LEGAL COMMUNICATION & RHETORIC: JALWD

Fall 2024 / Volume 21

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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

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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 Managing Editor 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

Welcome to Volume 21 of *Legal Communication & Rhetoric: JALWD*! This volume takes readers on a journey to uncover, dig past the surface, and unravel hidden narratives within the realm of legal reasoning and storytelling. In the preface to Volume 20, we acknowledged ChatGPT's contribution to drafting the preface as well as published the journal's first ChatGPT essay, from former editor-in-chief Ian Gallacher. Fast-forward to one year later and Generative AI has become much more than an interesting and amusing distraction. In Ethan Mollick's bestselling book, Co-Intelligence: Living and Working with AI, he offers "Principle 1: Always invite AI to the table."[1] (You can read more about Professor Mollick's book in Katrina Robinson's book review in this volume.)

When we invited ChatGPT to help draft the preface to the last volume, it was mostly entertaining. We shared ChatGPT's response with you but we—as humans—wrote the preface. This time around, taking Mollick's "always" principle seriously, we asked ChatGPT to draft a preface and the result was more polished, less of a joke, and perhaps more worrisome. Or perhaps it was more efficient and a sign of how useful Generative AI can be. Of course, this time we also knew more about prompting and gave ChatGPT more details. For example, we told ChatGPT "to put yourself in the role of editor in chief for a scholarly legal communication journal and write a preface to introduce the four articles in the volume. The theme of the articles is uncovering, hidden, digging past the surface." We then gave ChatGPT the abstract for each article and it generated a reasonably good preface. And a much better starting point than a blank screen with a blinking cursor.

So, back to the volume and what we have in store for you. The following description of the volume's articles is an edited version of the response we received from ChatGPT.

This volume's articles delve into diverse facets of law, from the intricate layers of legal reasoning to the untold stories lurking beneath the surface of historical events. In the first article, "Lessons of Legal Reasoning: Explicit, Implicit, and Hidden," Jay Feinman takes us on a thought-provoking exploration of legal reasoning, probing beyond the explicit and implicit lessons taught in law schools and practiced by lawyers. Through meticulous analysis, the author uncovers the "hidden"

1 Ethan Mollick, Co-Intelligence: Living and Working with AI 46 (2024). That is, "barring legal or ethical barriers." *Id.*

lessons embedded within legal doctrine, shedding light on the political and ideological dimensions shaping legal discourse.

Moving from the theoretical realm to real-life narratives, the second article, "Stories of My Great-Grandfather's Murder" by Stefan Krieger, explores the fascinating backstory of a century-old murder case. Through archival research and storytelling, the author unveils the complexities surrounding the tragedy, revealing the cultural perspectives, legal nuances, and societal dynamics at play. This article serves as a compelling model for applied legal storytelling, urging scholars to look beyond legal documents and opinions to grasp the deeper layers of historical events.

Shifting the focus to contemporary social movements, "#MeToo as Legal Storytelling" examines the transformative power of individual stories within the #MeToo movement. Through the lens of legal storytelling and traditional rhetoric, Dr. JoAnne Sweeny explores how these narratives, despite being brief and sometimes anonymous, resonate deeply with audiences, igniting empathy and catalyzing social change. This article highlights the persuasive potential of storytelling in shaping legal and social landscapes.

Finally, Bret Rappaport offers a reflective discourse on the virtue of humility in persuasive legal writing in "Humility—A Path to More Persuasive Legal Writing." By dissecting humility as both a trait and a communicative construct, the author advocates for its integration into legal discourse, emphasizing its role in fostering trust and enhancing persuasive impact.

The *Journal* continues its commitment to discipline-building with Aliza Milner's annotated bibliography on judicial writing and case management. Though much of Professor Milner's bibliography is new, it also updates two previous bibliographies from 2011: Ruth C. Vance, "Judicial Opinion Writing: An Annotated Bibliography," 17 *Legal Writing* 197 (2011) and Mary Dunnewald, Beth Honetschlager & Brenda Tofte, "Judicial Clerkships: A Bibliography," 8 *Legal Comm. & Rhetoric* 239 (2011).

This volume continues with a set of nine engaging book reviews sure to contribute to your growing to-read list. Aysha S. Ames reviews The 272: The Families Who Were Enslaved and Sold to Build the American Catholic Church by Rachel L. Swarns. In line with the theme of this volume's articles, Swarns's book brings forth the voices of the enslaved and their descendants to uncover narratives historically left out. Sara Cates reminds lawyers that reading good writing—including poetry—can help them become better writers in her review of Richard Hugo's The Triggering Town. In her review of Judge David L. Horan's Bad Words: A Legal Writer's Guide to What Not to Say, Amanda

M. Fisher highlights the practical value of the judge's specific writing tips. Justin Iverson reviews Elegant Legal Writing by Ryan McCarl, a legal writing style, substance, and process book aimed at practitioners. Katrina Robinson reviews Co-Intelligence: Living and Working with AI by Ethan Mollick, an accessible, thoughtful, and inspiring book that encourages engagement with AI. In her review of Dahlia Lithwick's Lady Justice: Women, the Law, and the Battle to Save America, reviewer Rachel H. Smith praises Lithwick's contribution to understanding the roles women lawyers have played in changing the law and recognizes the opportunity for a deeper investigation into the broader context. Dr. JoAnne Sweeny reviews Dan Canon's Pleading Out, a book that critiques plea bargaining as a means to wrongful guilty pleas. In her review of Dennis Duncan's Index, A History of the: A Bookish Adventure from Medieval Manuscripts to the Digital Age, Beth Hirschfelder Wilensky encourages readers to appreciate indexing and all it has to offer. In the concluding book review, Jayne T. Woods reviews Why They Can't Write: Killing the Five-Paragraph Essay and Other Necessities by John Warner, which argues that students can't write because of what they have been taught and offers ways to teach students how to make choices as a path to teaching writing.

This volume concludes by recognizing our former editor, Melissa Weresh. Professor Weresh received the 2023 Linda Berger Lifetime Achievement Award for Excellence in Legal Writing Scholarship. We share some thoughts about the award and Professor Weresh's contributions to legal writing scholarship, as well as provide a bibliography to her many brilliant works.

Finally, we say farewell to three of our editorial board members: Rachel Goldberg, Carol Mallory, and Dr. Joan Magat. We thank Rachel for her service as an associate editor on four volumes. We thank Carol for her service as associate editor on six volumes. Thank you to Joan—for everything! Joan started her service to the *Journal* with Volume 8 (published in 2011) as editor-in-chief. After eight years of tremendous leadership and meticulous editing as editor-in-chief, Joan transitioned to a lead editor position beginning with Volume 16. As a lead editor for Volumes 16–21, the *Journal* continued to benefit from Joan's exceptional attention to detail. To be honest, we are in denial that she is moving on (we can't even write "leaving"). We wish all the best to Rachel, Carol, and Joan!

Margaret Hannon & Jessica Wherry
(with some help from ChatGPT) (2024)

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ARTICLE

Lessons of Legal Reasoning

Explicit, Implicit, and Hidden

Jay M. Feinman*

Legal reasoning—"thinking like a lawyer"—is the fundamental skill taught and learned in law school, particularly in the first year of law school. For lawyers, legal reasoning is essential to predicting legal outcomes and to advocacy in litigation. In this article, I argue that the lessons of legal reasoning—those taught by professors, learned by students, and inculcated in lawyers—occur at three levels: explicit, implicit, and "hidden."

- The explicit lessons constitute the mainstream account of legal reasoning and legal doctrine as taught in law schools and that becomes second nature to lawyers. These lessons address the forms of legal reasoning and the substance and structure of doctrine, from simple deductive rule application through sophisticated policy analysis.
- The explicit lessons also carry implicit lessons about the deeper structure and function of legal doctrine and legal reasoning.
- The hidden lessons are embedded in the explicit and implicit lessons but are seldom part of the conscious understanding of legal reasoning, either by students or by lawyers. The hidden lessons reveal the shortcomings of legal reasoning and the political and ideological nature of legal reasoning and of the doctrine that is its context.

Section I outlines the content of each of the three lessons. Section II goes through the vehicle for the article's analysis, an exam question and writing assignment I have used in my first-semester Torts class. Section III uses the assignment to illustrate the elements of each lesson.

* Distinguished Professor Emeritus, Rutgers Law School. This article began as a discussion of an exam question and writing problem in my Torts classes over the past few years. My students enriched the discussion and my understanding of the issues. This article is for them.

What legal reasoning entails, its strengths, and its limitations have been at the center of debates about legal theory and legal education for generations. One might suppose there is little more to be said. Even the political dimensions of legal reasoning and legal doctrine explored in the hidden lessons are sometimes subjects of discussion in law schools and, rather remarkably, in public discourse through the attack on Critical Race Theory.[1] It is therefore possible that the explicit and implicit lessons of legal reasoning are well understood and the hidden lessons are not all that hidden. But I doubt it. The vibrant contemporary literature critiquing legal reasoning suggests that there is still more to learn.[2] And just as the common refrains that "We are all Keynesians now" or "We are all Legal Realists now" misunderstand the nature of the scholarship to which they refer, the insights here, many of which grow out of the Critical Legal Studies movement, are occasionally discussed in the legal literature and the classroom but have not been fully absorbed.

I. The Lessons of Legal Reasoning Outlined

A. The Explicit Lessons

1. Legal reasoning takes several forms, including classification of legal problems, simple deductive application of rule to facts, standard-based rule application, analogical reasoning, policy analysis within rule application, and policy analysis to develop new rules.
2. Legal reasoning, in form and content, constitutes a distinctive form of analysis.
3. The substance of legal doctrine and its application fall on a rough spectrum of relatively clear to relatively open-ended and of law to policy.
4. At some point the forms of legal reasoning and the doctrine and policy they use "run out," and any further discussion of the problem requires political judgments that are beyond the scope of ordinary doctrinal analysis. In a rough, nontechnical sense, this is the distinction between

1 *See* CRT Forward, *Tracking the Attack on Critical Race Theory*, UCLA School of Law Critical Race Studies, https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf (last visited May 17, 2024).

2 Some of that literature is cited throughout this article. *See also* Larry Alexander & Emily Sherwin, Advanced Introduction to Legal Reasoning (2021); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 Harv. Latinx L. Rev. 205 (2020); Kenneth Chestek, *Dimensions of Being and the Limits of Logic*, 19 Legal Comm. & Rhetoric 23 (2022); Phoebe C. Ellsworth, *Legal Reasoning*, *in* The Cambridge Handbook of Thinking and Reasoning 685–704 (Keith J. Holyoak & Robert G. Morrison Jr. eds., 2005); Mark A. Geistfeld, *Unifying Principles Within Pluralist Adjudication*, *in* Reflecting on Torts: Essays in Honor of Jane Stapleton (Sandy Steel, Jonathan Morgan, Jodi Gardner & Kylie Burns eds., 2023); Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 Emory L.J. 1197 (2001); Harold Anthony Lloyd, *Balancing Freedom and Restraint: The Role of Virtue in Legal Analysis*, 32 S. Cal. Interdisc. L.J. 315 (2023).

legislation, which appropriately makes political judgments, and adjudication, which rarely does so.

B. The Implicit Lessons

1. Legal reasoning mostly works.
2. There is a substantial core of legal reasoning and legal doctrine that is distinctly legal and a smaller periphery that is substantially nonlegal.

C. The Hidden Lessons

1. Legal reasoning doesn't work, and the extent of core and periphery is reversed.
2. All legal reasoning and legal doctrine reflects broader social and political conflicts.
3. The process of legal reasoning and the forms it takes obscures law's political nature.

II. The Problem

The vehicle for this article's analysis—the "problem"—is what was originally an exam question and then became a writing assignment in my first-semester Torts class. Because it is a hypothetical exam question and classroom exercise, it is a useful means of discussing legal reasoning. It raises a variety of issues, jurisdictional variation is minimized, and the questions can assume away many complications. In questions 1 and 2 for example, we can focus on the liability of only one party at a time. Proof problems can be acknowledged and then put aside, in order to move on to other doctrinal issues.

Here is the exam question:

> **Camdenosis**
> The biochemistry department at Hudson University,[3] a private university renowned for its research. One of its projects is an investigation of camdenosis, a lung disease caused by a bacterium known as CM. The CM bacterium occurs only in certain African plants. Camdenosis is caused by the interaction of CM with some bacteria commonly occurring in the air.
>
> The biochemistry department is experimenting with ways to neutralize the interaction of CM and other bacteria. Because of the danger of camdenosis if CM is mixed with the other bacteria, the lab in which the research is being conducted has special features. All of

3 Fans of the television program *Law and Order* will recognize Hudson University as the fictional university in New York City often mentioned on the program.

this research is conducted in a sealed room. Air in the room is supplied through a special ventilation system designed to filter bacteria out of the air, preventing interaction with CM.

Much of the work on camdenosis in the lab is carried out by research assistants. From 2017 through mid-2022, four of these research assistants contracted camdenosis; fortunately, all of them recovered after extensive hospital stays.

Four other university labs have conducted research on camdenosis during the same period and used the same type of sealed room and the same ventilation system as Hudson. No research assistants contracted camdenosis at these labs.

Under state law, student research assistants are not covered by the workers compensation law. Hudson does not have charitable immunity.

Questions:

1. Assume that the ventilation system is subject to monitoring and adjustment by Hudson personnel. The research assistants who became ill bring actions against Hudson. Discuss these actions.
2. Ignore the facts in Question 1. Assume that the ventilation system is manufactured by Penn, Inc., and has not been altered since its installation. The research assistants who became ill bring actions against Penn. Discuss these actions.
3. Ignore the facts in Questions 1 and 2. Assume that the ventilation system is manufactured by Penn, Inc., and is subject to monitoring and adjustment by Hudson personnel. The research assistants who became ill bring actions against Hudson and Penn. Discuss these actions.

A. Question 1

Question 1 focuses on the liability of Hudson University.

The first step is to assign the problem to one or more of the three doctrinal areas of torts: intentional torts, negligence, or strict liability. We immediately understand that no intentional tort is involved. If we need to justify the understanding, first the presence of personal injury makes battery the relevant intentional tort, then application of the elements of battery explains that Hudson did not intend that the research assistants come into contact with CM.

The next step is to determine whether the liability rule is negligence, which is the usual default rule in cases of personal injury, or strict liability. The general rule is that strict liability attaches for "abnormally dangerous activities." An activity is abnormally dangerous if it bears a foreseeable and highly significant risk of harm even if reasonable care is exercised by the actor, and the activity is not of common usage.[4]

Whether the activity is of common usage depends on characterization of the facts—so on the application of the rule: Is the activity laboratory research, laboratory research involving dangerous materials, or laboratory research involving an obscure, hazardous bacterium? Either way, the ability of the four other university labs to conduct similar research without causing injury suggests that the activity does not bear a significant risk if conducted with reasonable care. If this were a real situation, the suggestion likely would not be enough. Detailed factual investigation would be needed, four labs out of five might not be a large enough sample, and other factors might be in play. In the classroom setting, it is sufficient to recognize the possibility of strict liability, do a simple analysis, and move on.

Therefore, on to negligence. In considering whether Hudson might be liable in negligence to the research assistants, the elements of the negligence cause of action provide the rule to be applied. The elements of the cause of action for negligence are

a. Duty

b. Breach of duty

c. Harm

d. Causation

e. Scope of liability.[5]

Conclusions are easy under some elements of the rule. Conduct of the lab is a risk-creating activity to which the ordinary duty of reasonable care applies, and the problem states that workers compensation and charitable immunity are not relevant. The research assistants have suffered physical injury, which is the paradigmatic type of harm in a negligence case. Within the scope of Question 1, if Hudson was negligent, its negligence caused the harm. Assuming negligence and injury, the harm was precisely the type of harm that made Hudson's conduct negligent, so it was within the scope of liability. Therefore, simple doctrinal analysis resolves those issues.

The only significant issue is whether Hudson breached its duty of reasonable care. Hudson breached its duty of care if there was a foreseeable risk of harm to the research assistants that the reasonable person would take account of in engaging in its conduct and the reasonable person would have engaged in alternative conduct to eliminate or reduce the risk.[6] The application of this element of negligence depends on facts not stated in the exam problem, but there are three possibilities:

4 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (Am. Law Inst. 2010).

5 *Id.* § 6 cmt. b.

6 *Id.* § 3.

a. The facts establish that Hudson acted reasonably.

b. The facts establish that Hudson acted negligently.

c. The facts are insufficient to decide if Hudson acted reasonably or negligently.

If either (a) or (b) is correct, then the question is over, and this is a simple application of facts to law. If (c) is correct, the analysis is not over. There is a class of cases in which the plaintiff cannot prove the defendant's negligence, but there is a subrule that creates an exception to the ordinary proof requirement that potentially provides the plaintiff a way forward. That subrule is, of course, *res ipsa loquitur*.

Under *res ipsa*, a plaintiff may be relieved of its burden of production with respect to the elements of breach of duty and causation.[7] There are different formulations of the rule, both as to what triggers it and what its procedural effects are, but in general, *res ipsa* applies when the harm is more likely than not the product of the defendant's negligence. If so, the plaintiff has met its burden of production, though not necessarily the burden of persuasion.

In sum, if the research assistants can prove specific causal negligence, Hudson is liable. If they cannot find specific causal negligence, they may be able to persuade the court that the safety of the other four labs establishes that their harm was more likely than not caused by Hudson's negligence, so they are entitled to the *res ipsa* inference and its consequences under the law of different jurisdictions. If they cannot persuade the court, there are no further rules, subrules, or doctrinal moves to avoid the situation. More on their next steps in response to Question 3.

B. Question 2

Here Penn is the defendant. Because it is the manufacturer of the ventilation system, categorization moves the problem from a field defined by the defendant's level of culpability (intent, negligence, or strict liability) to a field defined by factual similarities among the cases: products liability.

Three subfields constitute products liability: manufacturing defects, design defects, and information defects. No facts suggest an information defect—a failure by the manufacturer to warn of the dangers of the ventilation system—so Penn's liability could be a result of a design defect or a manufacturing defect.

As to design defect, in the four labs other than Hudson's, the ventilation system operated safely. This suggests but does not prove that there was no design defect. Even if a product is defectively designed, every

7 *Id.* § 17.

instance of the product will not necessarily manifest the defect. An auto recall involving defective brakes may involve hundreds of thousands of vehicles, but not all of them will incur a brake failure that causes an accident.

The appropriate liability rule for a design defect varies widely and controversially among the jurisdictions.[8] Section 402A of the Restatement Second states that a product is defectively designed if it is in "a defective condition unreasonably dangerous" in terms of the expectations of the ordinary consumer of the product.[9] Some courts moved from § 402A to a risk–utility analysis as an alternative or substitute, and the Products Restatement adopted risk–utility with the added requirement that the plaintiff prove the existence of a reasonable alternative design.[10] Particularly in jurisdictions that apply the reasonable-alternative-design requirement rigorously, the research assistants would have a high burden of proof. But the problem does not offer sufficient facts to resolve the design defect question under any of the tests.

The problem also could be examined as a manufacturing defect. Here the ventilation system might fail under the § 402A standard, the Restatement Third's rule that the product "deviate from its intended design," or some other variation.[11] All of the rules are similar in effect, focusing not on the manufacturer's conduct—whether it was negligent in designing or manufacturing the product in a certain way—but on the variation in the product itself, under a rule of strict liability.

Once again, the proof is uncertain. Is the inference from the other four labs sufficient? Can the research assistants establish that the defect was present when the ventilation system was installed and has not been subject to subsequent action that affected its performance? As with Hudson, here the research assistants can either satisfy their burden of proof, or not. If they cannot, they are in the same position as at the end of the Hudson analysis—without a remedy.

C. Question 3

Questions 1 and 2 are rather typical examples of doctrinal application. They ask students to determine the relevant doctrinal category and the issues within that category, define the elements of the rule structure, apply the elements to the facts, and, to the extent possible, reach a conclusion,

8 Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 Seattle U. L. Rev. 1, 35–39 (2004).

9 Restatement (Second) of Torts § 402A (Am. Law Inst. 1963).

10 Restatement (Third) of Torts: Products Liability § 2(b) (Am. Law Inst. 1998).

11 *Id.* § 2(a).

which may be that the result depends on facts yet to be discovered. Each question addresses a single defendant. And the liability of one would presuppose no liability of the other.

But there is a problem. Because of the possibility of a manufacturing defect by Penn, Hudson's negligence as the cause of the harm is less probable, defeating the *res ipsa* inference. And because of the possibility of Hudson's negligence, it is less likely that a manufacturing defect caused the harm. Now what?

The presence of both defendants changes things in Question 3. Question 3 involves multiple actors, one of whom presumably caused the harm by violating the relevant liability rule. In one sense, this is, as in the earlier questions, a matter of rule application. Other situations involving multiple actors can be used as precedents, so we can use analogical legal reasoning. We look at other situations in which the courts have faced similar problems and the solutions they have devised. Typically, one would begin with close analogies well-established in the law and then broaden the inquiry as necessary.[12]

Several classes of cases involve two or more defendants, each of whom potentially or actually has engaged in tortious behavior, but the causation element cannot be satisfied.

One class involves concert of action.[13] Two teenagers are drag racing at excessive speed on a public street, and one of them strikes and injures a pedestrian. That driver is liable under the ordinary negligence rules. The other driver also is liable for negligently causing the harm through their agreement to enter into the race, even though, in a narrower sense, that driver has not caused the harm by striking the pedestrian. In the problem, however, there was no agreement between Hudson and Penn to engage in negligent behavior, so that analogy fails.

