional habits for surviving an information-rich and distracting digital world. Klotz notes that writers may do better by slowing down their fluency at adding words, citing John McPhee’s use of a mechanical typewriter.²¹ Information producers—for example, legal writers—should be guided to consider not only the cost to the producer of making the information, but also the total cost of using the information, including time spent reading it. This advice is not novel, but restates the case for concise, efficient writing for internal (lawyer) and external (client and public) audiences. Especially relevant to public legal writing, Klotz cites a wonderful study on how fancy vocabulary often backfires, Daniel Oppenheimer’s *Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly*.²²

Subtract’s treatment of analogies is brief but reinforces legal writing scholarship on persuasion theory as well as the nuts and bolts of well-constructed legal analysis and argument. The “pinnacle of mental subtraction is when we remove ideas that are no longer correct, or that never were in the first place,” Klotz writes.²³ Yet wrong ideas are extremely difficult to dislodge for various cognitive reasons. People learn best not by erasing what they already know, but by building connections between new material and prior knowledge—even if that knowledge is somewhat wrong.²⁴ Thus “accommodation, not removal, is how we construct new knowledge.”²⁵ Legal writing professors will be pleased to have another argument for the power of analogies, which Klotz points out as one way to help audiences learn new ideas. What’s more, in “very special cases,” they can actually “help us subtract wrong ideas.”²⁶ This is because analogies “feel like accommodation, in that they allow us to keep one foot in what we know while we seek new ground with the other.”²⁷

²⁰ KLOTZ, *supra* note 1, at 164.

²¹ *Id.* at 228.

²² *Id.* at 152.

²³ *Id.* at 239.

²⁴ *Id.* at 241–242.

²⁵ *Id.* at 242.

²⁶ *Id.* at 245.

²⁷ *Id.*

Subtract is also relevant to law professors' work in academic institutions, with their attendant policies, functions, and dysfunctions. Klotz mentions the proliferation of administrative rules and regulations in U.S. law, lauding efforts to streamline them by removing rules that don't work or no longer serve their purpose.²⁸ His brief treatment of law brings up a good point about overburdened syllabi. If a syllabus has become a "syllabus tyrannus"²⁹ overloaded with policies and tangential content, its primary purpose of framing the course may be compromised. The lessons from *Subtract* are consistent with what others already suggest regarding syllabus reform—for example, preparing a very concise syllabus as a cover sheet for a longer version posted to the course's learning management system.³⁰

Toward the end of the book, Klotz argues for the ethical dimensions of "less" in the workplace and classroom. One study showed that U.S. Army officers had to contend with more days of mandatory activities than available work days, causing both "corner-cutting" and "mental anguish."³¹ Students overwhelmed by information may impair and distort their decision-making: "In extreme cases, too much information doesn't just tax students' bandwidth, it can make them believe cheating is their only option to meet the demands upon them."³² The implication is: Giving impossible or impossibly numerous tasks to a class or team can lead to compromised ethics. The reference to officers' mental anguish called to mind a recent debate over experiential education. One law professor suggested that growing experiential educational practices may actually add stress and diminish students' already poor mental health and work-life balance.³³ Responding, a group of professors argued that the problem lies not with experiential education but with classroom doctrinal teaching and mandatory curved grades. They acknowledged experiential education does add, but what it adds is something deficient from the traditional

²⁸ *Id.* at 124–26.

²⁹ Rebecca Schuman, *Syllabus Tyrannus: The Decline and Fall of the American University Is Written in 25-Page Syllabi*, SLATE (Aug. 26, 2014), <https://slate.com/human-interest/2014/08/college-course-syllabi-theyre-too-long-and-theyre-a-symbol-of-the-decline-and-fall-of-american-higher-ed.html>.

³⁰ Tom Deans, *Yes, Your Syllabus Is Way Too Long*, CHRON. HIGHER EDUC. (Jan. 20, 2019), <https://www.chronicle.com/article/yes-your-syllabus-is-way-too-long/>.

³¹ KLOTZ, *supra* note 1, at 123–24.

³² *Id.* at 230.

³³ Jonathan Todres, *A Healthier Legal Profession Starts with Law Schools*, BLOOMBERG LAW (Mar. 15, 2022), <https://news.bloomberglaw.com/us-law-week/a-healthier-legal-profession-starts-with-law-schools> ("Many faculty now have students complete experiential exercises throughout the semester instead of relying solely on a final exam. These changes have value. . . . But their costs include further taxing students. When multiplied across the curriculum, at some point, it can be too much.").

doctrinal classroom.³⁴ This is an age-old and perhaps intractable debate; in light of *Subtract*, the important point is that additions to student task lists should be done deliberately and collaboratively among faculty. Likewise, legal writing faculty asked to take on additional tasks might cite Professor Klotz in seeking corresponding subtractions from their expected functions and roles.

Subtract is, overall, a good read and an excellent challenge to writers, designers, and creators of all types—including lawyers and law professors. One of the many pandemic lessons is this opportune moment for academics and professionals to evaluate what to reveal, carve out, streamline, edit, weed, clean, and otherwise subtract, so as to find “the delight of less.”³⁵

³⁴ Claudia Angelos et al., *Experiential Education: An Antidote to Law Student Stress*, BLOOMBERG LAW (Apr.11, 2022), <https://news.bloomberglaw.com/us-law-week/experiential-legal-education-an-antidote-to-law-student-stress> (“Quite literally getting up on one’s feet and taking some action in the world provides a break from the inactivity unfortunately associated with the usual regime of classroom-based study.”).

³⁵ KLOTZ, *supra* note 1, at 45.

Reflections on a Judge

Reflections on Judging

Richard A. Posner (Harvard University Press 2013), 380 pages

Srikanth Reddy, rev'r*

This book was published 10 years ago. It doesn't seem that long ago, 2013. But as I read this book in 2023, I couldn't help but think about how much has changed. A celebrated and oft-cited fixture on the United States Court of Appeals for the Seventh Circuit, Judge Richard A. Posner retired from the bench just four years after writing this book, at age 78. But in 2013, it was hard to remember a time when he wasn't on the court—he was appointed in 1981—or conceive of a time when he wouldn't be on it.

His retirement not many years later was strange, unpleasant, and sad. Posner said he suddenly realized in 2017 that courts weren't fair to pro se litigants, and that disagreements with his colleagues about the Seventh Circuit's treatment of pro se litigants caused him to step away.¹ He then self-published a book that purported to offer ways to improve the court's handling of pro se appeals.² But in the eyes of several critics, and in my own view, his criticism was misguided. And by disparaging the staff attorneys at the Seventh Circuit (who handle the court's cases involving pro se litigants) and airing disagreements he'd had with his colleagues on the bench, it may have been unethical.³ (I worked at the Seventh Circuit

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¹ Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>; Patricia Manson, *Posner says friction on 7th Circuit bench led to his retirement*, CHICAGO DAILY L. BULL. (Sept. 6, 2017), <https://www.chicagolawbulletin.com/archives/2017/09/06/posner-bench-friction-9-6-17>.

² RICHARD A. POSNER, *REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS* (2017).

³ See, e.g., David Lat, *The Seventh Circuit Responds to Judge Richard Posner*, ABOVE THE L. (Sept. 15, 2017), <https://abovethelaw.com/2017/09/the-seventh-circuit-responds-to-judge-richard-posner/>; Matthew Stiegler, *Posner's new book is bananas, but you might want it anyway*, CA3BLOG (Sept. 18, 2017), <http://ca3blog.com/judges/posners-new-book-is-bananas-but-you-might-want-it-anyway/>; Zoran (Zoki) Tasić, *Reforming Richard Posner: The Former Federal Judge Needs to Overhaul His Assessment of the Seventh Circuit's Staff Attorney Program and Correct the Errors in His Book* (Oct. 9, 2017), available at https://drive.google.com/file/d/0B_yKMHEBvcDLTdoOU1dWxZeUU/view?resourcekey=0-gDifX3trg0gmX-VqdOC0TTg.

as a staff attorney from 2009 to 2011.) In 2022, it was reported that Posner was diagnosed with Alzheimer’s disease six months after he retired.⁴

Ten years out, a reader of this book inclined to find fault may wonder at times if it contains hints of what was to come. On the first page of the first chapter, for example, Posner writes that he entered Yale College in 1959 at the age of 16.⁵ Most sources, however, state that Posner was born in 1939 and *graduated* from Yale in 1959, before going on to Harvard Law School, where he finished first in his class.⁶ (Posner himself writes a few pages later that he was a clerk at the Supreme Court during the 1962 term.⁷) And in the book’s Conclusion, after arguing for a paragraph that academic lawyers are no longer very useful to the practical profession of law—an argument in service of a larger argument that judges need better judicial education—Posner devotes eight pages to criticizing civil recourse theory, a theory of tort law.⁸ At least twice, he misspells it as civil *resource* theory. Posner’s criticism also feels personal; he responds to a critique by two civil recourse theory professors of an opinion he wrote, and he concludes by pointing out how infrequently their articles on the subject have been cited in judicial opinions.⁹ The age and spelling mistakes are minor, the type anyone could make at any time. But a reader will likely come away from this book concluding that Posner could have used more rigorous and challenging editing.

Editing aside, is this a book worth reading? Perhaps, but it’s not a book in which Posner offers many opinions he hadn’t offered elsewhere before. I liked, and would have liked even more of, Posner’s personal story. I found his criticisms of judicial restraint and textualism engaging—the latter seeming especially relevant these days. Another reader’s mileage may vary, depending on what the reader already knows about Posner and his views. There’s probably something in here to interest everyone, but it requires the reader to do some sifting.

Posner’s stated central concern in writing the book is the federal judiciary’s ability to handle the increasing complexity of federal cases.¹⁰ Judges don’t keep up with advances in technology or in other fields—an example Posner gives is “knowledge about foreign cultures”—that make

⁴ Jenna Greene, *After Posner retired from 7th Circuit, a grim diagnosis and a brewing battle*, REUTERS (Mar. 29, 2022), <https://www.reuters.com/legal/litigation/after-posner-retired-7th-circuit-grim-diagnosis-brewing-battle-2022-03-29/>.

⁵ RICHARD A. POSNER, REFLECTIONS ON JUDGING 18 (2013).

⁶ E.g., Posner, Richard Allen, FED. JUD. CTR., <https://www.fjc.gov/node/1386511> (last visited May 22, 2023).

⁷ POSNER, *supra* note 5, at 21.

⁸ *Id.* at 358–66.

⁹ *Id.* at 366.

¹⁰ *Id.* at 3.

cases complex.¹¹ Questions are complex, he explains, if they involve “complicated interactions,” or “a system rather than a monad”—economic, political, ecological or technological systems, to name a few examples.¹² Some complexity is external to the legal system, but some is internal, attributable to increased caseloads and bureaucratic pressures, which Posner says are illustrated “both by the overstaffing of the Supreme Court and by the growth in the length of the *Bluebook* and other citation manuals.”¹³

The thesis of the book, however, seems to have been conjured to justify the contents, and to advocate for realism as the antidote to complexity. I can accept that federal cases are getting more complex and am open to an argument that bureaucratic pressures in the legal system contribute to the problem. But are the *Bluebook* and staffing at the Supreme Court the best examples of this phenomenon? Are they really such serious problems, in the same way that heavier caseloads and technological illiteracy are? Are they the same type of problem at all? My sense is that they’re simply things Posner dislikes and wanted to write about. That description applies to the book as a whole. And some of the subjects he writes about here—the *Bluebook*, formalism, judicial restraint, methods of interpretation, Justice Antonin Scalia, opinion writing—are things he’d already written about elsewhere.