A second class of cases is alternative liability, exemplified by the casebook classic *Summers v. Tice*.[14] Two hunters were negligently shooting, simultaneously, with identical weapons, and a shot from one hunter's gun injured the plaintiff, but it was impossible to determine which one. The court nominally shifted the burden of proof on causation from the plaintiff to the defendants. In fact, neither defendant would ever be able to meet the burden of proving lack of causation, as it was impossible to prove whose shot struck the plaintiff. The result was not just burden

12 On analogical legal reasoning, see, e.g., Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & Pol'y 147, 149 (2013); Mark Cooney, *Analogy through Vagueness*, 16 Legal Comm. & Rhetoric 85 (2019); Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249 (2017).

13 Restatement (Third) of Torts § 876 illus. 2.

14 199 P.2d 1 (Cal. 1948).

shifting but liability shifting. In *Summers*, both defendants engaged in identical wrongful conduct, but in the problem, the assumption is that either Hudson or Penn, but not both, engaged in wrongful conduct; even if both did, the conduct was not like that of the hunters in *Summers*, in which the hunters engaged in exactly the same conduct, only one instance of which caused the harm.

The *Summer*s principle has been extended in several cases involving serial control. In *Collins v. Superior Air-Ground Ambulance Service, Inc.*, the plaintiff was transported by ambulance to and from a nursing facility.[15] When she returned several days later, she had suffered an injury. Either the ambulance service or the facility caused the injury, but the plaintiff could not prove which one had done so. In *Collins*, the court concluded that one but not both of the defendants was negligent. Using the information-forcing rationale that underlies some *res ipsa* cases, the court shifted the burden of proof to the defendants. That incentivizes the innocent one to come forward with proof of its reasonable conduct, which would usually allow an inference of negligence by the other. In the problem, if the information is exclusively in control of the defendants, then *Collins* might apply, although the time lapse is much greater than in *Collins*. But it is even more likely that the research assistants simply are not able to prove their case.

A final analogy involving multiple parties is market-share liability adopted in the DES cases.[16] In those cases, defendants engaged in equally wrongful conduct in distributing DES that caused harm to the daughters of women who took the drug, but which defendants caused harm to which individuals cannot be ascertained. Through different rules, courts used statistical probability to impose liability. For example, even if it cannot be proven that a particular defendant injured a particular plaintiff, a defendant that had a 40% share of the market for DES likely injured 40% of the plaintiffs, so apportioning partial liability to that defendant is appropriate. Once again, the problem does not assume equally wrongful actors, and certainly not actors who were wrongful in an identical way.

At this point, doctrinal reasoning through rule application and analogical thinking have both failed the research assistants. But there is one more move. Doctrinal rules, subrules, and analogies all rest on policies that tort law seeks to advance, and sometimes courts resort to

15 789 N.E.2d 394 (Ill. App. Ct. 2003); *see* Restatement (Third) of Torts § 17 cmt. f.

16 Diethylstilbestrol—a synthetic form of estrogen. *Diethylstilbestrol (DES) Exposure and Cancer*, Nat'l Cancer Inst. (Dec. 20, 2021) https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/des-fact-sheet. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989).

explicit policy analysis to formulate doctrine and achieve appropriate results.

A conventional and useful statement of the policies underlying tort law separates the arguments into three types: morality or corrective justice, social utility or public policy, and process.[17] Morality focuses on individual accountability, positive and negative: a defendant should be liable for harm it wrongfully caused but *only* for harm it wrongfully caused. Social utility involves compensation to injured victims, providing incentives for proper conduct and disincentives for wrongful conduct, and distribution of risks among relevant groups. Process requires that tort doctrine be realizable, providing an adequate amount of guidance to judges and private actors and a fair and efficient process for implementing the doctrine.

In the policy analysis, the assumptions and proof problems that give rise to Question 3 present challenges for the research assistants. They can make persuasive arguments within each category, but only within limits, and the sum of the arguments likely still leaves them without a remedy. Briefly, the research assistants will argue that they are the innocents in this situation and Hudson and Penn are responsible parties, one of whose behavior may be wrongful. Even if their behavior cannot be proven to be wrongful, both entities profit from the situation, and risk-bearing activities ought to bear their costs. Compensation is particularly needed for employees in a workplace where dangers are created by their employers and the entities that provide elements of the workplace, such as Penn and the ventilation system. Most broadly, this is a question of responsibility and not fault. Concepts of fault-based, individual, relational liability fail to respond to the needs of society and its members, and the law ought to create social obligations that reflect an ethic of caring and mutual responsibility.

Hudson and Penn will respond that the research assistants' aims may be sound but that there are other sides to each of the fairness and policy accounts. The research assistants cannot establish that Hudson or Penn have done something wrong, nor are they the appropriate entities on which to impose enterprise liability. Innocent victims of harm caused by others may in some sense deserve compensation, but desert in tort law is relational; the victim is entitled to compensation only from a wrongdoer or from one who engages in an activity to which the risk logically and effectively can be assigned. Because it cannot be established which of the two supposed wrongdoers, Hudson or Penn, has caused the harm, corrective justice does not lead to liability for either. Imposing liability

17 Dan B. Dobbs, Paul T. Hayden & Ellen Bublick, 1 The Law of Torts §§ 10–14 (2d ed. 2011).

on either, without determining fault, would provide improper incentives without logically assigning responsibility to a risk-creating activity. The policy rationales that permitted exceptions in *Summers v. Tice* or in the other multiple-party cases do not apply when it is assumed that one of the defendants is without fault and neither has obviously unique access to the information about fault. As an institutional matter, it would be hard for the courts to formulate a general rule here and, if there is liability to be imposed without fault, it is the task of the legislature, not the courts, to do so.

For the student and for the law in general, this poses an ultimate question: What is the right answer to the exam question? Existing tort doctrine and policy do not impose liability on either Hudson or Penn, but should they be liable?

The answer is the law professor's favorite: It depends.

Depends on what? Not on legal reasoning and the doctrinal structure. Not on the goals structure. It depends on choices about the allocation of values through law, which is another definition of politics. The research assistants can argue that we ought to transcend the existing doctrinal structure to impose liability because it is fair, or because it is in the public interest, or both. Hudson and Penn dispute the fairness and public interest arguments. Fairness and the public interest are embedded in the goals of tort law, but the scope of fairness and public interest that courts applying tort law can legitimately address is limited. Hudson and Penn also make an institutional argument. If liability is to be imposed here, especially as a no-fault responsibility scheme, it is the task of the legislature, not the courts, to do so. Because the problem stipulates that the research assistants are outside the workers-compensation system, the legislature has made the judgment that tort law with its focus on individual wrongdoing and responsibility provides the only remedy, which is to say no remedy, at all.

III. The Lessons of Legal Reasoning

A. The Explicit Lessons

The explicit lessons of legal reasoning address its forms and the substance and structure of doctrine, from simple deduction through sophisticated policy analysis. They constitute the mainstream account of legal reasoning and legal doctrine we all learned in law school and with which we are familiar as lawyers. Their formal statement in this article should be noncontroversial.[18]

18 The literature is vast. Canonical works include Duncan Kennedy, A Critique of Adjudication (*fin de siècle*) (1997); Edward H. Levi, An Introduction to Legal Reasoning (Frederick Schauer ed., 2d ed. 2013); Karl Llewellyn, The Bramble Bush (1930); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L.

1. Legal reasoning takes several forms, including classification of legal problems, simple deductive application of rule to facts, standard-based rule application, analogical reasoning, policy analysis within rule application, and policy analysis to develop new rules.

The problem, a typical law-school exercise or exam, illustrates many of the forms of legal reasoning. It begins with classification of Hudson's potential liability as involving intentional torts, strict liability, or negligence. It includes several examples of deductive rule application, such as whether Hudson owes a duty of reasonable care when engaging in a risk-creating activity that causes harm. These issues may be factually complex but, once the facts are determined, the rule application is rather simple. It suggests that doctrine can take the form of rules (whether Hudson owes a duty of reasonable care) and standards (whether Hudson acted reasonably).[19] Some rules require deduction supplemented by policy (whether *res ipsa* should apply if the information-forcing rationale is not present). When simple deduction is not enough, legal reasoning can involve analogical reasoning, as in the cases involving multiple actors. Finally, it demonstrates how policy analysis is used to develop new rules (market-share liability).

2. Legal reasoning, in form and content, constitutes a distinctive form of analysis.

The first thing students learn in law school is that legal reasoning is distinctive, distinguishable from other forms of analysis. It employs a unique legal vocabulary, including the particular meaning of common words such as "negligence," the meaning of unique legal terms, such as *res ipsa loquitur*, and the meaning of legal concepts, such as the elements of a cause of action for negligence. Legal reasoning also takes distinctive forms, including the ability to situate problems within rule systems, deductive legal reasoning, analogical legal reasoning, policy-based rule application, and policy analysis. Employing these forms requires the ability to use judicial opinions and statutes, including generating broad and narrow holdings of cases.[20]

Of course, although legal reasoning is distinctive, it is not unique. Deductive and analogical reasoning are common across all fields of inquiry and in daily life, and forms of policy analysis are used formally and

Rev. 1689, 1712 (1976). Many contemporary works are designed for teaching. *E.g.*, Christine Coughlin, Joan Malmud Rocklin & Sandy Patrick, A Lawyer Writes ch. 8 (3d ed. 2018); R.A. Robbins, S. Johansen & K. Chestek, Your Client's Story 104–06, 173–76, 225–35 (2d ed. 2019).

19 *See* Ward Farnsworth, The Legal Analyst ch. 11 (2007).

20 Kennedy, *supra* note 18, ch. 5; Jay M. Feinman, *The Future History of Legal Education*, 29 Rutgers L.J. 475 (1998); Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875, 891–92 (1985).

informally to weigh many kinds of decisions. The legal forms, however, *are* distinctive, involving the understanding of legal vocabulary, rule systems, analysis, and argument in systematic ways and recurrent categories.

3. The substance of legal doctrine and its application fall on a rough spectrum from relatively clear to relatively open-ended, from law to policy.

Experienced lawyers are often able to identify immediately the key doctrinal issue involved in a situation and to analyze the application of the facts to address the issue. A lawyer for an accident victim recognizes that two parties who have agreed to engage in dangerous conduct are involved in a "concert of action," potentially creating liability even for the party who does not directly cause harm. An advantage of the problem is that requiring students to work through the doctrine methodically reveals there are many forms of legal reasoning, and the forms are not just a list but a list with a degree of order.

The issues in the problem demonstrate that the spectrum of legal analysis links form and substance. Simple, well-established rules that can be applied deductively lie at one end of the spectrum and open-ended issues that need to be addressed by policy analysis lie at the other. The initial analysis of Hudson's potential liability, for example, begins with the deductive application of law to facts, which may be clear (whether the research assistants suffered cognizable harm) to more open (whether Hudson breached its duty of reasonable care). When Penn enters the picture in question 3, the research assistants move to analogical reasoning in trying to apply the multiple party cases. The rules in the analogies (alternative liability, concert of action, serial control, and market-share liability) are themselves the products of earlier cases in which courts applied principle and policy to develop new rules.

4. At some point the forms of legal reasoning and the doctrine and policy they use "run out," and any further discussion of the problem requires judgments that are beyond the scope of ordinary doctrinal analysis. In a rough, nontechnical sense, the need for such judgments distinguishes the reach of adjudication and legislation.

Legal reasoning and policy analysis provide distinctive forms of coming to answers in a whole range of questions, but sometimes the answer is "no" or at least "not here." This happens in two very different ways: In ordinary cases, the appropriate doctrinal issues are identified and applied, and sometimes that application denies a plaintiff a remedy. In Question 1, if Penn is proven to have acted reasonably, the research assistants lose. Likewise regarding Hudson in Question 2 under the product-liability doctrines. The appropriate legal rule has been applied to

achieve a result. In Question 3, because none of the analogies for multiple defendants fit the situation, the research assistants lose again. But the issue here is not that a single rule (negligence) has been applied to reach a result. Instead, the whole range of potentially applicable doctrines have been examined and none of them fits sufficiently to address Hudson's and Penn's potential liability. Legal doctrine and the forms of legal reasoning have done their work, and if the research assistants are to have a remedy, it resides elsewhere; the rule that would give it to them is within the nonlegal, political allocation of values by the legislature.

B. The Implicit Lessons

The explicit lessons of legal reasoning certainly are useful in laying out elements that are basic to the lawyer's toolkit (as well as to the core of the first-year student's experience). But the explicit lessons are not the whole story of what is communicated by the mainstream view of legal reasoning. That view also carries two implicit lessons about legal reasoning.

1. Legal reasoning mostly works.

Stepping back from the doctrine, some of the law and its application to the problem appears to be clear and correct, and some of it is less clear and up for grabs. At the relatively clear end of the spectrum, the law expresses consensus social values through clear rules; the values are so clear that they rarely require explication or can be stated in a simple, widely understood form. Hudson is liable if its negligence has caused the research assistants' injuries, and Penn is liable if a manufacturing defect in its ventilation system has caused the injuries. At the less-clear end of the spectrum, the distinctively legal form of policy analysis applies familiar general categories and substantive principles to reach results. Policy analysis in tort law entails rigorous use of principles of corrective justice, social utility, and process that are not just restatements of the type of arguments made outside of law. That type of legal policy analysis establishes categories of liability such as alternative liability and market-share liability.

In these ways, the forms of legal reasoning apply the underlying principles and policies to achieve results that conform to social values, though not in every case or with every rule, of course. Sometimes courts make mistakes in particular cases, and some rules are poorly formulated, outmoded, or just wrong. But most of the time the process of legal reasoning gets things right, and when it does not, the system has the capacity to correct itself.

The problem that the research assistants face in Question 3, with multiple actors, is not a failure of legal reasoning. Instead, legal reasoning

and the doctrines it has generated have run out. There are no rules, standards, or analogies through which Hudson or Penn can be held liable, so their remedy, if any, lies "outside" law, at least at the moment. Some of the doctrines discussed in the problem show that legal reasoning with doctrinal principles and policy analysis can expand to encompass new situations such as theirs. At different points in time, victims such as the plaintiffs in the origin case for *res ipsa*, *Byrne v. Boadle*,[21] *Summers v. Tice*,[22] and the DES cases[23] also had no remedy within law. Courts expanded liability through the development of new rules, exceptions, or counter-rules that covered those victims and others within the newly defined classes. For the moment, however, legal reasoning has done its job and courts cannot reasonably fashion a rule that would help the research assistants.

2. A substantial core of legal reasoning and legal doctrine is distinctly legal; a smaller periphery is substantially nonlegal.

Along with the spectrum of legal reasoning, a second physical metaphor is helpful in understanding the nature of law and legal reasoning, that of core and periphery. As we move along the spectrum, from simple rule application to policy and from ordinary negligence to, say, market-share liability, we get the sense that we are moving from the purely legal to the less legal. Because "We are all Legal Realists now," we understand that the classical conception of law as formal and, in Langdell's view, scientific, is invalid. But there remains a sense that some rules and techniques are closer to what it means to do "law" and others are farther away.

If the core is law, then the periphery is something outside the sphere of law. That something is politics. As post-realists, we understand that law is not entirely separate from politics, that legal rules involve the allocation of values, and that the struggles over legal rules sometimes are as motivated by interest and ideology as are electoral politics. Still, there is a sense that doctrines and forms can be more legal or less legal. Ordinary negligence is different than market-share liability. Liability for a defectively manufactured product is well established, but it rests on an enterprise-liability rationale that is less firm than fault-based liability, so a risk–utility test is more appropriate for design defects than a fuzzier standard of consumer expectations.

21 159 Eng. Rep. 299 (Exch. 1863).

22 199 P.2d 1 (Cal. 1948), discussed *supra* note 14.

23 Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), discussed *supra* note 16.

The core of determinacy occupies most of the sphere of law, with the periphery only a mantle of indeterminacy close to the surface. As process, the overwhelming majority of legal issues can be settled by deductive or analogical reasoning, with some additional quantity addressed by deduction supplemented by policy. Only a very few require pure policy analysis, a process that is to a substantial extent nonlegal. As substance, the lawyer advising about potential tort liability can confidently predict the outcomes in the vast number of cases once their facts are known, with the result that many cases do not need to be litigated. Among the litigated cases, even those that are uncertain have solutions that rest within a relatively narrow range, often requiring the application of uncertain facts to clear rules of law. Penn may or may not be liable for a manufacturing defect, but the company clearly is neither liable for all injuries its product causes nor immune from liability under any circumstance.

C. The Hidden Lessons

The explicit lessons of legal reasoning clearly communicate the forms of legal reasoning and the substance and structure of doctrine. The implicit lessons add some ideas about how well law works in achieving its objectives and on the limits of law. But there is more to the story—about the shortcomings of legal reasoning, its political meaning, and how and why those features are hidden.[24]

1. Legal reasoning doesn't work, and the extent of core and periphery is reversed.

A hidden lesson of legal reasoning is that the claim that legal reasoning produces a substantial core of law that is clear, correct, and "legal" is false. This is most obviously true in constitutional law. The current Supreme Court may provide an extreme example, but it is well understood that the Court's decisions about constitutional law almost always operate within a realm of broad indeterminacy, where lawyers can make plausible arguments for different results and individual justices will choose among those arguments based on principle and politics. But constitutional law is not exceptional: private law offers the same possibilities for different results employing different legal-reasoning techniques.

24 Much of the analysis in this part III has its origins in the Critical Legal Studies movement. I have generally avoided specific citation to that work. Among so many other works, see The Politics of Law: A Progressive Critique (David Kairys ed., 1998); Mark Kelman, A Guide to Critical Legal Studies (1987); Kennedy, A Critique of Adjudication, *supra*, note 18; Roberto Mangabeira Unger, The Critical Legal Studies Movement (1983); Jay M. Feinman, *The Jurisprudence of Classification*, 41 Stan. L. Rev. 661 (1989); Peter Gabel, *Reification in Legal Reasoning*, 3 Rsch. L. & Socio. 25 (1980); Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 18. For more recent work, see Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 Minn. L. Rev. 2511, 2523 (2023).

This does not mean that, in practice, every legal issue is up for grabs all the time. Obviously, lawyers can often confidently predict the outcome of cases. Just as obviously, the resolution of some issues cannot be resolved based on ordinary legal reasoning: whether the constitutional right to privacy encompasses a woman's right to choose to have an abortion, for example. The claim that legal reasoning doesn't work is that a huge portion of legal issues is indeterminate, so that most of the time lawyers would be justified in asserting contrary positions and courts would be justified in reaching contrary results.

Indeterminacy penetrates every form of legal analysis. Doctrinal systems contain rules, sub-rules, counter-rules, and exceptions that create issues of fit; a fact situation can be treated under one doctrinal element or another, and the choice is often both open and outcome-determinative. Doctrines are aligned on a spectrum from simple rules that appear to permit simple deduction to standards that are vague, that allow a broad range of possible results in their application, and the latter are much more common than the former. Doctrines rest on principles and policies, and the principles and policies can be deployed to achieve different results in particular cases and for the rule system more broadly. These features can be employed in a very large number of cases in support of different results—so many cases in fact that the core–periphery model fundamentally misstates the nature of law and legal reasoning; much more *within* the law's sphere is indeterminate. That result is embedded in the problem, as much in Questions 1 and 2 as at the end of Question 3.

The first issue in any doctrinal problem is one of fit: where in the doctrinal structure the issue belongs. The problem is set as one of tort law, but it could as easily involve a contract. Even in the absence of an express provision about safety in the contract between the research assistants and Hudson, there could be an implied term based on words and conduct or just the assistants' reasonable expectation of a safe workplace, especially when working with dangerous materials. This approach would further the fundamental purpose of contract law, which is the protection of reasonable expectations.[25]

Within tort law, the first issue in Question 1 is whether Hudson's conduct is governed by a rule of negligence or strict liability; if the research assistants cannot prove negligence, a move to strict liability would change the result.[26] The test for strict liability is stated in deductive form: If an activity bears a foreseeable and highly significant risk of harm

25 Arthur Linton Corbin, Corbin on Contracts §1, at 2 (1952).

26 Since the rise and generalization of negligence liability in the mid- to late-nineteenth century, negligence has been the baseline rule of liability, so it also can be seen as a rule–exception question.

even if reasonable care is exercised by the actor, and if the activity is not of common usage, then the actor is strictly liable for resulting harm. But the terms of the doctrine are standard-like rather than rule-like: defining "the activity," "foreseeable risk," "highly significant risk," "reasonable care," and "common usage." Is the "activity" operating a laboratory, operating a laboratory with potentially dangerous materials, or operating a laboratory involving CM? Is the risk involved merely "significant" or "highly significant?" And so on. Each of these choices is open for resolution within a very broad range, and a variety of answers arguably would advance tort law's purposes of corrective justice, incentives, and risk allocation.[27]

If the relevant rule is negligence, the result also is wide open. Whether Hudson has acted with reasonable care is a "question of fact" only in the sense that is to be decided initially by a jury, because reasonableness involves conflicting policy dimensions. Reasonableness is a judgment, not a fact; the conduct of the average person may or may not be reasonable. Learned Hand's risk–utility test for determining reasonableness makes clear that balancing is involved, but the elements that factor into the balance are typically incapable of being fixed in numbers that allow algebraic precision.

If the research assistants cannot establish negligence and Hudson cannot establish reasonableness, the research assistants may shift to a rule–exception mode and invoke *res ipsa loquitur*. *Res ipsa* is well-established, but what is less clear is how far its rationale extends. Its essential aim is to allow the plaintiff an inference when negligence is likely but proof is unavailable; as in the foundational case *Byrne v. Boadle*, proof often is unavailable because it is solely within the defendant's knowledge.[28] It is more controversial whether the doctrine applies when the defendant lacks superior knowledge and, at the extreme, when the plaintiff has failed to make sufficient efforts to determine the available facts.[29] Thus the availability of an exception may be determined both as a factual matter—whether the facts fit within the exception—and as a policy matter—what the underlying policies of the exception are and whether those policies would be served by its application on the present facts.

The factual assumptions in Question 3 require the research assistants to use analogical legal reasoning. Concert of action, alternative liability,

27 *Compare* Toms v. Calvary Assembly of God, Inc., 132 A.3d 866 (Md. 2016) (commercial fireworks display is not an abnormally dangerous activity), *with* Klein v. Pyrodyne Corp., 810 P.2d 917, amended by 817 P.2d 1359 (Wash. 1991) (commercial fireworks display is an abnormally dangerous activity).

28 2 H & C 722, 159 Eng. Rep. 299 (1863). In *Byrne*, a witness testified that the plaintiff was struck by a flour barrel that fell from defendant's shop, but no evidence was presented of the defendant's negligence in causing the barrel to fall.

29 *E.g.*, Howard v. Wal-Mart Stores, Inc., 160 F.3d 358 (7th Cir. 1998); District of Columbia v. Singleton, 41 A.3d 717 (Md. 2012).

serial control, and market-share liability, like the problem facts, involve multiple defendants, each of whom potentially or actually has engaged in tortious behavior, but the causation element of negligence cannot be satisfied. In each of these situations, the limits of the existing negligence rule stymied plaintiffs, and courts created an exception to permit liability because the courts' balance of the underlying principles or policies suggested the rightness of doing so. This ability to create exceptions based on policy is itself a source of indeterminacy because seldom is it clear when or to what extent courts will create exceptions. If an exception is created, its application seems to come through a form of deductive reasoning, in which the principle established by the exception becomes a new doctrine capable of application to other fact situations. That deductive application is often open as well. For example, in *Collins*, where the plaintiff's injury was caused either by the ambulance ride or by the facility to which the plaintiff was driven, the information-forcing policy led to the *res ipsa* inference. But in other serial-control cases such as the research-assistant problem, where that policy may not be as strongly served, the plaintiff is not relieved of its burden of production.[30]

The most obvious point of indeterminacy comes at the end of Question 3—in resorting to explicit policy analysis to formulate a new doctrine to achieve appropriate results. This reinforces a lesson implicit in the doctrines available in the multiple-party cases: Whether a court will resort to policy to create an exception or new rule is most often up for grabs. Often this is empirically true, as when an observer simply cannot predict with any confidence in which direction a court will go. How to frame arguments about morality, policy, and process in a particular case, what weight to give to each factor, and by what means to balance them are so wide open that different courts will go in vastly different directions. Other times the result may be more predictable even if it is not logically necessary; at some point in the development of products liability law, the weight of exceptions and subrules that imposed liability on manufacturers of defective products made the turn to strict liability, at least for manufacturing defects, more likely. But likelihood is far from certainty and the ebbs and flows of products liability illustrate the indeterminate nature of the rules and process.

2. All legal reasoning and legal doctrine reflects broader social and political conflicts.

Part of the reason that law doesn't work is that principles do not determine doctrinal results. If we try to apply carefully and fully the

30 Restatement (Third) of Torts § 17 cmt. F.

principles and policies underlying tort law, for example, in most instances we still cannot reach clear results on the choice of rules or the decision of cases; both the research assistants on the one hand and Hudson and Penn on the other can make credible arguments.

A useful way to think about this issue is to recognize that law is both coherent and contradictory. It coheres in the sense of the term's dictionary definition: a substantial portion of the policy, principles, doctrine, and forms sticks together and forms a whole. Although individual doctrinal elements of tort law are not logically compelled by the underlying principles and policies, they are strongly associated in a way that gives coherence to the whole. At the same time, law is contradictory because there are conflicting coherent structures. This coherence and conflict within the law reflects broader social and political conflicts about the social good, and even the most fundamental conflicts about social life.

To illustrate, again begin by situating the problem in doctrinal context: Hudson suggests that contract law is about individuals' choices to make promises or enter into agreements that may create legal liability; in the absence of evidence of agreement on issues of safety or compensation for injury, contract law is not an appropriate venue. Tort law is better suited, given its aims of providing compensation for harms wrongfully caused in order to achieve optimal levels of investment in safe conduct. The research assistants respond that contract law is not about choice. In concept and in doctrine, contract law is about manifest assent and reasonable expectations. Assent is manifested and reasonable expectations are created by words, conduct, and context, particularly in relational contracts, such as the employment contracts between Hudson and the research assistants. Contract law might therefore be applied to the problem to construct reasonable expectations about a safe workplace.

Within tort law, the requirement that liability be imposed only for wrongful conduct and the objective of providing optimal deterrence dictate that negligence is the baseline liability rule; only special circumstances call for strict liability or strict products liability. Given the spare facts in the problem, there is no clear resolution of the choice between negligence and common-law strict liability, but the ability of the four other university labs to conduct similar research without causing injury suggests that the activity does not bear a significant risk if conducted with reasonable care. The research assistants can argue that the potential scope of strict liability is much broader. At an individual level, tort law is about social responsibility, and at a system level, it is about providing reasonable compensation and protection against injury; in many circumstances, including this one, the desirability of enterprise liability as a source of compensation leads to a more expansive role for strict liability.

Penn's potential liability is determined in part by the rule for design defects, and the historical and contemporary dispute about the better liability rule is reflected in the problem. The research assistants argue that Restatement Second § 402A better captures the need for design defect to protect users of products; risk–utility balancing may supplement the test where consumers may not have particular expectations about safety, but it does not fully capture the concerns of consumer expectations of safety and the ability to spread the risk. Penn supports risk–utility balancing—negligence—or even negligence-plus, with the added requirement that the plaintiff prove a reasonable alternative design. These rules produce socially optimal results by balancing all of the costs and benefits of a product's design.

If the research assistants cannot establish either negligence by Hudson or products liability against Penn, *res ipsa* or the doctrines about multiple-party liability may be relevant. As a general matter, these moves demonstrate a feature of tort law beyond their immediate application: courts sometimes are willing to expand the rules in favor of plaintiffs where process fails or for other reasons when the doctrine does not adequately capture tort law's aims. The research assistants have a credible argument that the same should be done in the problem. But Hudson and Penn respond that the structures of the rules at present, properly defined, serve tort policies in denying the research assistants a remedy.

Hudson and Penn on the one hand and the research assistants on the other each present a coherent account of elements of the doctrinal analysis of the problem. Yet the two accounts are contradictory on the individual issues. As we step back from the competing accounts, the differences reflect a much broader conflict. Underlying Hudson's and Penn's arguments is a vision of a world of independent actors pursuing their own goals, often through the market. In this world, tort law's role is limited to providing remedies when and only when someone has wrongfully invaded the interests of others in a manner that imposes a net social loss. That role for tort law appropriately defines the scope of individual autonomy and produces all the benefits of net social welfare that arise from the market. The research assistants reflect an orientation that posits a world made up not of self-interested isolates but of social beings who share the benefits and responsibilities of living with others. In the social world, the law, including tort law, properly allocates the benefits and burdens of communal life not limited by narrow conceptions of fault and cost-benefit analysis.

These different orientations speak to the form of legal reasoning as well as to the substance of its doctrine. A world in which liability is imposed only where it is clear and for limited reasons, such as wrongdoing

or net social loss, is a world mostly of rules. Parties need to know their potential liability in order to calculate the consequences of their actions, and clear rules provide the necessary guidance. This approach therefore hews much more closely to pure deduction from clear rules as the dominant form of legal reasoning; even analogies are helpful only if a clear rule underlying the analogous case can be identified. A social world is more diffuse, however, and courts need more flexibility in considering the social contexts and effects of their decisions, so standards are the common form of legal doctrine. This approach leaves more room for policy-inspired doctrinal reasoning and policy application itself.

The elements of each of the competing doctrinal accounts coheres with the other elements in that account—the elements hang together to form a whole—even though the elements are not logically compelled by the others, nor by the underlying principles and policies of law in general and tort law in particular. Indeed, they cannot be compelled by the underlying principles and policies because both of the accounts rest on the same base of fairness, policy, and process.

Each doctrinal account also coheres with a more general social theory: individualism for Hudson and Penn and collectivism or communitarianism for the research assistants. Individualism and communitarianism do not require, say, narrow and broad spheres of strict liability in tort law. But an individualist philosophy and the defendants' doctrinal account and a communitarian approach and the research assistants' arguments cohere in the same way that the pieces of each account cohere. They appear to fit together, and we often see people who hold one general approach to the world make the corresponding specific arguments about tort law.

The problem deals with tort law but the analysis applies more broadly, across private law and beyond. In contract law, for example, the individualist world is one in which freedom *to* contract and freedom *from* contract are equally important to self-interested, welfare-maximizing individuals. The law's role is to define the forms through which contractual obligation may be assumed, and those forms tend toward clear and unambiguous expressions of consent. Unless a party has invoked those forms, it is not bound to a contract. The market, as the sum of freely chosen contracts, is the measure of all things, and society benefits as resources gravitate to their highest and best use. The social world, by contrast, is one in which contracts are not simply the expression of individual choice. Contracts always are situated in relations, networks, and communities, and parties contract in the context of those social situations. The law's role is to support reasonable expectations set by words, conduct, and context, and those expectations often include relational bonds.

The same is true far beyond private law. In laying the foundation for the modern law of negligence, Holmes famously wrote,

> The general principle of our law is that loss from accident must lie where it falls. . . . The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. . . . The state does none of these things, however.[31]

That was 1881. Today, of course, the state in many respects makes itself a mutual insurance company. The Affordable Care Act, Medicare, and Medicaid distribute the burden of healthcare among society's members, subsidizing those of lower economic means and the elderly at the expense of those with greater ability to pay. The federal government provides a "pension for paralytics" under Social Security disability payments, and those who "suffered from tempest" are supported through a subsidized National Flood Insurance Program and grants from the Federal Emergency Management Agency. The debate about the extent to which the community through the state ought to tax some to relieve the burdens of others continues, and the voices of modern heirs of Holmes' individualism remain strong.

In this sense, law and debates about public policy are both coherent and contradictory, and coherent and contradictory precisely because they reflect deeply held and often unexamined beliefs. And they are contradictory in an even more powerful way. The conflict of approaches is not simply between people with differing philosophies. The conflict is internal to each individual, and universal. People are both individuals and members of communities, and they experience the conflict that comes from holding both roles at the same time.[32]

3. The process of legal reasoning and the forms it takes obscure law's political nature.

Law's political nature presents a problem. Since the era of legal realism, the law has largely abandoned the claim of absolute formalism, in which objectively correct answers to legal questions can be deduced from fundamental principles. But the concept of legality requires that

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31 Oliver Wendell Holmes Jr., The Common Law 76–78 (Mark Howe ed., 1963) (1881).

32 In what Mark Kelman has deemed "the most widely cited passage in Critical Legal Studies," Duncan Kennedy describes the "fundamental contradiction" that underlies the competing social visions:

> The goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. . . . [A]t the same time it forms and protects us, the universe of others . . . threatens us with annihilation. . . . Numberless conformities, large and small abandonments of self to other are the price of what freedom we experience in society.

Kelman, *supra* note 24, at 62–63 (citing Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 2211–12 (1979)); *see also* Peter Gabel, The Desire for Mutual Recognition (2018); Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 114 (1984).

legal reasoning and doctrinal results still possess a substantial degree of certainty. The explicit lessons of legal reasoning teach that legal reasoning is a distinctive form of analysis, and the doctrine and case results it produces are a distinctive social product. The implicit lessons add that most of the time, deduction or deduction-plus-policy is employed to produce predictable results that represent a consensus of social values or at least are within the limited range of choices that are consistent with consensus social values. That is, law is distinct from and autonomous of politics, at least relatively.

The problem of uncertainty is addressed through a hidden lesson of legal reasoning: law's ideological function. Legal reasoning obscures law's political nature, reinforces the idea of legality itself, and legitimates the status quo. Law is not autonomous from politics, but most of the time, it appears to be so, especially within the realm of private law. The forms of legal reasoning and the results they generate are presented as of a different order than political decisions.

Law first legitimates itself through the claim that it is relatively autonomous.[33] The research assistants have suffered harm while working in Hudson's lab, in which Hudson and Penn sought to control the risk of injury. The forms of legal reasoning and the legal doctrine abstract from that social fact in order to frame how their harm is to be addressed. The substance of tort law and the process of legal reasoning are presented as the product of deliberation over decades, even centuries, that together present a structured and effective means of addressing problems such as how to respond to the research assistants' harm. Legal reasoning is not formalistic, its results are not always certain, and it may even produce results that appear to be unfair; but by and large the process works in the sense described in the explicit and implicit lessons.

More broadly, law and legal reasoning legitimates the status quo in economy, polity, and society.[34] That status quo is not fixed and discrete, but it *is* limited. For example, the economy works best with substantial areas of self-regulation, supplemented by state intervention to provide structure and correct market failures. Hudson and Penn make their own choices about the activities in which they will engage and how much they will invest in different parts of those activities, subject to limitations on risk creation provided by tort law and direct regulation.[35] Law is highly

33 *See, e.g.*, Kelman, *supra* note 24, at 289.

34 Kennedy, *supra* note 18, ch. 1.

35 Not implicated in the problem but highly relevant to present-day discussions, another belief is that society reflects individual biases about race, gender, and class, but less so than at previous times, and that the biases can be overcome by education and limited regulation. *See* Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 19–22 (3d ed. 2017) ("[I]dealists" hold that racism is a product of beliefs that can be corrected.).

functional for the operation of the economy and society in that it has created structures Hudson and Penn can invoke to engage in their activities. Their relationship with the research assistants can be structured through contract and employment law, and any risk of harm inherent in their activities can be allocated through tort law and regulation. At the same time, law is considerably autonomous from immediate political forces. Autonomy depends on a rationalist method of legal reasoning and the expertise of the courts in traditional common-law areas. Law's functionalism is expressed in flexible doctrine and a flexible method of applying the doctrine. The research assistants' claims will be addressed in a court system and through law that is different than political decision-making or the exercise of economic or social power. Although the lack of a remedy is unfortunate, that result is either correct or at least within the realm of reasonable.

IV. Conclusion

The exam question that poses the problem this article addresses had dual purposes: to evaluate and to teach. And it is useful for thinking about legal reasoning and legal doctrine by illustrating the explicit, implicit, and hidden lessons involved in both. These are not new lessons, but at least some of them only lurk in the background of our understanding of the law. The last hidden lesson explains why this is so; the day-to-day experience of learning, practicing, or teaching law almost requires us to suspend what we may know to be true about the indeterminacy and political nature of law.

There is a risk to bringing into the open what ordinarily is hidden. One reaction to the hidden lessons can be despair. The infinite questions and answers in the first-year law-school classroom cause some students to experience a "dark night of the soul." They come to see law and legal reasoning as hopelessly indeterminate, with a counterrule for every rule and a set of inevitably conflicting "policy arguments" that reduces ethical discourse to a meaningless game in which lawyers' craft and guile and the caprice of judges, not a sense of justice, determine the outcome.[36]

But an alternative reaction, rather than disabling, is empowering. The explicit and implicit lessons of legal reasoning teach that law mostly works, and therefore change is desirable and possible only around the edges. The hidden lessons in turn teach that the world does not have to be the way it is. Precisely because so much of law is open and ultimately

36 Feinman & Feldman, *supra* note 20, at 878.

political, lawyers have the capacity to envision and create, to correct injustices, and even to formulate new conceptions of justice and new law to advance those conceptions.

ARTICLE

Stories of My Great-Grandfather's Murder

Stefan H. Krieger*

I am not sure how old I was, but I vividly remember my father telling me the story when I was fairly young of how his grandfather, sleeping in bed one night with his son, was viciously murdered in his sleep by an intruder bludgeoning his head with a piece of scrap iron. That story of the murder of my great-grandfather, Yomtov (Jacob) Schoenberg in Batavia, New York in 1915 always haunted me. I sometimes tried to envision the horror of that scene but have no memory of exploring that event in depth with my father. Nor do I recall any mention of this murder by any relative—including my great-grandfather's son, my Great Uncle Max, whom I knew.

But then, when I began teaching Evidence over a decade ago, I started to investigate what happened to my great-grandfather, Zayde Schoenberg, that night. My father had told me that the alleged intruder was arrested and tried. So I read the New York Court of Appeals decision in the case.[1] I found that my Great Uncle Max was the key witness in the case and began to explore with my students the credibility of his testimony.[2] And I discovered that the murder took place in the context of two different newly arrived immigrant communities in a small upstate New York city—the Jewish community of my great-grandfather and the Polish community

* Richard J. Cardali Distinguished Professor of Trial Advocacy, Maurice A. Deane School of Law at Hofstra University. I wish to thank Agnieska Legutko, Roberta Newman, and David Roskies for their assistance in translations for this article; Bill Kelly and David States for their archival materials from the family of Fredd Dunham; and my family members Sidney Gottlieb, Jonathan Krieger, and Shoshana Krieger for their input in writing this article. I am also indebted to my research assistants Nicholas Zotto, Yawar Chaudhry, Landri Kennedy, Jamie Bernstein, Emma Kerner, and Griffin DeGaetano for their dedicated work, as well as Hofstra Law School which supported this project with a generous research grant. A paper describing this study was presented at the Eighth Biennial Applied Legal Storytelling Conference, hosted by Mercer University School of Law, in July 2021, and I wish to think the participants at that conference for their comments and suggestions on this research.

1 People v. Trybus, 113 N.E. 538 (N.Y. 1916).

2 *See* Record on Appeal at 52–124, 707–17, 876–77; *Trybus*, 113 N.E. 538.

of the alleged perpetrator, Jan Trybus—living among an already established community. So began my research into the archives—both legal and nonlegal—about the case. And so began my understanding that this case involved a number of stories besides the one told to me by my Dad.

This article describes the different stories I have encountered in this research: those of the victim, the alleged perpetrator, the prosecutor, the defense attorney, the private detective, the diverse immigrant groups, and the residents of the established community. These stories, I believe, provide a good example of how over a century ago, the different players in this murder case—from their own divergent cultural perspectives—used storytelling to try to explain this horrible tragedy. And not surprisingly, I discovered that some of the same ugly narratives about immigrants used today were prevalent a century ago. But just as importantly, through this inquiry, I learned that there were attorneys at that time who fought back against those narratives. And I gained some insights about myself. As an experienced civil rights lawyer, I discovered that the retelling of these stories shifted my narrative from the focus of what happened to my family that tragic night in 1915 to the legal rights of the perpetrator. The stories I uncovered changed my own story of that event.

In this article, I take a deep dive into archival material to discover the cultural milieu of Batavia in the early twentieth century; the backstory to the litigation of a case that reached the state's highest court; and the schemata of the attorneys who litigated the case. I first briefly describe the Batavia community in 1915 and introduce the key characters in this tale: the victim and his family and the defendant in the case. I then detail the conflicting stories about the murder presented at the trial of Trybus. Then, I present the different narratives of the Jewish, Polish, and established Batavia community about the case reported in the local media and the differing characterizations of those communities by the attorneys in the case.

With this background I explore how the attorneys' portrayal of immigrants and their rights infused the stories they told about the case. Then, examining the attorneys' schemata about themselves and the legal system, as reflected in their writings, I analyze how those views were reflected in their stories at trial. Finally, I will conclude by describing how my retelling of the different characters' stories—through my own schemata—affected my own story of events over a century ago.

I. The background of the case

A. Batavia, New York—1915

Batavia is a small city in upstate New York, approximately halfway between Buffalo and Rochester. In the early decades of the twentieth century, with a large influx of immigrants, the population of Batavia grew substantially. In 1900, the population of Batavia was 9,180; in 1910, it had grown to 11,613; and by 1920, it had increased to 13,541, a growth of approximately 47% in two decades.[3] By 1920, 16% of Batavia's population was foreign-born;[4] 38.76% of the white immigrant population was from Italy and 14.29% was from Poland and Russia.[5] With this increase in population, Batavia was incorporated as a city in 1915.[6]

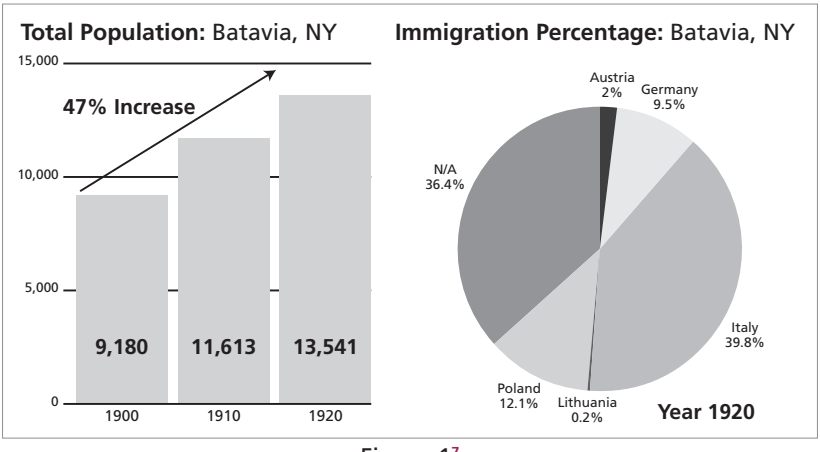


Figure 1[7]

This growth in population reflected an expansion of industry in the city. Batavia was located in an area with many dairy and vegetable farms. While the Erie Canal bypassed Batavia, the city was located on major rail lines, and starting in the mid-nineteenth century, it became a small industrial town in the heart of an agricultural area.[8] In the 1880s, for

3 U.S. Census Bureau Population: 1920, at 533 tbl.53.

4 *Id.* at 18 tbl.10.