Then again, so what? Get past that, and there’s a lot in here to like, even if they’re greatest hits rather than new songs. Yes, Posner has a tendency to make broad, categorical statements and sound remarkably sure of himself, in a way that’s incomprehensible to anyone who’s ever struggled with self-esteem or impostor syndrome: Yale Law School “did and does” baby its students;¹⁴ having a career law clerk is a mistake (except for “very weak” judges);¹⁵ a hot dog is “generally regarded” as a sandwich.¹⁶ In fact, as I’ve established, he did get things wrong—he was human. But he was undeniably a really smart human, and I think he was right more than most of the rest of us. He’s certainly right, for instance, that the *Bluebook*

11 *Id.*

12 *Id.* at 3–4.

13 *Id.* at 96. In an “Appendix” to the Introduction, Posner lists 45 “Sources of Complexity That Are External to the Judicial System” (random examples include “Bite-Mark Evidence,” “Energy,” “Neuroscience,” “Physics,” and “Statistics, including Multiple Regression Analysis”), and six “Sources of Complexity That Are Internal to the Federal Judicial System” (including “Delegation of Opinion Drafting to Law Clerks;” “Formalism, Including Canons of Construction;” and “Verbose, Overly Complex, Vague, Poorly Written Judicial Opinions”). *Id.* at 14–17.

14 *Id.* at 20.

15 *Id.* at 34.

16 *Id.* at 200.

is too complicated for the simple purposes of citation, even if spending nine pages criticizing it in Chapter 3 is overkill.¹⁷

The first chapter of this book is lively, recounting Posner's career and path to his appointment to the Seventh Circuit. It could be from a different book—an engaging memoir, full of stories and flashes of dry humor. Recounting a seminar for newly appointed judges, he writes that he can only remember an argument about how to designate sections and subsections of opinions, and that “I have avoided having to grapple with this profound issue by never dividing my opinions into sections.”¹⁸

The humor still peeks through occasionally after that,¹⁹ but the remaining chapters shift in tone from storytelling to criticism. If the problems Posner addresses all fall under the banner of complexity, his goal is simplicity: “I shall be urging throughout this book that law should be simple, regardless of the complexity of the issues it grapples with, and judicial opinions simple, and the judicial focus not on solving technical problems, which is for the real techies, but on managing complexity—not adding to it.”²⁰

Posner's criticism of judicial restraint is interesting and original to my eyes, although he doesn't appear to bring it to a convincing resolution. He characterizes judicial restraint as a passive response that allows judges to avoid complexity rather than confront and grapple with it.²¹ He focuses his discussion of judicial restraint primarily on what he calls “constitutional restraint,” meaning a reluctance to hold that legislation is unconstitutional, and makes the point that although courts are less likely to strike down legislation pursuant to this doctrine, it infringes on the power of legislatures by interpreting enacted laws narrowly.²² Posner observes that both conservatives and liberals have abandoned this form of judicial restraint on occasion in pursuit of their constitutional agendas: Conservatives have practiced judicial activism since taking control of the Supreme Court in the 1980s, while liberals have instead searched in vain for a theory of judicial review that would uphold the activist decisions of

17 “A system of citation form has two valid functions: to provide enough information about a reference to give the reader a general idea of its significance and whether it's worth looking up, and to enable the reader to find the reference if he wants to look it up.” *Id.* at 97.

18 *Id.* at 32.

19 In a footnote, Posner writes about his own weary acceptance of attorneys' habit during oral argument of seeking permission to answer a question thrown at them just before their time expires: “When lawyers ask me that at argument, I used to tell them peevishly that I would not have asked the question had I not wanted it answered. Failing to break their habit (it is so hard to change lawyers' habits), I gave up and now answer their question with ‘yes’ or ‘please.’” *Id.* at 109 n.1.

20 *Id.* at 95.

21 *Id.* at 149–50.

22 *Id.* at 150–51.

the Warren Court but invalidate the modern Court's activism that moves in the other direction.²³ Posner closes Chapter 6 with the suggestion that because constitutional law is not objective—"because that law remains to an alarming degree political and ad hoc"—despite the efforts of constitutional theorists on both sides, there is a place for constitutional restraint in "indeterminate" cases, such as *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁴ where it's uncertain what the relevant constitutional text means or that the legislation in question violates it.²⁵ But it's not clear how exercising this form of constitutional restraint would address the problem of complexity, given Posner's assertion that passivity and judicial restraint result in increased complexity.

His dismantling of textualism (which he describes as "literalism"), originalism ("historicism") and textual originalism (which he says purports to look to text and give it the meaning it had at inception, without considering the consequences of that meaning or the drafters' purposes) is clearer and more effectively sets up his call for realism.²⁶ It's also prescient, in retrospect, given the current prominence of textualism, originalism, and textual originalism. Textual originalists—and Posner focuses in particular on two of its proponents, Justice Scalia and Bryan Garner—maintain that judges interpreting statutory or constitutional text need only apply the text to the facts.²⁷ "The escape from empirical reality is then complete," Posner writes.²⁸ He criticizes it in form, as "a celebration of judicial passivity," and in application, as "a rhetorical mask of political conservatism."²⁹ Along the way, Posner takes down the use of dictionaries to determine meaning;³⁰ "law office history" done to find just enough historical support for a judge's or attorney's position, as seen, he says, in Scalia's majority opinion in *District of Columbia v. Heller*;³¹ the canons of construction (57 of which, out of 70, Scalia and Garner endorsed);³² and, pointedly, Scalia himself, whom Posner calls a "complexifier" who makes

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²³ *Id.* at 173–74.

²⁴ 551 U.S. 701 (2007).

²⁵ POSNER, *supra* note 5, at 176–77.

²⁶ *Id.* at 178.

²⁷ Posner also criticizes "liberal democrat" Yale Law professor Akhil Amar's argument for "unwritten" but authoritative Constitutions that coexist with the written version, but he directs most of his words and energy at Scalia and Garner. *Id.* at 179, 219–31.

²⁸ *Id.* at 179.

²⁹ *Id.*

³⁰ *Id.* at 179–82.

³¹ *Id.* at 185–91 (citing 544 U.S. 570 (2008)).

³² *Id.* at 217–18.

judging too difficult by “telling judges to master and apply a baffling and ultimately fruitless system for avoiding engagement with reality.”³³

Posner insists instead on what he calls a “realistic” approach to interpretation, and he manages to make it sound appealingly simple and sensible: If the statute’s not clear, figure out what the legislature’s general purpose was—using legislative history, if it helps—and interpret the statute to serve that purpose.³⁴ If neither the statute nor its purpose is clear, “we’ll have no alternative but to assume the role of pro tem legislators and impose some reasonable reading on the statute.”³⁵

It should be no surprise that Posner calls for a realistic approach to interpreting text because the solution he offers to *all* of the complexity threatening the federal courts is realism. In addition to focusing on the purpose of statutory text, a realist judge, he writes, recognizes the limitations of legal formalism, doesn’t have a “judicial philosophy” that generates outcomes, and wants decisions to make sense to laypeople.³⁶

The realist judge has a distaste for legal jargon and wants judicial opinions, as far as possible, to be readable by nonlawyers, wants to get as good a handle as possible on the likely consequences of a decision one way or the other, has an acute sense of the plasticity of American law, is acutely conscious too of the manifold weaknesses of the American judicial system and wants to do what he can to improve it. He does not draw a sharp line between law and policy, between judging and legislating, and between legal reasoning and common sense.³⁷

None of that will be new to anyone already familiar with Posner. Although I mostly feared him during my two years at the Seventh Circuit (despite rarely interacting with him), I’ve since realized how much he and his realism—inherently inhospitable to complexity—influenced me. His writing, which was bracingly original to someone just out of law school and pulled readers along with clarity and concision, set a standard to aim for. At oral argument he could pose a simple, pragmatic question that stripped away everything else, got at the essence of a case, and made the correct disposition seem obvious. He showed me there’s usually a right result in a case, or at least a better, more sensible result; figure that out, and the law will usually support it.

³³ *Id.* at 235.

³⁴ *Id.* at 234–35.

³⁵ *Id.* at 235.

³⁶ *Id.* at 120.

³⁷ *Id.*

Could realism by itself even begin to solve those motley problems he ties together and blames for swelling the complexity beast? I don't know. But I think his definition of realism near the end of this uneven book is still worth reading and thinking about 10 years later:

All that legal realism ought to mean—all that it means to me—is making law serviceable by bringing it closer, in point of intelligibility and practical utility, to the people it's supposed to serve, which is the population as a whole. It ought to be possible to decide most cases in a way that can be explained in ordinary language and justified as consistent with the expectations of normal people.³⁸

³⁸ *Id.* at 354.

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The Way Forward Includes Surprising Turns

The Way Forward for Legal Education

David I. C. Thomson (Carolina Academic Press 2023), 136 pages

Suzanna K. Moran, rev'r*

The pandemic radically changed the way law schools provided legal education during 2020 and much of 2021. Now that we are mainly on the other side, Professor David I.C. Thomson has used the lessons learned to chart a path toward a just-as-radical revisioning of the law school of the future. In *The Way Forward for Legal Education*,¹ Thomson makes a compelling case that the shift to online and hybrid learning is not only inevitable, but essential for the survival of law schools, the future of the legal profession and, in a sense, democracy itself. His model embraces our inevitable cultural shift toward an increasingly online world and seeks to address many of the critiques that have plagued law schools for decades.

The book begins with the critiques of legal education that most legal educators are already all too familiar with: the LSAT is a far too discriminatory admissions tool; traditional large classes taught through the Socratic method are cost-effective but not best suited to learning; we do a poor job inculcating legal values into our students; the cost of law school burdens graduates with crushing debt; and at the end, our students are still insufficiently prepared for practice.

Thomson takes these critiques a step further and places them in the context of many problems facing the legal profession. Because of our current model of legal education, access to justice is far too limited, the lawyer class is insufficiently diverse, and, perhaps most important, the profession as a whole has lost its moral compass and dedication to service. He lays two of society's most critical problems—systemic racism and the

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¹ DAVID I. C. THOMSON, *THE WAY FORWARD FOR LEGAL EDUCATION* (2023).

ongoing attack on the institutions of democracy and the rule of law—partly at the feet of the failings of legal education.

The book starts and ends with this premise, but Thomson lays out the problem he seeks to solve most clearly in stating, “we have lost our way in our mission, and thus so has the profession.”² Thomson says that law schools must therefore change both what they teach and how they teach it.

Professional identity and a culture of service

Thomson acknowledges that law schools do a fine job teaching doctrine and the rules that govern legal practice. But he asserts that we do far less well on things that are less tangible, the neglect of which has had dire consequences for our profession. One thing Thomson says we don’t do well is coach our students through the formation of their professional identities. This is not a controversial proposition. What is unusual about Thomson’s approach to this issue is that he does not shy away from saying directly that professional identity formation is about standards of moral behavior.