5 *Id.* at 29 tbl.12. According to the 1920 census, the "Native White" population of Batavia was 11,339, 7,022 (62%) of which had "Native Parentage"; 2,974 (26%) of which had "Foreign Parentage"; and 1,343 (12%) of which had "Mixed Parentage." *Id.* at 18 tbl.10. Accordingly, besides the 16% of Batavia's population who were foreign born white, 38% of the "Native White" population had foreign or mixed parentage. Batavia's black population in 1920 was .2%.

6 Larry Dana Barnes, History of Batavia 1801 to 2015, *The Twelfth Decade, 1911–1920,* at 10–11 (2015) (e-book), https://www.batavialibrary.org/sites/default/files/documents/HistoryOfBatavia-LarryBarnes.pdf.

7 Stefan Krieger, Richard J. Cardali Distinguished Professor of Trial Advocacy, Murder in the Family, Eighth Biennial Applied Legal Storytelling Conference slide 3 (July 16, 2021) (slide created using U.S. Census Bureau Population: 1920, at 533, tbl.53 and *id.* at 29 tbl.12) (on file with author).

8 Barnes, *supra* note 6, *The Fourth Decade, 1831–1840*, at 2.

example, the Johnston Harvester Co., a manufacturer of farm implements, relocated to Batavia,[9] and in 1910, the company was acquired by Massey-Harris Co., a subsidiary of a large Canadian manufacturer of agricultural equipment.[10] And, in the late nineteenth century, the E.N. Rowell Box Co. began operations manufacturing medicine and cosmetic boxes.[11]

As the county seat, Batavia was the home to the Genesee County Supreme Court where Jan Trybus was tried.[12]

B. The victim and alleged perpetrator

1. The victim: Jacob Schoenberg

The victim, Yomtov (Jacob) Schoenberg was born in Kuz'myn, Russia (now Ukraine) in 1869.[13] He emigrated to the United States on August 1, 1893, apparently for economic opportunity.[14] Jacob lived in New York City, then Rochester, and moved to Batavia before 1897, where he applied to be a United States citizen in 1899.[15] While it's unclear why he came to Batavia in particular, it appears that he was part of a chain migration of relatives and acquaintances from his region of the Ukraine to Western New York.[16]

Figure 2[17]

As the district attorney noted in his opening statement at the criminal trial, "Jacob Schoenberg has been a resident of the city for upward of 18 years. With one exception, he was here as long as any

9 *Id.*, *The Ninth Decade, 1881–1890,* at 11.

10 Farm Collector, Sam Moore, The Johnston Harvester Co., https://www.farmcollector.com/company-history/the-johnston-harvester-company/.

11 Barnes, *supra* note 6, at 157.

12 *Genesee County - History*, New York State Unified Court System, https://ww2.nycourts.gov/courts/8jd/Genesee/history.shtml (last visited Feb. 27, 2023).

13 *Immigration Application of Jacob Schoenberg to Become a Citizen of the United States*, Genesee County, NY County Clerk, Naturalization Records 1849–1929 v. 5, at 270, Oct. 21, 1899. I have been unable to find a photograph of Jacob. Figure 2 shows his gravestone.

14 *Id.*

15 *See id.* Ironically, Yomtov's immigration application was notarized by Fredd Dunham, who seventeen years later was the defense lawyer for Jan Trybus, Yomtov's alleged killer. *Id.*

16 Yomtov's brothers, Hyman and Jacob, for example, immigrated to Rochester, New York and resided there in 1910. *See 1910 United States Federal Census*, https://www.ancestry.com/imageviewer/collections/7884/images/4449350_00688?pId=110043895 (last visited May 2, 2023) (census record for Hyman); *1910 United States Federal Census*, https://www.ancestry.com/imageviewer/collections/7884/images/4449350_00685?pId=18241804 (last visited May 3, 2023) (census record for Jacob).

Hebrew. He was of the Hebrew nationality. He had a wife, five daughters and one son, all of whom lived in his home . . . on the west side of Liberty Street."[18] He further observed that Jacob was "one of the best and most favorably known men of that nationality residing in Batavia."[19] Jacob Schoenberg was a junk dealer who peddled junk on his wagon to the farmers in the area and, as his son Max testified at trial, peddled bread in Batavia to "Hebrews and Poles."[20] He was married to Rebecca. My grandmother Fanny was Jacob's and Rebecca's daughter.

Figure 3[21]

Figure 4[22]

As Lee Shai Weissbach observes in his study of Jewish life in early twentieth century small-town America, "A remarkable number of Jewish men in small-town America, especially among the East Europeans, got their start as junk collectors, buying up cast-off scrap metal, household goods, paper, rags, animal fur, and other waste, and then preparing it

17 Photograph on file with author; *see* Yom Tov Schoenberg, U.S., Find a Grave Index, 1600–Current, https://www.findagrave.com/memorial/118499950/yom_tov-schoenberg (last visited May 3, 2023). The Hebrew inscription on the gravestone reads, "Our beloved father Yomtov, son of Mordechai, died on the ninth day of the [Jewish month of] Cheshvan, [in the Hebrew] year 5676." The last five Hebrew letters in the inscription are an acronym for "May his soul be bound up in the bond of life."

18 Record on Appeal, *supra* note 2, at 35.

19 *Id.*

20 *Id.* at 36. A little more than two years before his murder, Jacob was arrested for selling junk without a peddler's license. *See Accused of Buying Junk Without Village License*, The Daily News (Batavia, N.Y.), Sept. 24, 1914, at 7. Two years prior, ten Jewish peddlers were tried in Batavia police court for selling junk after their licenses expired. *Dealers in Junk Before the Cadi*, The Daily News (Batavia, N.Y.), Nov. 18, 1913, at 7 (observing that police headquarters had been "transferred . . . into a metropolitan Ghetto . . . with Police Justice Wolcott as chief rabbi.").

21 Photograph of Rebecca Schoenberg in an email from Sidney Gottlieb to Stefan Krieger (May 14, 2021) (on file with the author).

22 Photograph of the home of Rebecca and Jacob Schoenberg, in William H. Coon, *Whom the Murder Cap Fits*, 79 True 58, 61 (Dec. 1943). Pictured is my great-grandparents' home at 138 Liberty Street, Batavia, New York, where the murder took place.

either for sale as used merchandise or as cleaned and sorted raw material to be marketed to large reprocessors in commercially viable lots. Junk dealing was a business that took almost no start-up capital and yet allowed for a certain level of independence."[23] Junk-dealing was a way for the new immigrants to integrate into the community at large.

This integration is reflected in a big event that occurred in the Schoenberg family two years before the murder: the wedding of Jacob and Rebecca's first-born daughter Fanny to my grandfather, Harry Krieger.[24] Apparently, from a review of the local newspaper at the time, this was not only a momentous occasion for my family but also for the wider Jewish and non-Jewish community. As Batavia's The Daily News reported, over 500 Jews and Gentiles attended the event in Brown's Hall. The non-Jewish attendees included a county supervisor, the town clerk, a prominent lawyer in the city, James L. Kelly, the police justice, and the police matron.[25]

The aspiring local newspaper journalist viewed the celebration as an anthropologist observing a tribal ritual, describing the celebration in grandiloquent language:

> Reaching far back into the days of Ruth, to the time when the fair Moabitish damsel gleaned in the fields of Boaz, were the Jewish songs, signs and ceremonies witnessed by more than 500 Jews and Gentiles in Brown's hall last evening. It was the famed wedding of Harry Krieger, son of Mr. and Mrs. Wolf Krieger, and Miss Fanny Schoenberg, daughter of Mr. and Mrs. Jacob Schoenberg, and Solomon Sadoufski, chief rabbi of the orthodox Hebrews of Western New York, saw that the ancient rites prevailed.[26]

But as the journalist goes on to say, the festivities were not limited by the strictures of the ancient rituals:

> The merrymaking proper started about 5 p.m. with dancing in Brown's hall, when a Rochester orchestra struck up the joyous strains of the popular rag, "In My Harem." There were gowns on Yiddish maidens which were a far cry from the pictured modes of the days of Ruth, Naomi, Esther and the other ladies of Talmudic times. Some of these most modern maidens, too, danced the Tango-Tangle, the Ivy Cling, the

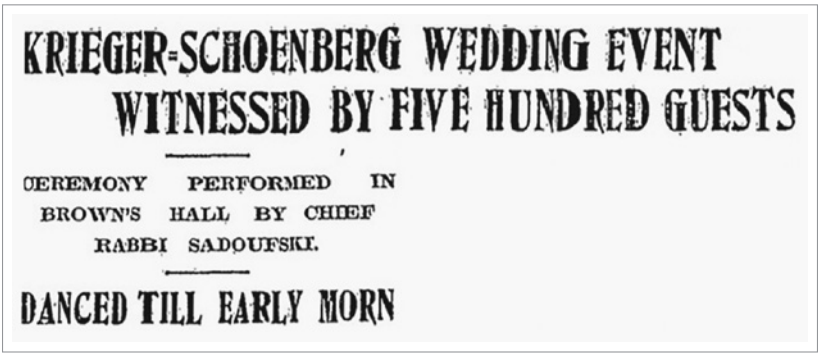
23 Lee Shai Weissbach, Jewish Life in Small-Town America: A History 109 (2005).

24 Wolf Krieger, the father of Harry, was the brother of Fanny's mother, Rebecca Schoenberg. This, then, was a wedding of first cousins.

25 *Krieger-Schoenberg Wedding Event Witnessed by Five Hundred Guests*, The Daily News (Batavia, N.Y.), July 7, 1913, at 8.

26 *Id.*

"Come to Me, Kid," and the like, which are even said to antedate Old Testament days.[27]



KRIEGER-SCHOENBERG WEDDING EVENT
WITNESSED BY FIVE HUNDRED GUESTS

CEREMONY PERFORMED IN BROWN'S HALL BY CHIEF RABBI SADOUFSKI.

DANCED TILL EARLY MORN

Figure 5[28]

In this context, it is clear that Jacob Schoenberg was what historian Anton Hieke terms an "Integrated Outsider" in Batavia.[29] On the one hand, the district attorney's reference to Jacob as "one of the best and most favorably known men of th[e Hebrew] nationality residing in Batavia" and the reporter's description of the ancient Hebrew rituals at the Schoenberg wedding reflect his outsider status. On the other hand, the attendance at the wedding of some of the prominent Batavia non-Jewish citizens and the description of the performance of the American top hits of 1913 at the wedding show a Jewish community that is assimilating.

So, it appears that at least in the eyes of some of the established community in Batavia—and perhaps Jacob himself—Jacob was inside the community but still the other.

2. The alleged perpetrator: Jan Trybus

The purported killer of Jacob Schoenberg, Jan Trybus, was also an immigrant. He emigrated to America in 1902 at the age of twenty, about a decade after Jacob.[30] He came from a village, Libiaz, near Chrzanow in Galicia, which at the time was in the Austro-Hungarian Empire and is presently in Poland.[31] Chrzanow had a substantial Jewish population in

27 *Id.*

28 *Id.*

29 Anton Hieke, Jewish Identity in the Reconstruction South: Ambivalence and Adaptation 164 (2006).

30 Year: *1902*; Arrival: *New York, New York, USA*; Microfilm Serial: *T715, 1897–1957*; Line: *16*; Page Number: *112 (entry for Johann Trybus).*

31 *Id.*; *Where was Galicia?*, Drohobycz Administrative District, https://kehilalinks.jewishgen.org/drohobycz/history-of-galicia/where-was-galicia.html (last visited Mar. 14, 2023).

1900: 5504 persons, 54% of the population.[32] Jan was a Roman Catholic.[33] On the ship's manifest, his occupation is identified as a day laborer.[34] I have searched the relevant archives for naturalization papers for Jan, but apparently he never applied to become a citizen.[35]

Figure 6[36]

In 1898, when Jan was sixteen, anti-Jewish riots broke out throughout Galicia, including Chrzanow.[37] As Daniel Unowsky, a historian of the riots, argues, the riots were, in large part, economically motivated with peasants attacking Jewish property, especially taverns. No Jews were killed but the property damage was significant.[38] Unowsky relates one story: In one village, after breaking into a Jew's farmhouse, a peasant beat the owner bloody with a stick and yelled, "Beat this dragon, because he has money."[39]

In 1915, Jan was thirty-three years old and single. His folks were still in Galicia in the midst of World War I.[40] He lived in Batavia, hanging out at the home of another Polish family, the Dzierzawskis, a/k/a Miller, with his friend Mike Miller.[41] A little more than a year prior to the murder, with the headline, "Officer Found a Pole Drunk and He was Locked Up and Fined," the local newspaper reported that police officers arrested Miller on charges of public intoxication.[42] Among his friends, Jan was known as "John Galicia."[43]

Between his arrival to America in 1902 and the murder in 1915, Jan had acquired a fairly substantial rap sheet. In 1904, he was convicted in

32 *Chryzanow*, Encyclopedia.com, https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/chryzanow (last visited Mar. 12, 2023).

33 Record on Appeal, *supra* note 2, at 20.

34 *Manifest of Pretoria,* Hamburg State Archives, entry for Johann Trybus (Nov. 1902), https://www.ancestry.com/discoveryui-content/view/940451:1068 (last visited Feb. 26, 2023). On this manifest, Jan is identified as Johann Trybus, and his occupation is listed as a "tagelöhner" (a day laborer) and "landmann" (person who works on the land).

35 *See NY Records of Aliens and Naturalization of Aliens 1849–1929*, Genesee County, New York, https://www.co.genesee.ny.us/departments/history/naturalization_records_1849-1929_(indexed).php (last visited Mar. 27, 2023).

36 *Jan Trybus, Batavia, Paid Extreme Penalty, Dying Unflinchingly*, The Daily News (Batavia, N.Y.), Sept. 1, 1916, at 1.

37 Daniel Unowsky, The Plunder: The 1898 Anti-Jewish Riots in Habsburg Galicia 104, 215 (2018).

38 *Id*. at 94–95.

39 *Id*. at 77.

40 Application of Fredd Dunham on behalf of Jan Trybus for Commutation of Sentence to Life Imprisonment (Aug. 9, 1916) (on file with author).

41 Coon, *supra* note 22, at 95–96.

42 *Shots Attracted Police,* The Daily News (Batavia, N.Y.), Aug. 31, 1914, at 5.

43 Record on Appeal, *supra* note 2, at 568.

Figure 7[44]

Buffalo for vagrancy and sentenced to five months in Erie County Penitentiary. In 1905, he was convicted in Blaisdell, New York for petit larceny for stealing box car wheels and sentenced to six months imprisonment in Erie County Penitentiary. In 1905, he was convicted for burglary in Batavia and sentenced to six months imprisonment. In 1909, he was convicted in Buffalo for carrying a gun and fined $50.00 or fifty days in jail. Finally, in 1911, he was convicted in Batavia for burglary in the third degree (second offense), sentenced to serve six years and one month in state prison. He was released in May 1915. All of these convictions were for offenses involving theft or were against the public order; none were for offenses against persons.[45]

Finally, Jan had a reputation for being, as the trial transcript puts it, "intemperate."[46] He was known to have gone with his friend Mike Miller to the notorious "Bowl of Blood" in Batavia, a saloon with an unsavory reputation as a venue for gambling and violent clashes between customers.[47] The Bowl of Blood was a few blocks from Jacob Schoenberg's house.[48]

In sum, in contrast to Jacob Schoenberg, who was an integrated outsider in Batavia, Jan was a foreign outsider in the Batavia community. While he mingled in the world of the Bowl of Blood, he does not appear to have integrated elsewhere into Batavia's established community.

44 Coon, *supra* note 22, at 96.

45 Record on Appeal, *supra* note 2, at 20–21, 329–32.

46 *Id.* at 20.

47 *See id.* at 700–04; *see also Two Under Arrest*, The Daily News (Batavia, N.Y.), Mar. 22, 1917, at 1.

48 Record on Appeal, *supra* note 2, at 196½.

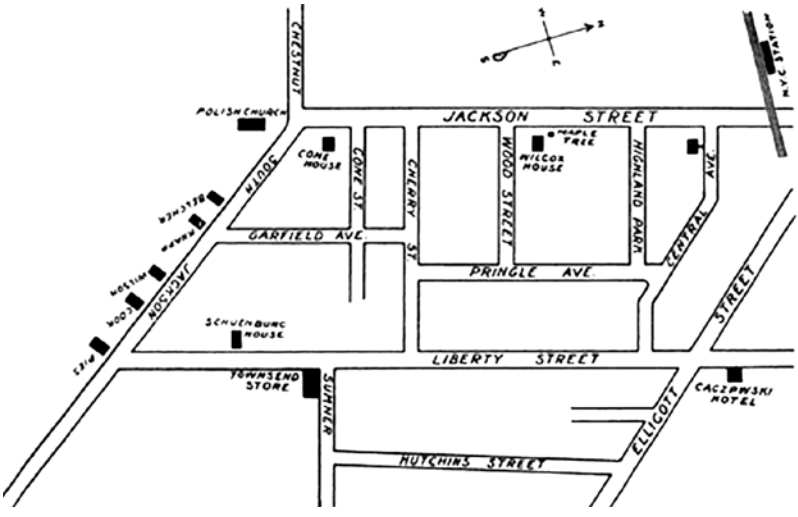


Figure 8[49]

In fact, after the trial, he wrote his attorney: "I sold my life for whiskey, beer and promises . . . I am not an American. I'm an Austrian—that's why I'm punished to death."[50]

II. The stories of the murder told in court

Having described the scene and the different principal characters, this article will now present the different stories told at the trial of Jan Trybus for the murder of Jacob Schoenberg from the perspective of the prosecution, the defense, and the Court of Appeals.

A. The district attorney's story of the murder

On December 1, 1915, Trybus's capital murder trial began in Genesee County Supreme Court.[51] District Attorney William H. Coon presented the prosecution's case.[52]

According to the evidence presented by District Attorney Coon, late at night on October 16, 1915, Jan Trybus and Mike Miller were out drinking whiskey at the Bowl of Blood. They got very drunk. Mike told Trybus to hit another patron, "Mike Jew." As Trybus said, "He is Polish but everybody called him Jew." Around midnight, Trybus and Miller left

49 *Id.*

50 *Jan Trybus Traded Life for Liquor*, The Daily News (Batavia, N.Y.), Dec. 22, 1915, at 1.

51 *Trial of Jan Trybus, Charged with Murder, Begun in Court Today*, The Daily News (Batavia, N.Y.), Dec. 1, 1915, at 1.

52 Record on Appeal, *supra* note 2, at 30.

the Bowl of Blood and staggered down the street and fell on the sidewalk. Mike lost his cap. And sprawled out on the sidewalk, passersby told them to go home.[53]

Then, Mike pointed to the Schoenberg house and said, "[W]e will go into the Jew's house and get the money. Mike says the Jews have always got money."[54]

At this time—about 4:00 a.m.—Jacob Schoenberg was asleep in the first-floor bedroom of his home with his sixteen-year-old son Max. The bedroom was off the living room. His wife, Rebecca, and daughters were asleep upstairs.[55]

Figure 9[56]

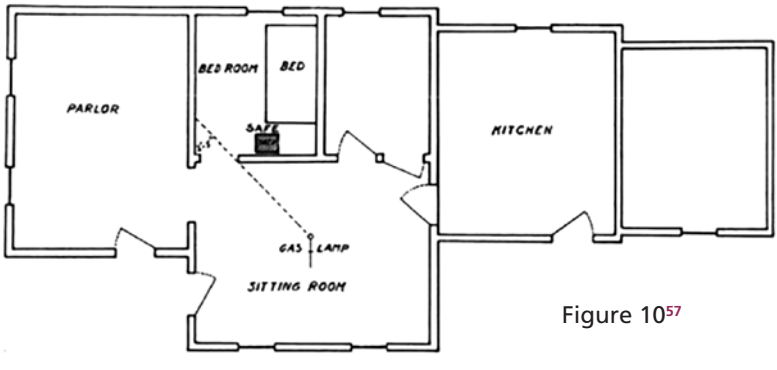


Figure 10[57]

53 *Id.* at 371, 383, 701.

54 *Id.* at 384.

55 *Id.* at 54, 61, 130, 142–43.

56 *Id.* Ex. 6.

57 *Id.* at 880½.

While there was no light in the bedroom, a chandelier with a dim gas light shown in the living room.[58]

The prosecution argued that stone-drunk Trybus—with the help of Miller—entered the house through the bedroom window. Mike handed him an iron bar weighing eighteen pounds.[59]

Jacob turned around in bed, and Trybus thought he saw him, so Trybus bludgeoned him over the head.[61]

Figure 11[60]

Then, Max—sleeping in the bed against the wall—woke up and pretended not to see the intruder. When Trybus went into the living room, Max yelled out, "Help! Murder! Mother!" Trybus came back into the room, holding a revolver, and said, "Shut up. Give me money or I will shoot you." Max told him he could ask his mother or father, but he did not know where the money was. Max asked him what right he had to come into my house, and Trybus said, "Shut up."[62]

At this point, according to the prosecution's evidence, Trybus heard a sound of someone walking upstairs to the bathroom. So Trybus jumped out of the window. Max then went into the living room and yelled, "Mother, come down; something has happened to father." Rebecca came downstairs and dragged Jacob's body into the living room. One of the daughters called the doctor who came over to the house. They also called the police.[63] When the police arrived, an officer found the iron bar against the frame of the bed. He also found a spot of blood three inches long covering the width of the bar.[64]

The doctor then arrived and found Jacob unconscious with the bones on the right side of the head crushed in. Two hours later, the ambulance arrived, and at 10:40 in the morning Jacob died in the hospital.[65]

58 *Id.* at 65–66.