While many professors believe that teaching morality is beyond our scope, Thomson provides concrete examples of how law professors can develop their students’ professional identities and encourage moral practice decisions, primarily through small, experiential, simulation-based classes. He argues convincingly and in detail that such experiential learning opportunities are essential to preparing our students for practice as well as developing their professional identities, and that the second and third years of law school should be devoted almost entirely to such courses.

The second less-tangible thing that we don’t do well is teach our students that the practice of law is fundamentally about service. Thomson points out that we have lost the idea of the lawyer-statesman, the good public citizen dedicated to service, fighting for justice, and protecting the oppressed. He says that we must reorient legal education around a culture of service if we are to address the problems faced by the legal profession. But he proposes more than that: a radical shift toward legal education based in love and compassion—hallmarks of his own teaching—rather than competition and humiliation.

When I first began teaching 16 years ago and got my first painful set of student evaluations, I sought Thomson’s help. He asked me a question that I will never forget: “Do you love your students?” Thomson was referring to

² *Id.* at 113.

the kind of love to which he devotes almost an entire chapter: the selfless love of others that drives us to serve. He draws on several philosophical and spiritual traditions in describing this kind of love and explaining its connection to a culture of service. This alone makes *The Way Forward* unique among books on legal education.

Hybrid and online learning

Both doing a better job with professional identity formation and fostering a culture of service require us to invest in high-touch, small, interactive, experiential courses. But such courses are expensive and resource-intensive, which raises the question: how do we pay for it?

The first part of Thomson's answer lies in online and hybrid learning. Thomson, a long-time and highly prescient promoter of online learning, has known for decades what most of us were forced to learn during COVID: *if done well*, online and hybrid instruction can be as effective for student learning as it is cost-effective for the institutions offering it. Moreover, most of our students will have significantly remote careers. Thus, Thomson says, we not only can, but have an obligation to, prepare them for this reality.

While many law professors accept hybrid modalities more readily today, fully online learning faces more resistance. But even with respect to that, Thomson supports his argument with surprising recent statistics that indicate that our students are much more ready for it and appreciative of it than we thought.

It is impossible to argue with Thomson's assertion that the pandemic has taught us that we have no excuse to keep doing things the way we have been doing them. Nor can we truly dispute his assertion that classes should be designed, and in many cases, completely redesigned, to focus on learning, including formative assessment, student learning objectives, and choice of teaching modality—live, hybrid, or fully online—based on those learning objectives.

The Way Forward is an argument for change but not exactly a how-to manual. Nevertheless, Chapter Five, "The Future is Hybrid" and Chapter Six, "Online Learning is Part of Our Future" offer some concrete suggestions for how to design courses effectively in that format. The ideal course that Thomson envisions is rich, complex, and very different from what most law school classes are today. And they would require a significant investment of professor time to convert.

Fully redesigning all of our courses is a laudable goal but a very big ask. When professors object to being asked to redesign their courses, it

isn't typically because they don't believe their classes would be improved. It is because we are, as a profession, exhausted, overworked, and stressed by ever-increasing demands to put more time and effort into our service, teaching, and scholarship.

Thomson rightly points out that most universities have teams of instructional designers standing by ready to help us redesign our courses. Indeed, law professors are likely behind the curve in taking advantage of the expertise of these colleagues. But the redesign is only the first step. To teach excellently a full load of small, interactive, experiential classes with ample formative assessment takes an enormous amount of work that leaves time for little else. Some of that work can be automated or delegated, but much cannot. Many professors already feel that they do not have the time for the quiet reflection that leads to discovery and growth.

Further, so much student interaction, especially with the personal touch, love and compassion that Thomson urges, is intensely emotionally draining. Taken together, these stressors are a recipe for burnout. While Thomson's argument that a move to hybrid and online learning is both necessary and inevitable is convincing, he has no ready solutions for these obstacles to implementation, perhaps because the obvious solution is reduced faculty course loads, and that is unlikely to gain much traction with many law school administrators.

A restructured law school and profession

Even in a hybrid or online format, such courses are still hugely resource intensive and thus very expensive. The second part of Thomson's answer to the cost question is the most interesting and most radical of Thomson's proposals. The backbone of his model is for law schools to admit a much *larger* cohort of 1Ls, without requiring the LSAT or GRE. We would teach them almost entirely online and at scale, and charge them lower tuition than we currently do.

While that is a radical enough proposition, Thomson goes further. Under his model, at the end of the first year, students would be given a rigorous, almost bar-like exam. Based on performance, roughly half of the 1L class would be permitted to advance to the upper-level curriculum. The other half would be dismissed and granted a Masters in American Law.

After that, the dismissed students could seek a bit more training and become certified as Limited License Legal Technicians. LLLTs are a small but growing group of professionals who perform the mechanical,

repetitive legal tasks that make up a lot of transactional lawyering but that so many still cannot afford because law school, and thus legal services, is so expensive.

The half of the 1L class that moves on to complete the JD would spend an additional two or three years in law school in a mix of significantly redesigned online, hybrid, and in-person courses. The courses would be primarily small and experiential and have a high degree of professor-student interaction and plenty of formative assessment. These classes are where professional identity and the dedication to a culture of service would be fostered. All this would be made possible because of the extra revenue brought in by the expanded 1L class.

Thomson makes a persuasive argument that this model would have many positive effects. It could eliminate reliance on the discriminatory LSAT for law school admission, lower the cost of attending law school while more 1Ls would increase law school revenue, and reduce the debt burden even of those students who complete law school so that they can have more freedom of choice about their future careers. It could also make a rudimentary legal education available to many more people and thereby increase the availability of legal services that can be performed by LLLTs.

These are intriguing solutions to critical legal education and legal profession shortcomings. However, for a book so grounded in morality, it leaves some moral questions unanswered. Is it right to create a large class of second-class-citizen “sub-lawyers” who would likely be viewed as law school flunkouts? Is it right to fund the more resource-intensive upper-level program with the tuition money of 1L students who the law school admits knowing that it plans to dismiss half of them?

How would this system impact how students view admission to different tiers of law schools? When prospective students know that the bottom half of the class will be dismissed and never get a JD or become lawyers, will they choose schools with lower admission standards in hopes of making the cut? Is this fair to students in the top and bottom halves of their classes across different tiers of schools? Would this “up or out” model bring back the cutthroat mentality that law schools have made significant strides in reducing in the last few decades? In what ways might this system disproportionately impact the very BIPOC students who this model is meant to elevate?

While Thomson does not address these concerns in *The Way Forward*, he is a scholar who thinks deeply and writes frequently in this field, so I hope that his next article will further explore the moral and practical implications of this model.

Coming in at a concise and manageable 136 pages, *The Way Forward* is a provocative read, especially for those who balk at the notion of fully

embracing digital delivery of legal education. Given that digital delivery is seemingly inevitable, it's an essential read for anyone who wants to think about what that could look like.

The Stories We Tell

Seduced by Story: The Use and Abuse of Narrative

Peter Brooks (New York Review Books 2022), 173 pages

Susan Greene, rev'r*

I have long believed that legal education should demand that students do more reading. Or perhaps “more” is the wrong word, as there already is a mountain of it. Perhaps what I mean is a different *kind* of reading. Hundreds of pages of case excerpts, as currently assigned, do little to orient students to the greater context of law practice broadly, or the personal stories that underlie those cases individually. But add in other kinds of reading—narrative nonfiction, literary fiction—and a new world opens. Students can immerse themselves in “lives, struggles and fights against oppression,”¹ reigniting the passion that brought them to law school in the first place or finding a new purpose as they build their careers. Through reading, students can enter the life and mind of a fictitious character and increase their own capacity to understand the thoughts and feelings of others,² thus building an empathy muscle sorely needed in legal practice.³

Most importantly, the practice of law is already saturated with stories. We write Constitutions, codify laws, and enact statutes. But when it comes time to interpret any of them, we look to *stories* about real people, who did real things, with real consequences—that is, case law. While law students indeed read a great deal of case law, they generally read it as a vehicle for learning legal doctrine. The more and sooner law students engage with

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¹ Claire Cain Miller, *How To Be More Empathetic*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/guides/year-of-living-better/how-to-be-more-empathetic>.

² *Id.*

³ Susan Greene, *Mindful Practices for Law Practices*, 46 OHIO N.U. L. REV. 53, 63–66 (2019); Jane Smiley, Opinion, *Fiction is an Exercise in Empathy*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/roomfordebate/2012/06/06/is-fiction-changing-for-better-or-worse/fiction-is-an-exercise-in-empathy> (“Reading fiction is and always was [a] practice in empathy – learning to see the world through often quite alien perspectives, learning to understand how other people’s points of view reflect their experiences.”).

narrative storytelling, I believe, the better prepared lawyers they will be and the greater context they will gain for those cases they read.

And so, I was naturally delighted to come across literary critic and Yale professor Peter Brooks's new book, *Seduced by Story: The Use and Abuse of Narrative*.⁴ In it, Brooks quickly confirmed my suspicion that stories have invaded every facet of human existence, from the back of a package of cookies he just bought,⁵ to *The New York Times* reporting on the economy,⁶ to President George W. Bush's presentation of his cabinet.⁷ A story, Brooks explains, has no inherent quality of good or bad. Rather, it has power. And "for that reason it demands a powerful critical response."⁸ We must "celebrate the human capacity to imagine, to create other worlds," but we must still retain our "skeptical capacities," because "[s]tories are tricky, and often designed to be so."⁹

In his central quest to equip us to be critical recipients of the stories that surround us and to minimize the risk that we conflate "what happened" with "the telling of what happened,"¹⁰ Brooks devotes much of his book to explaining how stories work. This was enlightening to me on a few levels. For one, I learned the word "epistemology," which Brooks defines as how "those who recount stories know what they are talking about."¹¹ (He admits it sounds pretentious, but nevertheless, I plan to use it liberally henceforth.) Relatedly, he explores why some narrations are unsatisfying, Paula Hawkins' *The Girl on the Train* being a particular target of Brooks's ire for its narrator's impossible description of her own death.¹² Brooks makes much of the relationship between narrator and reader, and the reader's dependence on a narrator to act fairly. The relationship is ultimately a question of control—*who controls the narrative?* Brooks's discussion is rewarding for readers familiar with the books upon which he focuses, for he delves deeply into the literary techniques those authors employed. The discussion is surely less rewarding for readers unfamiliar with the literary examples upon which Brooks draws.

⁴ PETER BROOKS, *SEDUCED BY STORY: THE USE AND ABUSE OF NARRATIVE* (2022).

⁵ *Id.* at 5.

⁶ *Id.* at 7 (stating that we "need a better story about the drivers of economic growth").

⁷ In which Bush proudly stated that the appointees have "their own story that is so unique, stories that really explain what America can and should be about." *Id.* at 3.

⁸ *Id.* at 120.

⁹ *Id.*

¹⁰ *Id.* at 14.

¹¹ *Id.* at 27.

¹² Here I must admit that I recall reading *The Girl on the Train* while lounging by a pool several summers ago and not minding that suspension of logic in the least. In fact, I quite enjoyed the book.