59 *Id.* at 160.

60 *Id.* Ex. 4.

61 *Id.* at 490.

62 *Id.* at 71–72.

63 *Id.* at 72.

64 *Id.* at 148–49.

65 *Id.* at 166–68, 175.

In Coon's words in his brief in the Court of Appeals, the crime "shocked the people of the community, and the Batavia police officers being handicapped because of lack of sufficient officers to investigate this important case, engaged the services of Thomas O'Grady, a private detective in Buffalo, to assist him in the apprehension of the murderer of Jacob Schoenberg."[66]

O'Grady formed a group of former police officers and informers to investigate the case. The Batavia police had found Mike Miller's cap on the street. One of O'Grady's men went to the Bowl of Blood—the natural hang-out for thugs—where the bartender identified the cap as belonging to a factory worker in Buffalo. The factory worker said he left the cap at Mike Miller's so it could have been worn by Mike or his partner, John Galicia (a/k/a, Jan Trybus). So O'Grady's men picked up Trybus and brought him to O'Grady's office in Buffalo on Friday evening, October 29.[67]

Detained in Grady's office, Trybus initially denied he murdered Jacob but finally, on Saturday, October 30, he confessed to the murder and described the events in detail.[68] That afternoon, Grady brought Trybus into the Buffalo police station for a show-up with Max Schoenberg. Max identified him as the culprit by his features and voice.[69] Over the course of three days, he confessed four additional times.[70] Then, O'Grady, the Batavia Police Chief, and Coon himself, took Trybus on a perp walk down Liberty Street to the Schoenberg house so he could describe his movements that night. The visit was capped off with confessions to two of Jacob's daughters.[71]

On Monday, November 2, 2015, four days after O'Grady's men had picked up and detained Trybus, he was arraigned.[72]

B. The defense's story of the murder

At the trial, Fredd Dunham and his co-counsel, appointed attorneys, represented Jan Trybus.[73]

66 Brief for Respondent at 67; *Trybus*, 113 N.E. 538.

67 Coon, *supra* note 22, at 96; Record on Appeal, *supra* note 2, at 334.

68 *Id.* at 369–72.

69 Brief for Respondent, *supra* note 66, at 25.

70 *Id.* at 74–79; Brief for Appellant at 21–25, 54; Trybus, 113 N.E. 538.

71 Brief for Appellant, *supra* note 70, at 25–26; *see also No Charge Yet Against Miller*, The Daily News (Batavia, N.Y.), Nov. 4, 1915, at 6. (Trybus said, "I'm sorry I killed your father. If I was not drunk and had not met Mike Miller I would not have done it" to Jacob's daughters.)

72 Record on Appeal, *supra* note 2, at 891.

73 *Id.* at 12.

Dunham presented a counter-narrative to Coon's story on behalf of Trybus. First, he challenged Max Schoenberg's identification of Trybus. Dunham pointed out that Max, a mere sixteen-year-old, admitted that the only light in the bedroom where Trybus encountered him was a dim light in the ceiling of the living room, seven feet from the doorway to the bedroom. Max could not visually identify the assailant.[74] Moreover, Dunham challenged Max's voice identification of Trybus at O'Grady's show-up at the Buffalo police station. On the witness stand, Batavia Police Chief Anthony Horsch testified that Max originally said the assailant had "a foreign voice, he didn't know whether it was an Italian voice or [a] Polock's."[75] In fact, Max told a newspaper reporter two days after the murder that he was so excited he could not identify the man in the room, that the man had a mask, and that he could not identify the man's voice.[76]

Second, Dunham called into question the validity of Trybus's confessions. He elicited testimony that after O'Grady's man abducted Trybus and brought him to O'Grady's office, O'Grady grabbed Trybus around the neck and threw him against a radiator.[77] With four other men in the room, O'Grady accused Jan of the murder of Jacob Schoenberg and kept badgering him even though he adamantly denied the charges.[78] Trybus testified that when he went to the bathroom, one of O'Grady's crew named Mennecci—an informer—joined him and told him that O'Grady knew that Trybus had recently shot a railroad detective. With his prior convictions, he would be sentenced to life imprisonment as a habitual offender. But, Mennecci suggested, if Trybus admitted to the murder of Jacob Schoenberg, O'Grady could persuade the judge to sentence him to twenty years in prison.[79]

Then, after the initial roughing up and Mennecci's maneuvering, O'Grady plied Trybus with whiskey, even taking him to the Napoleon Hotel in Buffalo for drinks. Without an indictment or even an arrest, O'Grady, with Coon's support, kept Trybus in his custody from Friday afternoon until his arraignment on Monday. During that time, with the

74 Record on Appeal, *supra* note 2, at 106–08, 960–61; *see also Arrest of Man May Give Clue*, The Daily News (Batavia, N.Y.), Oct. 23, 1915, at 1 (Max, upon visiting in Buffalo the penitentiary, county jail, and police headquarters, was unable to positively identify a suspect. Max did indicate that two men possibly looked and talked like the murderer.).

75 Record on Appeal, *supra* note 2, at 749.

76 *Id.* at 878–79 (Newspaper reporter John Maney testified for the defense that he interviewed Max, who stated he was excited and could not identify the man.). *But see id.* at 876–77 (On recall, Max stated that the reporter never interviewed him, nor did Max provide him with any information.).

77 *Id.* at 206 (testimony of Thomas O'Grady).

78 O'Grady testified that he had four other men in the room during questioning, even though he did not have any bodily fear of Trybus. *Id.* at 244.

79 Trybus testified that "the Italian detective [Mennecci]" told him, "if you tell us that you killed the jew O'Grady will get you out in 20 years." *Id.* at 338–39.

initial roughing up, Mennecci's promise, and plenty of whiskey, Trybus confessed.[80]

Quite simply, as Dunham argued in his summation, Trybus's confessions were coerced:

> I wouldn't wish to slander Thomas O'Grady, but I want to tell you this, between Judas Iscariot and Thomas O'Grady, I would rather have Judas Iscariot for a roommate, because Judas repented but Tom O'Grady sat here in ghoulish glee all through this case thinking of the time when he was going to be down there at Auburn prison and when he was going to be in the room there and watch this boy electrocuted.[81]

Regarding the substance of the confessions, Dunham's narrative focused on the testimony of all the witnesses that Trybus and Mike Miller were smashed after their drinks at the Bowl of Blood. They were so drunk that passersby saw them sprawled out in the middle of the sidewalk not far from the saloon.[82] As Dunham argued in his closing, "It strains credulity that Jan could have easily even entered the Schoenberg home: The blinds have got to be taken off; second, the window has got to be taken out, with a bedstead there seven inches away from it; third, the curtains hanging down between the window and the bedstead."[83]

Finally, Dunham suggested an alternative narrative for the events of October 17, 1915. A police officer saw two suspicious men getting off the late train from Buffalo the night of the murder. Later, at 12:15 a.m., a witness saw two men sitting on a bench in the Schoenberg neighborhood. The witness testified that the two were not drunk, and Trybus was not one of them. That same night, there was evidence of five other attempted burglaries in the area, including severed telephone lines. The police never found the two suspicious men or solved the burglaries.[84]

80 In Dunham's closing, he highlighted that Trybus was given liquor, taken for meals in a hotel, and held by O'Grady for an extended period of time before being charged. *Id.* at 843–44; *see also id.* at 257–64 (O'Grady testified to having meals and drinks with Trybus at the Napoleon Hotel and holding him without charge for several days.).

81 *Id.* at 940.

82 *Id.* at 946–47.

83 *Id.* at 946; *see supra* Figure 9 (Jacob's bedroom, showing proximity of the window to the bed); Figure 11 (exterior view of the window through which Trybus allegedly entered).

84 Officer Henry Stickney explained that DA Coon called his attention to two "suspicious" individuals who alighted from a train arriving from Buffalo the evening prior to the murder. Record on Appeal, *supra* note 2, at 150–51. A defense witness, arriving home early in the morning of October 17, 1915, saw two men, unknown to him, sitting outside. *Id.* at 861–62. At the trial, Dunham explored the theory of the two unknown men and a spate of burglaries the night of the murder as an alternative explanation as to who might have committed the crime. *Id.* at 953–54.

C. The aftermath of the trial

After a six-day trial during which Coon and Dunham told their respective stories, the jury retired for deliberations at 11:00 a.m. on December 9, 1915. After lunch, a little more than three hours later, at 2:15 p.m., they rendered a guilty verdict. The judge immediately sentenced Trybus to death.[85] That same day, the district attorney announced that Mike Miller would plead guilty to second-degree murder and was sentenced to twenty years to life.[86]

Dunham and his co-counsel appealed the judgment to the New York Court of Appeals. Seven months after the verdict, the court rendered its decision.[87]

While acknowledging that Max Schoenberg's identification was based largely on Trybus's manner of speech, the court found that his identification was not incredible as a matter of law.[88] As to the confessions, the court censured O'Grady's conduct in eliciting the confessions:

> The conduct of a detective in needlessly laying hands on a helpless man detained by him without legal warrant deserves the severest censure. The practice of detectives to take in custody and hold in durance persons merely suspected of crime, in order to obtain statements from them before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction.[89]

But the court held that the jury could reasonably have found that the confessions were made voluntarily.[90] The court, therefore, affirmed the guilty verdict and death sentence.[91]

Dunham then filed a petition for commutation of the sentence to the New York Governor.[92] He included in the petition statements from eight of the jurors requesting that the death sentence be commuted to life imprisonment.[93] One of the jurors argued that Trybus was so intoxicated

85 *Verdict of Guilty Reported by Jurors Against Jan Trybus*, The Daily News (Batavia, N.Y.), Dec. 9, 1915, at 1, 8; Record on Appeal, *supra* note 2, at 1032.

86 Miller, whose trial was set to begin the following week, pled guilty on the day of Trybus's verdict and sentencing. *Verdict of Guilty Reported by Jurors Against Jan Trybus*, *supra* note 85, at 1.

87 *Trybus*, 113 N.E. 538.

88 *Id*. at 539.

89 *Id*. at 539–40.

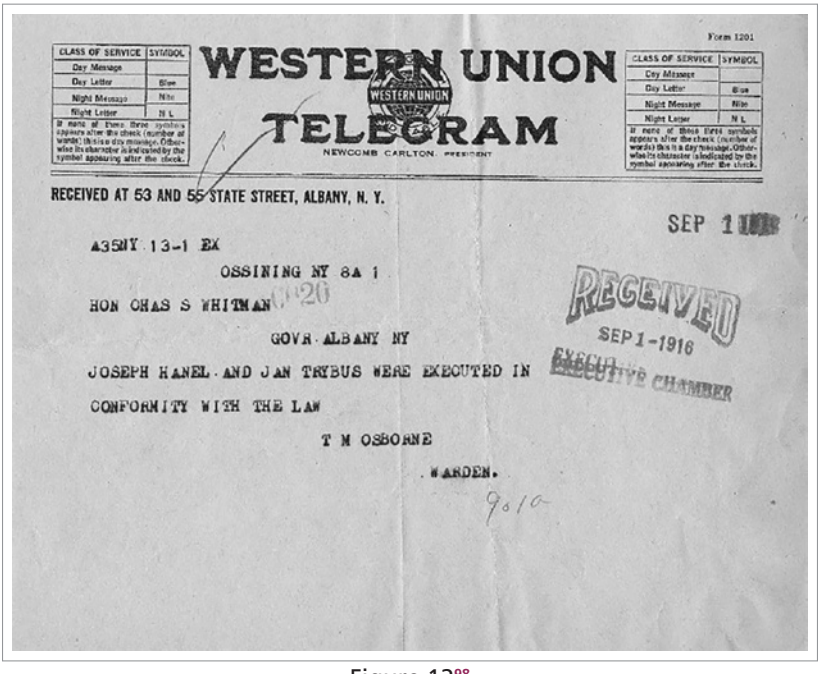
90 *Id*. at 540.

91 *Id*. at 541.

92 *Intoxicated at the Time, Trybus Plea*, The Daily News (Batavia, N.Y.), Aug. 11, 1916, at 1; Dunham Application, *supra* note 40.

93 Letter from George Hunt et al., to Hon. Charles S. Whitman, Governor of the State of N.Y. (undated) (on file with author).

when he murdered Schoenberg, he should have only been found guilty of second-degree murder.[94] Dunham also included a letter from the Counsel-General of Austria-Hungary, on behalf of his "unfortunate countryman," arguing that Trybus had nothing to do with the murder or, if he did, that he was so intoxicated, he should have only been convicted of second-degree murder.[95] The Governor denied this petition.[96] And on September 1, 1916, Jan Trybus was executed.[97]


WESTERN UNION
TELEGRAM
NEWCOMB CARLTON, PRESIDENT
RECEIVED AT 53 AND 55 STATE STREET, ALBANY, N. Y.
SEP 1
A35NY 13-1 EX
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HON CHAS S WHITMAN
GOVR ALBANY NY
JOSEPH HANEL AND JAN TRYBUS WERE EXECUTED IN
CONFORMITY WITH THE LAW
T M OSBORNE
WARDEN.
RECEIVED
SEP 1-1916
EXECUTIVE CHAMBER

Figure 12[98]

III. The stories told in different communities

The criminal trial against Jan Trybus took place in a small upstate city in which separate communities told their own stories about what happened in the Schoenberg home late at night on October 16, 1915, and what was occurring in the Genesee County Supreme Court. This section

94 Dunham Application, *supra* note 40.

95 Letter from Alexander von Nuber, Consul-General of Austria-Hungary, to Hon. Charles S. Whitman, Governor of the State of N.Y. (Aug. 10, 1916) (on file with author).

96 Letter from T.M. Osborne, Agent and Warden Sing Sing Prison, to Hon. Charles S. Whitman, Governor of the State of N.Y. (Sept. 1, 1916) (on file with author).

97 Telegram from T.M. Osborne, Agent and Warden Sing Sing Prison, to Hon. Charles S. Whitman, Governor of the State of N.Y. (Sept. 1, 1916) (on file with author); *see infra* Figure 12; *see also Jan Trybus, Batavia, Paid Extreme Penalty, Dying Unflinchingly,* The Daily News (Batavia, N.Y.), Sept. 1, 1916, at 1.

98 Osborne Telegram, *supra* note 97.

of the article will address how the case played out in three different communities in Batavia: the Jewish community, the Polish community, and the established community. As will be seen in section IV of this article, this cultural landscape affected the stories District Attorney Coon and Fredd Dunham told at trial.

A. The Jewish community's story

In the early twentieth century, Jewish newspapers were quite popular and loved to cover sensationalist criminal cases.[99] A search in the Jewish Historical Press archives for articles on the case from that period, both in English and Yiddish, however, turned up no articles on the case.[100] This lack of attention to the case could be because Batavia was an obscure little town in Upstate New York far from New York City. But around the same time, the Jewish press was quite absorbed by a blockbuster murder at a farm in New Brunswick, New Jersey, as far off the beaten path from urban Jewish communities as Batavia.[101] So the absence of any reportage in Jewish newspapers about the case is quite surprising.

Without any reports of the case in the Jewish press, the only archival source for reaction to the murder and the case is the coverage in the general local Batavia newspapers of the Jewish community's response to the murder. In those press reports, the major event that stands out is the community's reaction to District Attorney Coon's and O'Grady's parading of Trybus through the Schoenberg neighborhood when Trybus described Miller's and his purported movements the early morning of October 17, 1915. This was a perp walk worthy of today's media-crazed prosecutors. One article, headlined "Revenge Demanded by Jews," read in part,

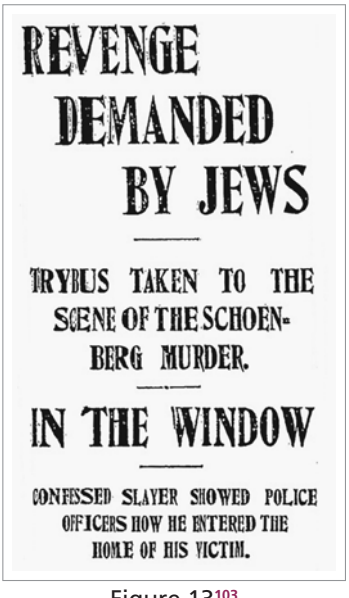
> Ringing with cries which suggested the sentiment "an eye for an eye and a tooth for a tooth," the Jewish quarter of Batavia presented a fearful spectacle yesterday afternoon when the family, friends and countrymen of the murdered Jacob Schoenberg saw for the first time Jan Trybus, the self-confessed slayer of that reputable Jew.
>
> "Murderer!" "Kill him." "Don't let him live!" and sundry other expletives, mingled with Yiddish maledictions, imprecations and

99 *See generally* Eddy Portnoy, Bad Rabbi and Other Strange but True Stories from the Yiddish Press (2017).

100 I personally searched the website for English-language articles. And my Yiddish-language researcher, Roberta Newman, found no articles in the Yiddish press on the murder or the case. Dr. Newman researched the biggest New York Yiddish newspapers—The Forward, The Jewish Morning Journal, Der Tog, and Die Vahrheit—for the period October to December 1915 and June to September 1916, and even entire issues near the important dates in the case and turned up no articles. Email correspondence from Roberta Newman to Stefan Krieger (May 7, 2021) (on file with author).

101 *Id.* Even though the Leo Franck trial and lynching had occurred in 1913, the Yiddish press was still absorbed with the case in 1915 and 1916. *Id.*

> exhortations for revenge, echoed the length and breadth of South Liberty Street. . . .
>
> In the street Jews—men, women, and children—mingled with Italians. A Jew set up the cry, "Murderer!" and there was a rush for Trybus which frightened the officials and made them think for a moment that there was an organized plan to take the prisoner from them.
>
> Mrs. Schoenberg's grief and rage were startling. She set the example for the Jewish women to tear out handfuls of hair from their heads and to utter piercing screams.[102]


REVENGE DEMANDED BY JEWS

TRYBUS TAKEN TO THE SCENE OF THE SCHOENBERG MURDER.

IN THE WINDOW

CONFESSED SLAYER SHOWED POLICE OFFICERS HOW HE ENTERED THE HOME OF HIS VICTIM.

Figure 13[103]

While this article highlights the deep emotions expressed by Jacob Schoenberg's family and the crowd, it also suggests the empowerment felt by the Batavia Jewish community. They did not see themselves as cowering victims. The community felt it had a right to protest—even a right to revenge—under American law. As described earlier in reference to Jacob Schoenberg, this was a community, while still outsiders, that viewed itself as integrated into the established community. In fact, according to the reporter, Italian neighbors of the Jews participated in the protest. And it appears, at least in the reportage by Batavia's *The Daily News*, that there were no shouts by the crowd about anti-semitism or Trybus's targeting of Jewish homes.[104] This lack of focus on anti-Jewish hatred was especially striking given the purported motive for the crime: Trybus's confession that as Miller and he walked toward the Schoenberg home, Miller exclaimed, "All Jews have money." And even Trybus's connection with Galicia—the site of fairly-recent anti-Jewish riots targeting wealthy Jews—did not seem to influence the message of the residents of Batavia's "Jewish Quarter." All in all, apparently these Jews felt part of the community at large in Batavia. Perhaps the absence of reportage on the case in the Jewish press reflects the sentiment of the local Jewish community that the murder, while horrific, was not primarily an antisemitic incident.

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102 *Revenge Demanded by Jews*, The Daily News (Batavia, N.Y.), Nov. 3, 1915, at 1, 5.

103 *Id.* at 1.

104 There is no record, however, of the Yiddish "imprecations" that day.

B. The Polish community's story

Unlike the Jewish press, Polish newspapers in Buffalo—a little more than forty miles west of Batavia—covered the case widely.[105] A number of stories—especially at the beginning of the case and early in the trial—objectively reported on the status of the investigation of the case and the testimony at trial. Some pieces actually were very unsympathetic to Trybus. For example, one item read, "According to reports from Batavia, Jan Trybus, who was proven guilty of the murder in the first degree, will die by the electric chair on August 28th. You've made your bed, now lie in it. . . ."[106]

But the day after the execution, one columnist was quite critical about the American system of justice and drew sobering lessons from the case for the entire Polish community:

> Jan Trybus, a Pole from Galicia, sentenced to death for murdering a Jewish dealer in Batavia, NY, was executed by the electric chair yesterday in Sing-Sing.
>
> Trybus committed the crime when completely intoxicated and he did not confess to the murder.
>
> As he was sitting down on this horrible chair, used for administering justice, he said to the gathered, "Pray for me and I will pray for you."
>
> A few years ago, Gośliński of Buffalo who killed a police officer while intoxicated was executed in the same way.
>
> Also, several years ago, a Buffalo boy named Maruszewski was executed by the electric chair for the same murder committed under influence.
>
> At present, two or three young Poles are in prison, awaiting justice for crimes committed while . . . intoxicated.
>
> We are therefore faced with a terrible fact.
>
> An intoxicated, that is a completely unconscious man kills another man. Sobering up, he denies the deed. During the trial, however, the prosecutor charges the poor man with a murder in the first degree. The defense, in most cases a public attorney, quickly handles the case. The jury delivers the verdict: "guilty." The judge sentences the accused to death. And since usually there is no one to stand up for a Pole, when the day of the execution comes, he sits down on the electric chair and a few minutes later the prison doctor announces that . . . justice has been done.

105 A researcher hired for this project, Agnieszka Legutko, Lecturer in Yiddish & Director of the Yiddish Language Program at Columbia University, translated these articles.

106 Dziennik Dla Wszystkich (Buffalo, N.Y.), July 30, 1916, at 4.

* * * * *

> We, Poles, who according to the statistics commit 90 percent of crimes when intoxicated, should draw the attention of our future representative to this matter during this year's elections.
>
> We have to fight against drunkenness as hard as possible, but before the results of this fight are visible, we should employ our best efforts to make sure that such Maruszewskis, Goślinskis and Trybuses are not sentenced to death for committing a murder when drunk unconscious.[107]

Thus, while the Batavia Jewish community publicly sought revenge—either within or without the justice system—for the murder, at least some sectors of the local Polish community, as reflected in this opinion column, had serious concerns about their treatment in that system. Again, while the Jewish community saw itself as integrated outsiders, this columnist seemed quite ambivalent about the status of Poles in the established community.

C. The established Batavia community

A final aspect of the cultural context of the case is the established Batavia community: folks who were well-settled in the community, Americans for more than a few decades.

From both the news coverage of the case and the trial record, it is clear that the established community in Batavia viewed the case primarily through the prism of ethnicity. For example, not only the ethnicities of Schoenberg and Trybus were mentioned in articles about the case, but also the ethnicity of Mike Miller, an Italian suspect in the case, and other residents of South Liberty Street.[108] Apparently, this focus on ethnicity arose from the large influx of immigrants into the community.[109] In fact, at the trial, District Attorney Coon asked a lengthy series of questions to private investigator, Thomas O'Grady, laced with references to the ethnicity of his agents. For nearly three pages of the transcript, O'Grady

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107 Maruszewski—Goślinski—Trybus, Dziennik Dla Wszystkich (Buffalo, N.Y.), Sept. 2, 1916, at 2.

108 *See, e.g.*, *Schoenberg Murder Case Not Solved,* The Daily News (Batavia, N.Y.), Oct. 19, 1915, at 1 (referring to Jacob Schoenberg as the "South Liberty Street *Jew*") (emphasis added); *Officers Arrested Suspects,* The Daily News (Batavia, N.Y.), Oct. 28, 2015 at 7 (reporting on the arrest of "both *Poles*" Trybus and Miller) (emphasis added); *No Charge Yet Against Miller*, The Daily News (Batavia, N.Y.), Nov. 4, 1915, at 6 (reporting on "Mike Miller, the *Pole* who is being held at police headquarters") (emphasis added); *Jacob Schoenberg Brutally Killed*, The Daily News (Batavia, N.Y.), Oct. 18, 1915, at 1 (reporting that, after the neighbors heard the news of the murder "the Schoenberg yard was thronged with a wildly excited crowd of *Jews, Italians, and Poles*") (emphasis added); *Jacob Schoenberg Brutally Killed*, The Daily News (Batavia, N.Y.), Oct. 18, 1915, at 5 (reporting that when the police brought Frank Filita to Max Schoenberg, Max said "he thought the *Italian* looked and talked like the man who had leveled the revolver at him") (emphasis added).

109 *See supra* notes 3–4 and accompanying text.

identified each of the members of his posse as Irish, German, Italian, Polish.[110] The final crony O'Grady identified was "William Ross, an American or Yankee."[111]

While the local newspaper's coverage of the Schoenberg family could at times be sympathetic, it sometimes played into ethnic stereotypes. In one article, the reporter played the anthropologist, describing in some detail the rituals of shiva.[112] But the headline for the article noted that Jacob Schoenberg was a "well-to-do junk dealer," and the reporter described the reaction of one of Schoenberg's daughters to the murder: "'Revenge is sweet,' vehemently exclaimed one of [Max's] sisters, as her luminous dark eyes, typical of the ancient race, glowed like fiery coals. 'The police must catch that murderer.'"[113] And the coverage of the Jewish community's reaction to Trybus's perp walk is replete with classic Jewish stereotypes:

> Ringing with cries which suggested the sentiment "an eye for an eye and a tooth for a tooth," the Jewish quarter of Batavia presented a fearful spectacle yesterday afternoon, when the family, friends, and countrymen of the murdered Jacob Schoenberg saw for the first time Jan Trybus, the self-confessed slayer of that reputable Jew.[114]

The reporter continued, "The officials who took Trybus to the scene of his fearful crime had difficulty in preserving him from the wrath of that ancient race that first taught the doctrine of retributive justice and laid the foundation for our law of capital punishment."[115] This article—highlighting the character of descendants of an ancient, vengeful race but with a recognition of the Hebrew Bible's underpinnings of modern law—perhaps reflects the ambivalent attitude of the established community to the Jewish community in Batavia.

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110 Record on Appeal, *supra* note 2, at 198–200.

111 *Id.* at 200.

112 *Schoenberg Murder Case Not Solved*, The Daily News (Batavia, N.Y.), Oct. 19, 1915, at 1.

113 *Id.*

114 *Revenge Demanded by Jews*, The Daily News (Batavia, N.Y.), Nov. 3, 1915, at 1. Similar to generalizations drawn by many journalists today, this reporter's stereotypic description of the Jewish sentiment toward capital punishment ignores the divergent views of rabbinic authorities on the subject. Basil F. Herring, Jewish Ethics and Halakhah for Our Time: Sources and Commentary 208–32 (1984). Jewish legal tradition contains conflicting views that reflect a variety of policies for and against the death penalty—from imposition of the punishment for the wellbeing of society to opposition to the penalty in favor of rehabilitation of the offender. *Id*. at 229.

115 *Revenge Demanded by Jews*, The Daily News (Batavia, N.Y.), Nov. 3, 1915, at 1.

IV. The portrayal of immigrants at the trial

A close analysis of the storytelling of District Attorney Coon and defense attorney Fredd Dunham in their litigation of the case demonstrates how this cultural landscape infused the portrayal of the different parties at trial.

A. Coon's portrayal of immigrants

Throughout his litigation of the case, District Attorney Coon played on the ethnic stereotypes of the established Batavia community to differentiate the acceptable immigrants from the bad ones. As described previously, in his direct examination of the private investigator, Thomas O'Grady, Coon focused on the ethnic identity of each of O'Grady's cronies.[116] And then in his summation, Coon played on the trope of the drunken Pole in his characterization of the defendant:

> [Trybus] is a man 33 years old, thoroughly steeped in crime, by his own confession a fifth offender under the law of this State. He is a drunken brute according to the testimony in the case. He is a gun man. He is a man, according to his own confession, who has shot people, a man who has carried a gun, a car burglar by two confessions, and you know what character of man that is.[117]

And, fully aware of the legally improper tactics of O'Grady, Coon defensively justified those tactics in terms of protecting Batavians from the likes of this drunken brute:

> If this crime had gone unpunished we certainly ought to be removed from office, every one of us. Gentlemen, I do not stand here and approve of everything that has been done in this case. Neither do I disapprove of it. We are not dealing here with a Sunday School boy. . . . If you find this man guilty of murder in the first degree, [the court] is going to impose the judgment of death upon him. It is a horrible thing to contemplate, and I fully realize it as I stand here . . . and I believe that God means that it is right and proper that when one man deliberately, with premeditation, or while in the act of committing a felony, takes the life of one of our human beings, . . . I believe that the man should be sent to his God to receive the judgments of his Master. I believe it is proper for the protection of society that he be removed from this earth. Hard as it is for you and me to do our duty, let us be manly men, let us be strong men,

116 *See supra* note 110 and accompanying text.

117 Record on Appeal, *supra* note 2, at 964–65.

> let us not be weak. Let us stand up and do our duty to the People, to the State, and to our Master.[118]

This specter of the feared outsider—the drunken Pole who endangers the community—is precisely the sentiment that is critiqued by the columnist in the Polish press. To protect society, Coon urges the jurors, they must obey their duty to God and the State and sentence Trybus to death.

In contrast to this portrayal of Trybus, in bolstering the credibility of Max Schoenberg's sketchy eyewitness identification, Coon subtly contrasts the drunken Polish immigrant with the stereotype of the Jewish immigrant, semi-integrated into the community:

> This Max is one boy out of a thousand; probably you have seen that before this. He is a brighter boy than the average, a good deal. He is a 16-year old Jewish boy, born of a poor junk dealer. He is having the advantages which you and I would give him when he came from Russia to this country. We afford the advantages of a high school education to our adopted Americans, and he is in our high school, and he is taking Third Year German, Second and Third Year Latin and Geometry, and studying the higher subjects. I wondered what you gentlemen thought of that when you heard that testimony. He is away above the average young man in intelligence and observation, he is a boy who is going to make a mark for himself in this world some time.[119]

So unlike Trybus, Coon argues, Max was integrating into Batavia society—"an adopted American"—who, despite emigrating from Russia and being the son of a Jewish junk dealer, was excelling in his studies at Batavia High. The not-so-unsubtle message was that the jury could believe Max's identification of Trybus because he was becoming "one of us." This trope was consistent with the established community's views of Jews as "integrated outsiders."

B. Dunham's portrayal of immigrants

In his storytelling in the case, Dunham, like Coon, played on ethnic stereotypes in his own portrayal of the different immigrant communities. On the issue of divine justice for Trybus, for example, Dunham lapsed into the stereotype of the legalistic Hebrew Bible:

118 *Id.* at 964, 996.

119 *Id.* at 981–82.

> On the night following the 16th of October last, Jacob Schoenberg was killed. His widow and four daughters and son sat here in this courtroom throughout this case, missing him, oh yes, but even if the old Jewish law of an eye for an eye, a tooth for a tooth, and a life for a life, calls for the life of Jan Trybus, it won't give Jacob Schoenberg back to his family. No one feels sorrier for that family than I do, and if I could give him back I would.[120]

While certainly this argument is a response to Coon's calls for the jury to follow their duty to God and send Trybus to the electric chair, in an indirect way, it may be a subtle message to the jury to reject the calls by the Jewish community for revenge during Trybus's perp walk. Indeed, the local coverage of that event was laced with a reference to the Jewish quarter's "cries which suggested the sentiment 'an eye for an eye and a tooth for a tooth.'"[121]

Most of Dunham's story, however, focused on the abuse of power by District Attorney Coon and O'Grady against a helpless outsider. For example, referring to O'Grady's methods, in his summation, Dunham asks each juror:

> If [you] are ever accused of a crime, [would you] want some fellow to take [you] by the throat and slam [you] against the wall; [Would you say] I want him to keep me for five days, three-quarters drunk, coaxing, wheedling, threatening every other way, to get me to confess to something that I didn't do, to let the authorities out of a hole.[122]

But Dunham goes even further. Not only does he urge the jurors to view Jan Trybus as a person in the community abused by the legal system, just like themselves, but he asks them to consider the difficulties posed by his immigrant status:

> I do not believe you are going to convict poor Jan Trybus, that boy that stands here, homeless, friendless, with just your hand and mine between ushering him into the great eternity; I do not believe, Gentlemen, that because his father and mother are living in that far off land of Galicia, which has been ravaged by this awful war of Europe, and he is unable to get any word from them, you are going to treat him any less thoughtfully and conscientiously than you would if it was the life of one of your boys or your brothers that was at stake.[123]

120 *Id.* at 933.

121 *Id.*; *see supra* note 114 and accompanying text.

122 Record on Appeal, *supra* note 2, at 955.

123 *Id.* at 932.

Dunham drives home this point even more directly in his storytelling in the Court of Appeals: "[O'Grady's] methods are peculiarly vicious and dastardly when employed in a capital case, and against a defendant whose foreign birth, appearance, manner of speech, habits, and previous criminal record, are against him already."[124]

Finally, in his story of abuse of power against an immigrant, he unsparingly chastises District Attorney Coon:

> The District Attorney had no more right to contemptuously disregard the provisions of the Statute in the case of this man than he would in the case of any other accused person, entirely irrespective of previous good character, reputation or social standing, and the District Attorney of nine years experience was necessarily well aware of this, but carried away by his zeal and by his desire to succeed in obtaining a conviction and deliberately relying upon the defendant's helplessness, on account of his foreign birth, intemperate habits, previous convictions and the confessions which the District Attorney himself had so cunningly and laboriously obtained, deemed it a safe case for him to ride rough shod over the Statute, and strip from the defendant the last vestige of protection which the law afforded him.[125]

In this storytelling, then, Dunham—with his references to Trybus's foreign birth and parents in war-torn Galicia—explicitly addresses Trybus's immigrant status and asks the jury to respond with compassion. Echoing the critique in the Polish newspaper of the legal system, Dunham berates Coon's and O'Grady's deliberate attempts to use their power to take advantage of this helpless immigrant.[126] In short, Dunham portrays Trybus as one of their own and asks the jury to reject Coon's attempts to consider Trybus an outsider.

V. The lawyers' schemata about themselves and the justice system

In the field of Applied Legal Storytelling, scholars talk a lot about the schemata of the parties, witnesses, and decisionmakers in analyzing the different narratives of the characters regarding the events in the case and the decisionmakers in constructing their versions of "what really

124 Brief for Appellant, *supra* note 70, at 36.

125 *Id.* at 93–94.

126 But contrary to the critique of the justice system in the Polish newspaper, Dunham, an appointed lawyer, did not "quickly" handle Trybus's case—even submitting a plea to the Governor for commutation of the death sentence. *See supra* notes 85–87 and accompanying text.

happened."[127] Schemata are semi-conscious mental frameworks that witnesses use to filter and organize the facts they perceive about the case, and that triers-of-fact apply to make sense of the evidence that is presented.[128] These schemata underlie the stories told by witnesses at the trial and by the judges and jurors deciding the case. This literature, however, rarely addresses the stories that lawyers tell about themselves as attorneys or as members of the justice system.

The historical record developed in this article provides a unique opportunity to consider the schemata of the two opposing attorneys in the Trybus case—District Attorney William H. Coon and defense attorney Fredd Dunham—about themselves and the justice system and to take a deep dive into the impact of those schemata on their portrayal of immigrants in the litigation. Both attorneys left written records reflecting their schemata of the role of the legal system in society that infused their storytelling. Nearly three decades after the Trybus trial, Coon published an article on the case.[129] And Dunham left behind unpublished reminiscences for his family about his professional development, which shed light on the story he crafted for his client.[130]

127 *See, e.g.,* Ruth Anne Robbins, *Fiction 102: Create a Story for Story Immersion*, 18 Legal Comm. & Rhetoric 27, 38–39 (2021) (observing that "narrative transportation"—the process by which audiences and triers of fact enter the storyworld—is a schema lawyers can use in developing stories in their cases); Sherri Lee Keene, *Stories That Stream Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 Md. L. Rev. 747, 758 (2017) (describing how police officers' schemata operate in their evaluation of suspects); J. Christopher Rideout, *A Twice-Told Tale: Narrativity, Plausibility and Narrative Coherence in Judicial Storytelling*, 10 Legal Comm. & Rhetoric 67, 78–86 (2013) (discussing how the schemata of different Supreme Court justices in the majority and dissenting opinions in a case challenging a police officer's use of deadly force impacted their storytelling about a high-speed chase to apprehend a suspect); Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That are Harmful to Your Client's Case*, 34 Hastings Comm. & Ent. L.J. 187, 190–94 (2012) (describing how schema theory can be used to develop persuasive narratives to the trier-of-fact); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Legal Writing 127, 162 (2008) (noting how "narrative theory provides the [legal] writer with a useful large-scale organizational schema" for drafting an appellate brief); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 Sw. U. L. Rev. 101, 143–45 (2008) (examining the role of stereotypes in witness perception of events); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006) (describing how lawyers can use the trier-of-fact's schemata reflected in stock stories to persuade); Steven Cammiss, *He Goes Off and I Think He Took the Child: Narrative (Re)Production in the Courtroom*, 17 Kings L.J. 71, 78–79 (2006) (describing the role of schemata in the telling of stories at trials and the understanding of the stories by the audience).

128 *See generally* Stefan H. Krieger, Richard K. Neumann Jr. & Renee M. Hutchins, Essential Lawyering Skills 176–77 (6th ed. 2020) (noting that "[t]he findings of fact in a case can, therefore, hinge to a certain degree on the schemas of the different witnesses and those of the trier-of fact").

129 Coon, *supra* note 22.

130 Letter from Fredd Dunham to Mary et al., at 1 (unpublished) (Oct. 20, 1931) (on file with author); Fredd Dunham, *Reminiscences,* at 5–7 (unpublished manuscript) (May 15, 1926) (on file with author).

A. William H. Coon

District Attorney William H. Coon was born in 1875, went to high school in Batavia, and later went on to Rochester Business University. His father was a lawyer and, following in his father's footsteps, he became a member of the bar in 1899 by reading the law at a Batavia law firm.[131] Eight years later, Coon was elected as Genesee County District Attorney on the Republican ticket.[132] As district attorney, even before the murder trial, he handled the Batavia criminal cases against Trybus.[133] Coon served two terms as district attorney, but in 1916—right after the Trybus case—he was not renominated by the party.[134]

Figure 14[135]

In a biographical sketch for the 1925 History of Genesee Country, apparently written by Coon himself, he (immodestly) wrote,

> Through the intervening period of twenty-six years he has been actively engaged in law practice in Batavia, where his clientage has assumed extensive proportions and has connected him with considerable important litigation. His fidelity to the interests of his clients is proverbial; yet he never forgets that he owes a higher allegiance to the majesty of the law.[136]

Then, nearly three decades after the Trybus trial, he published his article in *True,* a periodical devoted to sensationalist stories, sports, and high adventure, touting his prowess in the case.[137] In that article, he portrayed himself as the hero of the story, playing a front-and-center role at every stage of the case. As he told it, he was awakened before dawn by a call from the assistant police chief about the attack on Jacob Schoenberg and immediately rushed to the Schoenberg home.[138] There, he coordinated the work of the police and one of the county coroners, and took charge of interviewing Rebecca and Max Schoenberg and nearby

131 IV History of the Genesee Country 736 (S. J. Clark Publ'g Co., 1925).

132 *Majorities in Genesee*, The Daily News (Batavia, N.Y.), Nov. 7, 1907, at 6.

133 Record on Appeal, *supra* note 2, at 2, 8, 13–14.

134 *Kelly Defeated Coon for The District Attorneyship*, The Daily News (Batavia, N.Y.), Sept. 20, 1916, at 1.

135 Photograph of Coon in Coon, *supra* note 22, at 58.

136 IV History of the Genesee Country, *supra* note 131, at 736.

137 *See* Coon, *supra* note 22.

138 *Id.* at 58.

neighbors.[139] He then played detective and reconnoitered the scene of the attack and the exterior of the house and started to hypothesize theories of how the perpetrators entered the house.[140] Then, when an officer found a gray cloth cap near the Schoenberg home, Coon recounts, the police chief and he visited all the haberdashers in Batavia to find out who bought the cap, but found no leads. So, Coon confesses, he was stumped.[141]

At this point, Coon remembers, he came up with the idea of engaging the services of Thomas O'Grady, "one of the ablest detective sergeants in [] Buffalo, N.Y."[142] In his telling, Coon and O'Grady brainstormed possible motives and theories about the case.[143] Then, Coon relates, O'Grady got some of "his boys" to assist on the case. As Coon puts it, "There was Tom Fogarty, an Irishman; Jake Mennecci, Italian; Frank Jawczynski, called Polish Frank, and William Ross, American—a combination competent to take care of any situation involving almost any given nationality."[144] When some of the boys found witnesses who saw two drunks in the vicinity of the Schoenberg house the night of the murder, O'Grady surmised those men were the perpetrators.[145] And Coon recounts,

> I, too, subscribed wholeheartedly to this theory . . . and in so doing came to an inescapable conclusion: if the murderers were drunk, they must have obtained the liquor probably near by. And when I considered from what source in that neighborhood after-closing-hours liquor might have come, I turned to experience for counsel. . . . [In the vicinity of the Schoenberg home] stood a combination saloon and poolroom which was known in those days in local police circles as the "Bowl of Blood." It was frequented principally by the town's rougher element.[146]

To which, according to Coon, O'Grady responded, "I have just the man for such a dive as that—Polish Frank Jawczynski."[147]

O'Grady gave "Polish Frank" the cap, and in the words of Coon, "it didn't take very long before Polish Frank developed his first bit of essential information" by ingratiating himself with the customers at the Bowl of Blood.[148] Eventually, Coon reports, "Polish Frank" found out from

139 *Id.* at 59.

140 *Id.* at 60.

141 *Id.* at 62.

142 *Id.*

143 *Id.*

144 *Id.* at 62, 94.

145 *Id.* at 94.

146 *Id.*

147 *Id.*

148 *Id.*

the Bowl of Blood bartender that the cap belonged to a relative of Mike Miller.[149] After interviewing the relative, O'Grady and Coon interrogated Miller and, Coon recounts, Miller admitted he had been at the Bowl of Blood with Jan Trybus. And Coon reports that was his breakthrough moment:

> From that point on as far as I was concerned, the Schoenberg case increased in interest. We had Jan Trybus identified, yes, but he wasn't caught yet. He was loose. He had a gun. He was dangerous and clever. What I already knew of him [from the previous prosecutions], and what I subsequently learned, proved it.[150]

"We caught him on Friday, October 29," Coon continues, and ignoring any mention of the mistreatment in O'Grady's office, he recounts, Trybus "confessed finally, after much malingering."[151]

Coon, then, in three short paragraphs, tells of the confessions, reports that Trybus was "ably defended" but was convicted and sentenced to death at Sing Sing because of the "overwhelming" evidence.[152]

Obviously, it is difficult to draw firm conclusions about Coon's schemata about the justice system at the time of the trial from his recollection three decades later or from an article written for readers of a sensationalist magazine. But the consistency between Coon's arguments in the litigation and the views he expressed in the article make it possible to fairly assess those schemata. Contrary to Coon's professed allegiance in his 1925 biographical sketch to the "majesty of the law," his article portrays a prosecutor who saw his role as crime-solver-in-chief rather than as a public servant weighing whether there was probable cause to charge a crime. In the article, Coon touts his role as leader and coordinator of the investigation from the interviews in the Schoenberg home in the early morning of the attack to the brainstorming with O'Grady to visits to the haberdashers to the interrogation of Miller. But he ignores any reference to O'Grady's tactics in coercing Trybus's confessions, Max Schoenberg's inconsistent versions of the events and his sketchy identification, and the failure of his office to fully investigate the two suspicious men who got off the late train from Buffalo just before the murder.[153] While it is understandable that Coon wanted to frame his article as true crime, nowhere in

149 *Id.* at 95.