Of particular interest to me, Brooks concludes his book with a discussion of storytelling in the law. In this realm, because “story is so forceful, the law needs to police and cabin its uses,” says Brooks.¹³ First, he makes the well-established point that stories saturate a case from the very beginning of an investigation¹⁴ to a court’s final judgment.¹⁵ But he makes a more compelling, novel argument in his discussion of our legal system’s “unabated reverence for and obedience to” the narrative of the Constitution and the story of our founding principles, even when such reverence is “counterintuitive and socially unproductive.”¹⁶ That reverence is particularly strange, says Brooks, for a country that prides itself on being so “resolutely turned to the future.”¹⁷ And yet, argues Brooks, all constitutional interpretation relies on the premise that the story began in the 1700s and that modern legal decisions are merely new points in a plot line that plods through American History. In this way, there is no new law; rather, there is just an ongoing story. Here, again, Brooks reiterates his ultimate point that we must be aware of stories and critical of them. “If the Constitution is our myth of origins,” he says, “we must expect it to generate mythic narrative consequences. But it should no doubt be subjected to a more acute awareness of its narrative logic.”¹⁸

Brooks’s writing is clear and effective. He develops his arguments methodically but organically, and I found space while reading this book to reconsider stories that have been impactful in my own life. There are, however, two criticisms I might levy. First, Brooks dives into thorny questions without first establishing parameters. What exactly *is* a story? Brooks tells us what it is not—it is not a lyric, he says—but he does not quite define it. Brooks focuses primarily on narrative fiction and a bit on American legal history, both of which are workable vehicles for his argument, but they are mere slivers of how one might define a story. Second, he gives relatively short shrift to the already rich literature on legal storytelling and its ethics.¹⁹ The reader would benefit from a deeper

13 *Id.* at 129.

14 “[E]ven when police apply for a search warrant they tell a story of how and where they will search, and what they think they will find.” *Id.* at 132.

15 Brooks points to various opinions by Justice Cardozo to establish that a persuasively set forth factual narrative nearly obviates the need for a legal explanation. *Id.* at 127.

16 *Id.* at 136–37.

17 *Id.* at 137.

18 *Id.* at 150.

19 See, e.g., Lori D. Johnson & Melissa Love Koenig, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 NEV. L. J. 1037 (2020); Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEGAL WRITING 163 (2010); Victoria Ajayi, *Violence Against Women: The Ethics of Incorporating the Cultural Defense in Legal Narrative*, 25 GEO. J. LEGAL ETHICS 401 (2012); Steven Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010); Helena Whalen-Bridge, *Persuasive Legal Narrative: Articulating Ethical Standards*, 21 LEG. ETHICS 136 (2018).

engagement with that literature in this book to provide a more well-rounded presentation of the thorny issues that arise when storytelling and the law intermingle.

Despite minor shortcomings, I thoroughly enjoyed my time with *Seduced by Story* and Brooks's compelling argument that we must be critical and attentive listeners to the stories around us. It has solidified my belief that a well-rounded legal education should introduce greater variations in assigned reading and even inspired me to make a suggested reading list for my students.

Simply Said Says It All

Simply Said: Communicating Better at Work and Beyond
Jay Sullivan (Wiley 2017), 271 pages

Jennifer M. Cooper, rev'r*

“News flash: Your audiences don’t care about you.”¹ Your audience cares about how *your content impacts them*.² To communicate effectively, *focus on how your content is helpful to others*, not on you or your message.³

I’m a fan of cut to the chase straight shooters. So is Jay Sullivan, former attorney whose bona fides include Skadden Fellow, in-house counsel for Covenant House, and corporate attorney for Lloyds of London. Sullivan now leads Exec-Comm’s Law Firm Group where he “help[s] lawyers improve their communication skills.”⁴

Simply Said succeeds in simplifying effective communication strategies. With a substantial focus on content, oral and written communication, *Simply Said* readily applies to legal education and the practice of law. *Simply Said* is logically divided into five sections: *Your Content*, *Your Oral Communication Skills*, *Your Written Communication Skills*, *Your Interactions*, and *Your Leadership*. Each section is then divided into three to four easy to read chapters with intriguing invitations to learn more, like “What Do You Mean by That?” or “What If They Ask You Something You Don’t Know?” *Simply Said* provides helpful examples and illustrations of each recommendation and skill, outlines for structuring content, and helpful visual cues.

Simply Said crystallizes concepts for legal educators so law students can better grasp and articulate complex concepts to various audiences. For

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¹ JAY SULLIVAN, *SIMPLY SAID: COMMUNICATING BETTER AT WORK AND BEYOND* xiv (2017) (acknowledging that focusing on your audience is hard to put into practice because writing and speaking are self-focused activities).

² *Id.*

³ *Id.*

⁴ *Id.* at 15.

lawyers, *Simply Said's* communication strategies may not be revolutionary, but provide a useful, user-friendly guide to sharpen communication skills with easy to incorporate practical tips.

The first three sections on effective content, oral communications skills, and written communication skills are the most immediately applicable to legal writing and legal education. *Your Content* and *Your Oral Communication Skills* applies directly to oral communication and oral advocacy and *Your Written Communication Skills* applies directly to both formal legal writing and informal email writing.

In *Your Content*, Sullivan provides concrete suggestions for structuring a key message based on the audience's needs, crafting engaging stories and analogies to reinforce key points, and organizing content for maximum impact to educate or persuade your audience.

In Chapter 1, *Conveying a Clear Message*, Sullivan suggests "focusing on the needs of the person or people with whom we are communicating."⁵ I envisioned immediate utility for oral research report assignments, client counseling and negotiation, oral arguments, and so much more. Sullivan proposes we ask ourselves, "What's the key take-away for your audience?"⁶ Envisioning a high-stakes game of telephone, Sullivan cautions the impact of your message often depends on the *recipient's* ability to convey your message *to someone else*. Lawyer to Assistant General Counsel for client; Assistant General Counsel to General Counsel; all the way up to the Chairman to Board, and so on. If your message is clear, your message will be conveyed consistently.⁷ Sullivan knows sophisticated professionals (lawyers!) often showcase their smarts, relying on verbosity and legalese, muddying our messages.⁸

Don't be clever, be clear. In multiple contexts, Sullivan recommends bottom-line up-front, keep your message short, easy to understand, and focused on your audience's needs.⁹ Always ask yourself, "How does this audience need to use my content?"