150 *Id.* at 96.

151 *Id.*

152 *Id.*

153 *See supra* note 84 and accompanying text.

it did he once step back and question the reliability of the evidence Grady, the police, and he gathered. Instead, as Coon admits in the article, as soon as he heard Jan Trybus's name, he jumped to the conclusion that he was the culprit.

And the *True* article also reveals how Trybus's ethnicity played a key role in Coon's certainty that Trybus committed the murder. Like the established Batavia community, Coon viewed people through the prism of their ethnicity. As at the trial, the article identifies members of O'Grady's gang in terms of their nationalities except for one individual—"William Ross, American."[154] In his recounting of the investigation of the cap, he consistently referred to O'Grady's investigator as "Polish Frank," not by his surname. And he clearly suggested in the article that the Bowl of Blood was the hang-out for disreputable drunken Poles.[155] So, for Coon, in his single-minded pursuit of the killer without an evaluation of the evidence, who better to assume was the murderer than the "dangerous and clever" Pole who hung out at the Bowl of Blood?

Coon's closing argument's references to immigrants, then, clearly reflect his own schemata about the justice system. For him, the people who lived in Batavia were divided between Americans like William Ross and other individuals who were identified by their nationalities. Some of those Batavians whom he labeled by their ethnicity—the ethnic members of O'Grady's cohorts and Max Schoenberg—were the good immigrants who were becoming integrated into the community. But others, like the disreputable Poles at the Bowl of Blood were a danger to the community. They were the bad immigrants. And, for that reason, he, as the official leader of an investigation of the "horrible murder," was required to engage the services of O'Grady to protect the established community from the "drunken brute."[156] This portrayal of these "disreputable immigrants" from whom Batavia must be protected at all costs belies his purported allegiance to the "majesty of the law."

B. Fredd Dunham

Defense attorney Fredd Hall Dunham was born in 1861 on a farm twenty-two miles south of Batavia.[157] Dunham traced his ancestry back

154 Coon, *supra* note 22, at 94.

155 In his reporting, after learning that two drunken men were seen in the neighborhood of the Schoenberg home the morning of the murder, Coon tells O'Grady that the likely source of the liquor was a saloon for the town's "rougher element," to which O'Grady responds, "I have just the man for such a dive as that *Polish* Frank Jawczynski." *Id.* (emphasis added).

156 Record on Appeal, *supra* note 2, at 963–65 (In his closing argument, Coon defended O'Grady's tactics explaining to the jury that they were necessary to protect the community from Trybus.).

157 Dunham Letter, *supra* note 130, at 1.

to the beginning of English colonization of America. Sometime between 1628 and 1632, his ancestors, Deacon John Dunham, Sr., and Abigail Barlow arrived in Plymouth Colony.[158] They were Separatists fleeing England.[159] Dunham's great-grandfather, Simeon Dunham, was an ensign in the Revolutionary War.[160]

Figure 15[161]

After high school in Attica, NY and a stint teaching third grade at a country school, Dunham graduated from Cornell.[162] During that time, Dunham reports in his unpublished autobiographical papers that he basically lived hand-to-mouth.[163] He then studied law in firms in Batavia and became a member of the bar in 1889, ten years before Coon.[164] Besides practicing law, he served as one of the Justices of the Peace in Batavia for twelve years.[165] As Justice of the Peace, he notarized the application for citizenship of Jacob Schoenberg.[166] Dunham died in 1936 at the age of 75.[167]

His unpublished autobiographical papers reflect an intelligent and creative thinker with a deep commitment to civic responsibility.[168] Those papers demonstrate how his ideas about America were influenced to a great degree by the Civil War. He vividly recalled as one of his first memories that—at three-and-a-half years old—all of his family were in tears when they heard of Lincoln's death and recounted the tale of his father returning to the farm from Batavia after viewing Lincoln's funeral train.[169] He related,

158 *See* Fredd Hall Dunham, Family Tree of Fredd Hall Dunham, https://www.ancestry.com/family-tree/person/tree/52652446/person/222000469933/facts ("Family Tree") (last visited May 3, 2023); *see also Dunham Family Connections*, http://chazzcreations.com/robert_brewer__dunham_family_history_conections/dunham_family (last visited Mar. 27, 2023).

159 John Dunham Society, *About John Dunham*, https://johndunhamsociety.com/about-john-dunham (last visited Mar. 22, 2023).

160 *Dunham Family Connections*, *supra* note 158, at 53.

161 *See* Fredd Hall Dunham, Gallery, https://www.ancestry.com/family-tree/person/tree/52652446/person/222000469933/gallery?galleryPage=1&tab=0 (last visited May 9, 2024).

162 Dunham, *Reminiscences*, *supra* note 130, at 1–2; Dunham Letter, *supra* note 130, at 7–8.

163 Dunham, *Reminiscences*, *supra* note 130, at 2–4.

164 *Id.* at 8.

165 *Id.*

166 *Immigration Application of Jacob Schoenberg*, *supra* note 13.

167 *New York, Death Index*, entry for 1852-1956 (2017); *see* Fredd Hall Dunham, Family Tree of Fredd Hall Dunham, https://www.ancestry.com/family-tree/person/tree/52652446/person/222000469933/facts (last visited Mar. 27, 2023).

168 Dunham Letter, *supra* note 130, at 1.

169 *Id.*

> I have . . . thought that perhaps the fact that my prenatal days, were the early days leading up to our Civil War and the bloody early days of that great war may have made its prenatal impress upon me for my father tells me that Patriotism burned at white heat in those days in our home and that President Lincoln might be preserved along with an undivided Union was the daily and both public prayer of both my father and mother, as well as the subject of all their private devotions.
>
> In fact, mother herself has told me that she spent far more time sewing for the soldiers and "picking lint", for the wounded in the hospitals, [than] she did in making me baby clothes."[170]

Then, after describing the turbulent years of the Andrew Johnson administration, he continued,

> [A]s a child, [I] was impressed by the gravity of the situation and the factional bitterness which developed between sections of the Republican party and which was fostered by the Democratic party and I have later learned how excellent was the counsel of such plain citizens as my Father who sought to still the angry clamor of rabid counselors whose leadership was most dangerous in arousing the passions of our citizens.
>
> * * * * *
>
> Thank God that my excellent father and mother permitted me to get some of this early training which helped me to think and to get some light on the great problems which confronted this nation and which have continued to interest me and which helped greatly later in my education as a citizen's preparation for the work of being an American.[171]

In Dunham's schema, therefore, the America he sought should be led by cool-headed leaders, like Lincoln, who would refrain from playing on the passions of the public and who would try to unite the country. Even from an early age, he believed that patriotism meant working hard to address the problems of the nation. As an example of those values, in 1904, Dunham received a handwritten letter from Booker T. Washington thanking him for a donation to the Tuskegee Institute.[172]

Dunham's heroes were "plain" people like his father "who sought to still the angry clamor of rabid counselors." This same modest sense pervaded his schema about his practice of law. In a piece for his sixty-fifth birthday, he reflected on his legal career, "I doubt if many offices have settled more matters than mine has. I know of some lawyers who have

170 *Id.*

171 *Id.* at 2.

172 Telephone conversation with David States, the grandson of Fredd Dunham (July 1, 2021) (notes on file with author).

lost more suits, and some that have won more suits."[173] Dunham took real pride in his service as Justice of the Peace, Acting City Judge, and United States Commissioner, but even in his recounting of this work, he was self-effacing:

> During the many many cases in which I have presided as a Magistrate, Acting City Judge or Commissioner, I frankly admit I have made errors. Some of them serious, many of them trifling: Some disclosed to the public view. Some never discovered: Thank heaven for that. . . .[174]

In contrast, then, to Coon's self-laudatory description of his career as an unsurpassed lawyer, in his papers, Dunham describes his career in the legal profession with great humility. Unlike Coon, he did not revert to high-blown platitudes about the "majesty of the law," boast of his accomplishments in practice, or ignore the errors he made in his career. Instead, he seemed to take satisfaction in the fact that he settled more cases than other lawyers in the community and that he provided service to the community. And, in fact, he appeared quite pleased in retrospect that his career was not the same as Coon's when he wrote,

> One of the best things that ever happened to me was when I failed to be nominated for District Attorney and it was probably also a good thing for Genesee County as well. At least I never knew of anyone having any large measure of grief, and I guess I was about the only fellow in the County who was disappointed.[175]

This review of Dunham's schemata about the citizen's role in American society and the practice of law reveals some of the underpinning of his closing argument in the Trybus case. Perhaps because of his family's heritage, but certainly because of the impact of the Civil War on his early life, Dunham strongly believed in an America where the community was united and not susceptible to the whims of popular rancor. For that reason, he asked the jurors to consider Trybus as a human being, not a "drunken brute," as a "boy" who was homeless and friendless and whose family was caught up in that far away, awful war in Europe. Indeed, he entreated the jury, in Lincolnesque language, that they should treat the case "as [if] the life of one of your boys or your brothers . . . was at stake."[176] Consistent with Dunham's schemata about the justice system,

173 Dunham, *Reminiscences*, *supra* note 130, at 6.

174 *Id.*

175 *Id.*

176 *See supra* note 123 and accompanying text.

while Trybus was a new immigrant in the community, the jury should treat him with dignity.

Moreover, Dunham's excoriation of Coon in his brief to the Court of Appeals clearly reflects his view of the dangers of "rabid counselors" who dangerously arouse the passions of the citizenry. In that brief, Dunham portrayed Coon as someone so "carried away by his zeal and by his desire to succeed in obtaining a conviction" that he deliberately took advantage of Trybus's helplessness, "on account of his foreign birth" to ride rough shod of law.[177] Dunham's disdain for Coon's "contemptuous" disregard of the rule of law to win a conviction reflects his own schema of shying away from grandstanding in the practice of law.

While it can be argued that Dunham was merely employing this rhetoric before the jury and the Court of Appeals as good advocacy for his client, his work on the case after the Court of Appeals affirmed the conviction belies that notion. These efforts demonstrate that his arguments reflected values deeper than effective litigation strategy. After the Court of Appeals affirmed Trybus's conviction, Dunham, without any compensation, tried without success to locate Trybus's relatives in Europe to provide support for him. Similarly, he tried unsuccessfully to recruit a humanitarian organization to help in averting the execution. He obtained a petition of eight of the twelve jurors to support his commutation petition and solicited a supporting letter from the Counsel-General of Austria-Hungary.[178] Clearly, these efforts were beyond the call of duty for Dunham. For him, apparently, he was following the lessons he learned from his parents.

Perhaps, though, Dunham did eventually have some vindication against Coon for his tactics in the Trybus case. While no direct evidence appears in the archives, it appears that Dunham and James Kelly, Mike Miller's lawyer, might have played a role in ousting Coon as a candidate of the Republican Party for district attorney in 1916. It appears from news reports at the time that both Dunham and Kelly were leaders in the Republican Party in Genesee County.[179] Less than a month after the execution of Jan Trybus, in the September 1916, Republican primary, Kelly defeated Coon for the Republican nomination for district attorney and went on to succeed him.[180]

177 *See supra* note 124 and accompanying text.

178 *Intoxicated at the Time, Trybus Plea*, The Daily News (Batavia, N.Y.), Aug. 11, 1916, at 1; *see supra* notes 93–95 and accompanying text.

179 *See College League Men Organized*, The Daily News (Batavia, N.Y.), Oct. 24, 1916, at 6 (announcing Dunham's efforts as President of an organization to elect Charles Evans Hughes, the Republican candidate for President); *Mr. Coon Lauds Candidate Kelly*, The Daily News (Batavia, N.Y.), Sept. 21, 1916, at 7 (Coon's concession letter describing Kelly's support from the Genesee County Republican Committee).

180 *Kelly Defeated Coon for the District Attorneyship*, The Daily News (Batavia, N.Y.), Sept. 20, 1916, at 1.

Conclusion

This article has provided a model for scholars in the field of Applied Legal Storytelling to unpack the backstory of cases. By researching archival materials regarding the surrounding community, the parties to the case, the cultural milieu, and the schemata of the opposing attorneys about themselves and the justice system, I was able to gain deeper insights into the anatomy of the Trybus case than a mere review of the case record or Court of Appeals decision. These historical insights provided me with added perspectives on how I need to reflect on issues such as cultural context, opponent's schemata, and the character of parties in developing stories in my current cases. Hopefully, other scholars and practitioners will follow this model of mining the historical record to gain deeper insights into the development of case narratives.

* * * * *

On a personal note, through the research of the trial record and other archival material, my story of the murder of Jacob Schoenberg—my Zayde—has been transformed.

When I was a child, in my imagination, I saw this forbidding, faceless tall man enter my Zayde's bedroom and bludgeon him to death. My father told me the motive was money and that a national publication had visited the Schoenberg home immediately after the murder and described my great-grandmother—my Bubbe— laying on the floor hysterical in tears. I still have those images in my mind. They comport with the story told to the jurors by Coon at the trial.

But, when I began teaching Evidence as a law professor, I sought to dig deeper into the case, and my story changed. I read the Court of Appeals decision affirming Trybus's conviction and then sat down with the record in the case. The first issue that caught my eye was the purported identification of Trybus by Max Schoenberg—my Uncle Max—primarily by the sound of his voice. At that point, I had found a wonderful hypothetical that I could use in teaching the personal knowledge rules of Federal Rule of Evidence 602. Every semester since then, I capture the attention of my students in telling the tale of the murder and each term, students have different assessments of the reliability of Uncle Max's identification. In this teaching moment, my story was quite abstracted from my family history and became an academic exercise.

Then, when I started work on this project, I sought to answer the question whether the evidence at trial supported the conviction, and my story again was transformed. Like any trial attorney, I read the trial transcript closely and assessed the evidence. I discovered that Trybus's

multiple confessions were superficially strong evidence of guilt. Since it was undisputed that Mike Miller and he were at the Bowl of Blood that night and became quite intoxicated, the story told by Coon, at first blush, seemed solid. But then I turned to the photographic evidence and started to identify holes in that story.[181] How could a stone drunk man, even with the help of an accomplice, wriggle his way holding an iron bar and gun through the window when part of the bed's headboard blocked it? Why did he kill Schoenberg when he moved around in bed instead of simply asking for the money? After Max had previously told the police that the voice could have been from an Italian or a Pole, how could he be so certain that Trybus was the perpetrator? And then, of course, there were O'Grady's tactics to coerce the confessions and the publicity-stunt perp walk that calls into question any of Trybus's statements to the family. Additionally, the language of the confessions seemed to reflect a degree of literacy that would not be possible for an immigrant like Trybus.[182]

By the end of this assessment of the evidence, in my schema as a lawyer, I was simply unsure whether Trybus had committed the murder.

But my deep dive into the case had a surprising outcome. I no longer was convinced one way or the other that Trybus committed the murder, nor was I focused on the technical evidentiary issues that I have used in my teaching. Rather, I became very interested in the stories told by the attorneys, especially Fredd Dunham. Perhaps because of the civil rights litigation which I have practiced on behalf of immigrant communities, I was deeply impressed that a lawyer over a century ago could expend the time and effort to defend a friendless and deeply flawed man who had no friend in the community or relative to call upon. But something in Dunham's values as an American compelled him to zealously give Jan Trybus the representation he deserved.

Perhaps because, unlike my Bubbe and Zayde, I am no longer an integrated outsider, but am an integrated insider in America, my schemata in writing this article have focused not on my Jewish immigrant ancestors but on a lawyer with a Yankee heritage who tried to live by the values of Lincoln.

Fredd Dunham concluded his *Reminiscences* writing,

181 *See supra* Figures 9 and 11.

182 An expert in Forensic Linguistics, Robert Leonard, has reviewed the transcript of Max Schoenberg's testimony about the voice identification of Trybus. In his opinion, while a century later it is hard to gauge whether Max Schoenberg knew the difference between a Pole and an Italian, certainly he would have known the person did not sound like a Yiddish speaker. But, especially given the stressful circumstances and limited conversation with Trybus, he likely would not have recognized the person as anyone but someone outside of his Yiddish-speaking community unless he recognized that the voice belonged to someone he knew. Leonard notes that research shows that voice identification is difficult except with voices a witness knows well. Email from Robert Leonard to Stefan Krieger (Apr. 28, 2023) (on file with author).

> I do not believe that [the] world has much regard for a lawyer unless he succeeds, and the price of that success is sometimes pretty high. It is my honest conviction that none of my fellow lawyers can ever conscientiously call me a great lawyer. It is my hope that some of them would be willing to concede that I have tried with varying success to give honest advice to clients who sought my services.[183]

At least to me, Dunham is the hero of this story. After reading the case record, I had doubts about the guilt or innocence of Jan Trybus; I still do. But I have no doubt Fredd Dunham's lawyering in the Trybus case was a model for me to follow.

183 Dunham, *Reminiscences*, *supra* note 130, at 5–6.

ARTICLE

#MeToo as Legal Storytelling

Dr. JoAnne Sweeny*

I. Introduction

The #MeToo movement, begun on MySpace by activist Tarana Burke,[1] went viral on Twitter[2] on October 15, 2017 after actress Alyssa Milano tweeted a request that anyone who had been sexually assaulted or harassed write "me too" in response.[3] Within twenty-four hours, that message had received over 55,000 replies.[4] Within the next 45 days, it had reached other social media platforms and had been posted over 85 million times on Facebook.[5] These numbers did not slow down over the next year. According to the Pew Research Center, the hashtag had been used over 19 million times by September 30, 2018, with an average of 55,319 uses per day.[6]

The sheer volume of women[7] who stated that they were survivors of sexual assault or harassment, as well as the details they provided about who had committed the assaults (often a friend or acquaintance), took the

* Professor of Law, University of Louisville Louis D. Brandeis School of Law. This article benefitted greatly from audience feedback at the Ninth Biennial Conference on Applied Legal Storytelling as well as the research assistance provided by Gracie Davis.

1 *See infra* note 108 and accompanying text.

2 Although Twitter has now been rebranded as "X," this article will continue to refer to it as Twitter because that is how it was referred to when #MeToo went viral in 2017, and also because "X" is silly.

3 Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied*, NBC News (Oct. 18, 2018, 5:59 PM), https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246.

4 Nadja Sayej, *Alyssa Milano on the #MeToo Movement: 'We're Not Going to Stand for it Anymore,'* Guardian (Dec. 1, 2017, 7:00 AM), https://www.theguardian.com/culture/2017/dec/01/lyssa-milano-mee-too-sexual-harassment-abuse.

5 *Id.*

6 Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, Pew Rsch. Ctr. (Oct. 11, 2018), https://www.pewresearch.org/short-reads/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/.

7 Although sexual assault and sexual harassment are predominantly committed by men against women, there are many examples of men and gender nonconforming people suffering these abuses as well. The intent of this article is not to minimize their experiences by using the word "women" to describe #MeToo participants, but merely to create simpler prose.

media by storm and led to a new dialogue about what rape actually is, who is likely to commit it, and how often it happens.[8] As noted by legal scholars, "gendered violence has largely been represented and responded to as an individual problem for both perpetrators and victims. . . . [which] has worked along axes of gender, race, class, and sexual hierarchies to silence and normalize violence in a variety of contexts."[9]

#MeToo changed that dynamic. A 2022 Pew Research Center study showed that seventy percent of those surveyed believe that, post #MeToo, "people who commit sexual harassment or assault in the workplace are now more likely to be held responsible for their actions."[10] According to the same study, sixty percent of people surveyed believe that people who report sexual assault or harassment are now more likely to be believed. A majority of people who also indicated that they oppose #MeToo believed that these changes had taken place.[11] Similarly, a 2022 survey of rape victim advocates showed that several of the advocates surveyed also believe that #MeToo has increased societal awareness of how prevalent sexual assault is.[12] Several other surveys have shown that, for good or bad, #MeToo has forced men to reexamine their daily interactions with women because they were suddenly aware that sexual misconduct could include a lot more behavior than they had previously anticipated.[13]

Empirical work also shows that #MeToo has changed people's perceptions of sexual assault. A 2020 longitudinal study that asked participants to indicate their agreement with statements that said that women lie about being sexually assaulted showed that participants' views regarding false reporting of sexual assault changed during #MeToo.[14] The first measure took place in November 2016, the second in January 2017, the third in November 2017, and the fourth in May 2018.[15] There was a

8 *See* Nadia Khomami, *#MeToo: How a Hashtag Became a Rallying Cry Against Sexual Harassment*, Guardian (Oct. 20, 2017, 1:13 PM), https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment.

9 Sarah J. Jackson et al., *Women Tweet on Violence: From #YesAllWomen to #MeToo*, 15 Ada: J. Gender, New Media, & Tech. 1, 1 (2019) (internal citations omitted).

10 Anna Brown, *More Than Twice as Many Americans Support Than Oppose the #MeToo Movement*, Pew Rsch. Ctr. (Sept. 29, 2022), https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement/.

11 *Id.*

12 Shana L. Maier, *Rape Victim Advocates' Perceptions of the #MeToo Movement: Opportunities, Challenges, and Sustainability*, 38 J. Interpersonal Violence 336, 348 (2023).