In Chapter 2, *Telling Engaging Stories*, Sullivan recommends using engaging stories, analogies, and examples to persuade or convince others. I'm a terrible storyteller and I can't tell a joke. Sullivan's recommendations for using analogies and examples to illustrate or simplify complex concepts, instead of stories, resonated with me, providing hope to similar sorry storytellers.

5 *Id.* at 3.

6 *Id.* at 4.

7 *Id.* at 5.

8 *Id.* at 7.

9 *Id.* at 6.

In Chapter 3, *Organizing Your Content*, Sullivan suggests organizing your content around the audience's needs, the key message for your listeners, and your purpose, whether to educate or persuade. Sullivan again recommends a bottom-line up-front approach putting your audience's needs in context, which tells your audience *how* to hear your message and plan accordingly. Imagine "Regarding Project X, everything is on track" or "Regarding Project X, we've hit a snag," immediately followed by necessary details for your audience to understand what you need them to do next.

Spoiler alert! Good lawyers and communicators are not mystery novelists. They don't save the big reveal for the end. Effective communicators tell their audience where they're taking them, so they'll understand the path more clearly.

Perhaps counterintuitively, we *deliver* content in a different order than we *create* it. Content creation is writer focused; we create content to understand meaning and understand our message. Content delivery is focused on the audience, not the speaker.

In *Your Oral Communication Skills*, Sullivan covers body language, listening to understand, delivering from notes and visuals, and responding to questions. The key to *presenting* well is to *be present* to your audience.¹⁰ We can *be present* by conveying a sense of commitment and presence through eye contact, voice, and body language. Sullivan recommends we look at one person at a time for a complete sentence to express a full thought. Connecting with one person for a full thought helps us relax, avoids distraction, and builds rapport with the audience.¹¹

Your voice is a powerful delivery tool. By varying your speed, volume, tone, and inflection, your voice bolsters your impact. Attention fast talkers! Audiences become overwhelmed by a speaker's fast pace and the absence of pauses between sentences.¹² Pausing between sentences is essential for an effective delivery because it allows your audience to *process what you just shared*.¹³

Oral Communication Skills includes effective *listening* skills. "Listening well is hard work."¹⁴ Good listening requires energy and engagement to learn what your audience's concerns are. Sullivan suggests simple engagement strategies: maintain eye contact when listening, put away distractions, and take notes. Good listeners ask open-ended

10 *Id.* at 42.

11 *Id.* at 44.

12 *Id.* at 49.

13 *Id.*

14 *Id.* at 65.

questions and are comfortable inquiring to uncover information *they didn't know they didn't know*.¹⁵ Good listeners confirm and clarify—confirming what they heard to stay on track and clarifying to ensure their understanding is accurate. For law students and lawyers, client relationship building is a learned skill and employers expect basic competency in building rapport and effective listening.

In *Delivering From Notes and Visuals*, Sullivan states your job is to make it as *effortless* as possible for the audience to receive your message. When delivering from notes, be both organized and conversational. Create a *delivery tool* called a “Spot Word Outline,”¹⁶ a set of notes sparse enough to glance at and “spot” the words you want to say by using white space and major topic headings organized around common themes. Use bullet points, not long sentences, to create “anchor word” phrases in your spot word outline. Visually connect with the spot word outline, make eye contact with an audience member, deliver the content, then visually return to the spot word outline, starting the process anew.

But wait! “What if they ask you something you don’t know?” Even experienced presenters fear such questions. Sullivan suggests listening to the entire question, gaining time to think, answering and reaffirming the main point, and moving on.

In *Your Written Communication Skills*, Sullivan covers communication in many writing modes including email and text. Sullivan divides this section into four chapters: editing for clarity, structuring your documents, creating reader-friendly documents, and writing emails that resonate. Again, Sullivan emphasizes the audience’s needs: Always start with the reader. Your writing is about the audience and what knowledge the audience needs, or what action they need to take.¹⁷ Sullivan recommends *editing* for stronger, more precise writing: cut clutter by eliminating zero words and wordy expressions; create stronger sentences by focusing on a central idea and strong verbs; prefer active voice, etc. *Simply Said*, “the longer your document, the less likely it is to be read.”¹⁸

Next, Sullivan tackles document structure to orient and direct readers. “Very few people care what you did to get to this point with this issue. They care about where they’re going from here.”¹⁹ “Often, [writers] think they need to build their case for the recommendations they are about to make.”²⁰ Again, Sullivan emphasizes a bottom-line up-front

¹⁵ *Id.* at 74.

¹⁶ *Id.* at 90.

¹⁷ *Id.* at 126.

¹⁸ *Id.* at 129.

¹⁹ *Id.* at 147.

²⁰ *Id.* at 149.

approach: tell the reader what needs to happen, provide some background, expand the message to explain the benefits of the recommended course of action, and end quickly. Sullivan advocates for reader friendly documents with short sentences, varying sentence length, and keeping paragraphs to a quarter of the page to avoid visually intimidating readers.

The last two sections, *Your Interactions* and *Your Leadership*, provide practical, professional suggestions for the practice of law, interviewing, networking, and leadership. Sullivan provides concrete suggestions for effective client meetings, delegating successfully, sharing meaningful feedback, giving toasts, handling introductions, facilitating brainstorming meetings, leading others, and showing vulnerability.

Overall, Sullivan's advice is approachable, yet tactical. *Simply Said*, we are more effective communicators when we focus on others and how our message impacts them.

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