13 *See* Elizabeth L. Jeglic, *#MeToo is Changing Attitudes and Behaviors*, Psych. Today (July 31, 2019), https://www.psychologytoday.com/us/blog/protecting-children-from-sexual-abuse/201907/metoo-is-changing-attitudes-and-behaviors; Tim Bower, *The #MeToo Backlash*, Harv. Bus. Rev., Sept.–Oct. 2019, at 19, 22; Julie Zeilinger, *The #MeToo Movement Is Affecting Men Too*, MTV (Jan. 29, 2018), https://www.mtv.com/news/vd2dkk/mtv-survey-men-metoo.

14 Hanna Szekers, Eric Shuman & Tamar Saguy, *Views of Sexual Assault Following #MeToo: The Role of Gender and Individual Differences*, 166 Personality & Individual Differences 1, 3 (2020).

15 *Id.* at 2.

significant decrease in agreement with the statement that women lie about sexual assault and this decrease persisted through 2018.[16] Another longitudinal study showed that, after #MeToo had begun, participants (college students) were more likely to label "their most upsetting unwanted sexual experience" as sexual assault, which shows that #MeToo had an impact on how they viewed their own past experiences.[17]

However, the information presented by #MeToo is not new. Feminist scholars and activists have been trying to convey the scope of the problem—as well as the common misperceptions about it—since at least the 1970s. The first victory in this area was the creation of rape shield laws, which limited sexual assault defendants' ability to use a woman's sexual history against them.[18] In 1980, the term "rape myth" was coined, which allowed for greater study into existing prevalent (and pernicious) "false beliefs about rape, rape victims, and rapists."[19] The cultural impact of rape myths cannot be overstated. As noted by feminist scholars, "'no other criminal offence . . . is as intimately related to broader social attitudes and evaluations of the victim's conduct as sexual assault.'"[20] Unfortunately for women, rape myth-fueled social attitudes work to "'trivialize . . . sexual assault or suggest that a sexual assault did not actually occur.'"[21]

Put simply, when the public hears the word "rape," they think of a deranged maniac hiding in an alley who grabs a woman off the street and physically forces himself upon her despite her loud and vigorous protests.[22] Any sexual assault that does not meet those characteristics—the woman knew her accuser, she did not scream, etc.—is therefore not a "real rape." And yet, these myths are, as implied by the term itself, patently untrue.

Into the late 1980s, researchers had conducted empirical research that definitively showed that, contrary to popular opinion, the vast majority

16 *Id.* at 3. These results were consistent across all demographics but were more pronounced for men who also scored low on the "social dominance orientation" scale. *Id.*

17 Anna E. Jaffe, Ian Cero & David DiLillo, *The #MeToo Movement and Perceptions of Sexual Assault: College Students' Recognition of Sexual Assault Experiences Over Time*, 11 Psych. Violence 209, 215 (2021).

18 *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 80 (2002). A lot can be said about the overall effectiveness of these laws, but that mantle will have to be taken up by another author.

19 Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. Personality & Soc. Psych. 217, 217 (1980).

20 Joanne Conaghan & Yvette Russell, *Rape Myths, Law, and Feminist Research: 'Myths About Myths'?*, 22 Fem. Leg. Stud. 25, 26 (2014) (quoting Jennifer Temkin & Barbara Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (2008)).

21 Holly Jeanine Boux, *Sexual Assault Jurisprudence: Rape Myth Usage in State Appellate Courts* 6, 24 (Apr. 19, 2016) (Ph.D. dissertation, Georgetown University), http://hdl.handle.net/10822/1040722 (quoting Renae Franiuk et al., *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case,* 14 Violence Against Women 287–309, 288 (2008)).

22 Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 132–33 (2002); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 Hastings L.J. 663, 677–78 (1998).

of sexual assaults are committed by someone the woman knows.[23] These statistics were also reported in the popular media; in 1991, *Time* magazine ran a story discussing the same sobering reality.[24] Around the same time, studies conducted by nonprofits and government agencies were consistently showing that rape is extremely common: a 1989 Worldwatch Institute report stated that "the most common crime worldwide was violence against women"[25] and an FBI report estimated that by 1990, twelve women were raped every hour that year, an increase from the 1989 report that ten women were raped every hour.[26]

Another common rape myth is that women lie about rape, typically to punish a man who "scorned" them or to cover for their own sexual indiscretions.[27] As early as the 1970s, FBI statistics have shown that false claims of sexual assault are just as common as other felonies and, considering how skeptical police are of rape accusations, the official statistics probably overestimate how often women lie about being sexually assaulted.[28] This information has also been publicly reported for decades.[29]

All of this is to say that the information contained in the #MeToo stories has been public knowledge for decades. Which begs the question, what made #MeToo change the public's perception where data-driven research and government reports could not? The answer may lie in #MeToo's format: personal narratives, which made use of rhetorical and storytelling techniques. As this article shows, the stories that make up the #MeToo movement have been effective in changing people's perceptions because of the inherent credibility of these personal narratives and the way these shorter "microstories" combined into a larger narrative that was able to combat the existing public misperceptions about rape culture.

This article examines the persuasiveness of #MeToo through the two lenses of traditional rhetoric and storytelling techniques. More specifically, this article examines how these two lenses explain #MeToo's

23 Kimberly A. Lonsway, *Preventing Acquaintance Rape Through Education: What Do We Know?*, 20 Psych. Women Q. 229, 230 (1996).

24 Nancy Gibbs, *When Is It RAPE?*, Time, June 3, 1991, at 48.

25 Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 Psych. Women Q. 133, 133 (1994).

26 Staff of S. Comm. on the Judiciary, 102d Cong., Report on Violence Against Women: the Increase of Rape in America 1990, at 2 (Comm. Print 1991).

27 Orenstein, *supra* note 22, at 680.

28 Lonsway & Fitzgerald, *supra* note 25, at 135; Lindsay Orchowski et al., *False Reporting of Sexual Victimization: Prevalence, Definitions, and Public Perceptions*, Handbook of Interpersonal Violence and Abuse Across the Lifespan: A project of the National Partnership to End Interpersonal Violence Across the Lifespan (NPEIV) 2–3 (2021).

29 Polly Poskin, *A Brief History of the Anti-Rape Movement*, Resource Sharing Project, https://resourcesharingproject.org/ resources/a-brief-history-of-the-anti-rape-movement/ (last visited Mar. 8, 2024); Leora Tanenbaum, *Women Don't 'Cry Rape': Why it's so Unlikely any Woman Would Lie About Being Raped*, U.S. News (Jan. 10, 2018, 7:00 A.M.), https://www.usnews.com/opinion/civil-wars/articles/2018-01-10/women-dont-lie-about-being-raped.

persuasiveness, with a particular emphasis on #MeToo's digital format and its implication for legal communication.

II. Traditional rhetoric

Rhetoric is broadly defined as "the function of adjusting ideas to people and people to ideas."[30] Classical rhetoric goes back to Aristotle who conceptualized it in terms of "three modes of proof": ethos, pathos, and logos.[31] When these general concepts are applied to a specific situation, Aristotle also incorporates the concept of kairos.[32] Combined, these four rhetorical concepts show how words, whether spoken or written, can persuade.

A. Classical definitions

1. Ethos

Under classical rhetoric, ethos is defined as the "charisma and credibility of the speaker."[33] Credibility is the perceived believability of the speaker and is established through the speaker's expertise and trustworthiness.[34] Some scholars have further broken down the concept of ethos into two categories: situated ethos, which relies more on the speaker's existing reputation, and invented ethos, which is the credibility the speaker "actively constructs" with their speech.[35] In the invented or "constructionist" model of ethos, the speaker's appearance, demeanor and inflections are also part of a speaker's effort to gain the audience's trust. [36]

2. Pathos

Pathos focuses on emotions by appealing to the "passions or the will of the audience"[37] and "putting the audience in the appropriate mood, by

30 John Rodden, *How Do Stories Convince Us? Notes Towards a Rhetoric of Narrative*, 35 Coll. Literature 148, 154 (2008) (internal quotation marks and citation omitted).

31 Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 Wash. U. Juris. Rev. 131, 132 (2014). As discussed further below, some scholars also include the concepts of kairos (exigence) and mythos (storytelling) in this list.

32 James L. Kinneavy & Catherine R. Eskin, *Kairos in Aristotle's Rhetoric*, 17 Written Comm. 432, 434–35 (2000).

33 Ülkü D. Demirdöğen, *The Roots of Research in (Political) Persuasion: Ethos, Pathos, Logos and the Yale Studies of Persuasive Communications*, 3 Int'l J. Soc. Inquiry 189, 191 (2010).

34 *Id.* at 194.

35 Julie Nelson Christoph, *"Let Yourself Shine": Looking at and Through Students' Invention of Ethos*, 25 J. Teaching Writing 177, 180 (2009).

36 James S. Baumlin & Craig A. Meyer, *Positioning Ethos in/for the Twenty-First Century: An Introduction to Histories of Ethos*, 7 Human. 1, 11 (2018).

37 Demirdöğen, *supra* note 33, at 192.

playing on its feelings."[38] To effectively use pathos, a speaker must accurately "assess the emotional state of the audience."[39] Doing so requires that the speaker be aware of the values of the community so that the speaker can use those values to effectively persuade through emotion.[40]

According to Aristotle, an audience's emotional state can be altered by looking at three things: what condition can trigger the desired emotion (e.g., an event or quality of the audience members that the speaker can focus on), the persons about whom the audience can feel the desired emotion, and the motive for the emotion that connects the first two parts.[41] For example, a speaker can provoke anger in an audience who has recently lived through unseasonably bad weather and direct that anger at a local politician by pointing out that that politician recently blocked legislation that would address climate change.

By changing the audience's mood, according to Aristotle, the speaker can more easily induce the audience to agree with the speaker's arguments.[42] Emotions change the way people see the world in general so that, "[d]epending on how an audience feels, a certain action may appear as a threat or as behavior that should be pitied, or as some other challenge."[43] By understanding this emotional impact, a speaker can use it to their advantage. For example, a happy audience will be more likely to agree with a speaker that an upcoming event or situation will have a positive impact.

3. Logos

Logos is the argument being advanced using "appeals to the intellect or reason."[44] In contrast to pathos, logos focuses on the rational side of the audience. However, logos does not simply mean using data and facts; it instead focuses on "[w]ord choices, logic choices, and readable sentence structures."[45] Although classical rhetoric emphasizes formal logical proofs such as syllogisms, logos can encompass many different styles of word choice, including narrative.[46]

38 Martine Courant Rife, *Ethos, Pathos, Logos, Kairos: Using a Rhetorical Heuristic to Mediate Digital-Survey Recruitment Strategies*, 53 IEEE Transactions on Pro. Commc'n. 260, 261 (2010).

39 Demirdöğen, *supra* note 33, at 192.

40 Rife, *supra* note 38, at 261.

41 Antoine C. Braet, *Ethos, Pathos and Logos in Aristotle's Rhetoric: A Re-examination*, 6 Argumentation 307, 314 (1992).

42 Barbara Emanuel et al., *Rhetoric of Interaction: Analysis of Pathos*, *in* Design, User Experience, and Usability: Design Discourse: 4th International Conference, DUXU 2015 418–19 (2015) (conference paper offered as part of HCI International 2015, Los Angeles, CA, USA, August 2–7, 2015).

43 James L. Kastely, *Pathos: Rhetoric and Emotion*, *in* A Companion to Rhetoric and Rhetorical Criticism 221, 225 (2004).

44 Demirdöğen, *supra* note 33, at 192.

45 Rife, *supra* note 38, at 261.

4. Kairos

In simple terms, kairos can be defined as "saying the right thing at the right time."[47] Kairos focuses on the context of the speech, specifically the "rhetorical importance of time, place, speaker, and audience, the proper and knowledgeable analysis of these factors, and the faculty of using the proper means in a particular context to arrive at belief."[48] Kairos has three components: opportune timing, the right situation for the speech, and the appropriate speech for that time and situation.[49]

In contrast to chronos, which "expresses the fundamental conception of time as measure," kairos "points to a *qualitative* character of time, to the special position an event or action occupies in a series, to a season when something appropriately happens that cannot happen at 'any' time, but only at 'that time.'"[50] Accordingly, with regard to timing, kairos is all about seizing the moment and finding the right time to act.[51] Similarly, it has been framed as a speaker identifying a critical moment where the speaker feels they "must finally act."[52] Accordingly, it is the "moment that directs the orator to talk."[53]

Instead of kairos, some scholars discuss the concept of exigence, or a situation that "functions as the organizing principle: it specifies the audience to be addressed and the change to be effected."[54] Similarly, the concept of the "rhetorical situation" is concerned with the external circumstances that cause the speaker to speak.[55] According to other scholars, kairos incorporates these concepts but is broad enough to also include both the speaker's perception of a situation as providing an opportunity to speak and "the roles of changeability, indeterminacy, and uncertainty that form the precondition for rhetorical communication" in general.[56] To these scholars, the rhetorical situation emphasizes exigencies

46 Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. Crim. L. & Criminology 1045, 1055 (2008–2009).

47 Michael Harker, *The Ethics of Argument: Rereading Kairos and Making Sense in a Timely Fashion*, 59 Coll. Composition & Commc'n. 77, 78 (2007).

48 *Id.*

49 Linda L. Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Right Moments*, 16 J. App. Prac. & Process 147, 157 (2015).

50 John E. Smith, *Time, Times, and the 'Right Time';* Chronos *and* Kairos, 53 Monist 1, 1 (1969).

51 Jens E. Kjeldsen, *Reconceptualizing Kairos*, *in* Paradeigmata: Studies in Honour of Øivind Andersen 249, 250 (2014).

52 Harker, *supra* note 47, at 84.

53 Kjeldsen, *supra* note 51, at 252.

54 Lloyd F. Bitzer, *The Rhetorical Situation*, 1 Phil. & rhetoric 1, 7 (1968).

55 Kjeldsen, *supra* note 51, at 252.

56 *Id.* at 251.

and the constraints it imposes on speakers to speak in particular rhetorical spaces, whereas kairos sees these rhetorical spaces as opportunities.[57]

In other words, kairos "is the very source of rhetoric's power to adapt to circumstances."[58] A speaker using kairos will look at whether "the circumstances, and the intellectual ideological climate are right."[59] "The nuanced sense of timeliness afforded by the concept of kairos helps make an argument 'more sensible, more rightful, and ultimately more persuasive.'"[60] As noted by Linda Berger, kairos is also related to the concept of metonymy where seizing the right moment involves speech that "evokes a larger context, picture, or story."[61] It is not just the literal time the speech happens but the larger context, or zeitgeist, that is happening at the moment the speaker chooses to speak.

In addition, kairos is not just seeing a moment (both temporal and situational) and choosing that time to speak, but using the right communication to properly seize that moment.[62] Kairos "delimits choices and sets the boundaries of action by supplying the circumstantial (although often assumed universal) criteria or 'codes'—conventions, values, ethics, customs—that guide and confirm decisions and actions."[63] It is more than finding the right time; the speaker must also take the "right measure" when acting, "what is fitting or appropriate to this particular time and space."[64] Kairos is therefore particularly grounded in context and anticipates that a speaker will both influence and be influenced by the situation around them.[65]

Accordingly, as with the other Aristotelian proofs, kairos focuses on the relationship between the speaker and their audience, requiring that the speaker chooses the right time and place as well as "the delivery the audience expects at that time and place."[66] In other words, kairos "draws attention to the connection between occasion and audience,"[67]

57 *Id.*

58 Cynthia Miecznikowski Sheard, *Kairos and Kenneth Burke's Psychology of Policial and Social Communication*, 55 Coll. Eng. 291, 293 (1993).

59 Harker, *supra* note 47, at 81 (internal quotation omitted).

60 Berger, *supra* note 49, at 154.

61 *Id.* at 155.

62 *Id.* at 152 (citing John Poutakos, *Toward a Sophistic Definition of Rhetoric*, *in* Contemporary Rhetorical Theory: A Reader 29 (John Louis Lucaites et al. eds., 1989)).

63 Sheard, *supra* note 58, at 292.

64 Berger, *supra* note 49, at 154.

65 *See* Debra Hawhee, *Kairotic Encounters*, *in* Perspectives on Rhetorical Invention (Janet M. Atwill & Janice M. Lauer eds., 2002).

66 Nicole Basaraba et al., *New Media Ecology and Theoretical Foundations for Nonfiction Digital Narrative Creative Practice*, 29 Narrative 374, 383 (2021).

67 *Id.* at 384.

and it requires that the audience be receptive to the message.[68] Whether something is timely and appropriate is entirely dependent on the audience and requires that the speaker have a profound sense of both timing and empathy.

B. Rhetoric and legal communication

Traditional rhetoric is easily applied to a legal context. Indeed, Ancient Roman treatises, which borrowed heavily from Aristotle, originally "were written for inexperienced advocates or for anyone who might sometime argue a case in court."[69] These treatises, which were early practice manuals for lawyers and the educated public generally, consisted of analyses of speeches made in famous court cases. They also explicitly used the three Aristotelian proofs of ethos, pathos, and logos.[70]

Ethos certainly applies to legal communication. In the legal world, credibility is important for witnesses, but likeability is also important for attorneys.[71] In trial, for example, it behooves an attorney to attempt to create a sympathetic bond between the jury and their client but also between themselves and the jury, which can be done not only with the attorney's credentials but by choosing language that is familiar to the jury.[72]

Historically, pathos was analyzed in the legal context in terms of arousing the sympathy of the judge towards one's client.[73] In more modern legal scholarship, pathos is often undervalued in favor of logos's objective presentations of the law and facts with an emphasis on the rationality and objectivity of judges and juries.[74] However, some scholars have noted that pathos is important to help the decisionmaker understand the client's perspective and the stakes of the litigation for the client.[75] When dealing with policy and broader concepts of justice, an appeal to emotion may be advisable and, indeed, inevitable.[76]

Moreover, emotion, some have argued, combines with logic to allow the audience to be able to analogize and see the connections between prior cases and the case at hand.[77] Ethos, logos and pathos therefore work

68 Harker, *supra* note 47, at 82.

69 Michael Frost, *Ethos, Pathos and Legal Audience*, 99 Dick. L. Rev. 85, 86 (1994).

70 *Id.*

71 McCormack, *supra* note 31, at 137–39.

72 *Id.* at 138–39.

73 Braet, *supra* note 41, at 314.

74 McCormack, *supra* note 31, at 134–35.

75 *Id.* at 140.

76 *Id.* at 152.

77 *Id.* at 140.

together to create "a more comprehensive form of argument in which the emotions and tendency of the judge and jury to trust what an advocate is saying are considered."[78] Finally, kairos is also relevant to legal communication because it incorporates the context-heavy concept of equity into legal proceedings.[79] Court cases, in contrast to legislation, are fact specific and often bring forth situations that lawmakers did not anticipate. In these cases, kairos allows for creativity and sensitivity so that more just solutions can be crafted.[80]

C. Rhetoric and digital communication

With regard to digital communications, classical rhetoric techniques still apply but the unique features of online communication change the importance of certain aspects of each of the rhetorical proofs. One of the most important features of digital or social media communication is the speed and accessibility of speech on those networks:

> Hashtags, consisting of the "#" symbol followed by a text phrase, function as linked conversation anchors on Twitter, enabling users from across different networks to participate in a conversation around a particular topic by tweeting using the hashtag. Notably, public tweets from individual users containing a hashtagged phrase can be easily aggregated and retweeted, circulating messages to people outside of the original tweeter's personal network and allowing for virality.[81]

These features create new ways for ethos, pathos, logos, and kairos to be expressed and combine into new rhetorical techniques.

"*Ethos* in a digital context is established or broken through the source (e.g., expertise, skills, motives)."[82] However, some scholars have noted that the uniquely discursive nature of social media communities may impact ethos because digital communities can be quite insular with their own vernacular and inside references.[83] These communities are also highly participatory, which means that statements made online are likely to be actively discussed, which may alter the original speech's meaning.[84] In such

78 *Id.* at 135.

79 Kinneavy & Eskin, *supra* note 32, at 436.

80 *Id.*

81 S. J. Jackson & S. Banaszczyk, *Digital Standpoints: Debating Gendered Violence and Racial Exclusions in the Feminist Counterpublic*, 40 J. Commc'n. Inquiry, 391, 395 (2016) (internal citations omitted).

82 Basaraba et al., *supra* note 66, at 381.

83 Michael Middleton et al., Participatory Critical Rhetoric: Theoretical and Methodological Foundations for Studying Rhetoric in Situ 13 (2015).

84 Basaraba et al., *supra* note 66, at 381.

situations, the credibility of the original speaker may change over time or even become irrelevant as their words are taken over and transformed by the digital community. In fact, a study has shown that comments on social media stories may be more persuasive than the stories themselves, and even an anonymous comment containing false information can change the reader's perception of the original post.[85]

The typically short and quick messages sent out on social media also impact the effectiveness of pathos. For example, speakers using digital technologies may break up their messages so that each part uses the type of digital communication that will have the most emotional impact.[86]

Logos is also affected by the digital medium because digital communication typically does not follow the traditional model of one-way communication from storyteller to audience. Instead,

> [t]he rhetoric around a narrative can completely change as a result of participatory culture and the multiple perspectives and opinions available in digital media. What is communicated in the paratext can change the rhetorical impact of the original narrative source for better or for worse and, thus, the public has influence in determining the *logos*.[87]

Accordingly, original narratives may be "remixed" by the author or the public into new narratives. The logos will, therefore, evolve as new perspectives are added. For example, a woman posted about how her eyeliner remained intact even after she was in a car accident, which quickly took over the narrative of any prior social media marketing of that product.[88]

Finally, kairos is a large part of digital and social media communication. Algorithms drive content to audiences based on a wide variety of factors such as the popularity of a post or hashtag, or the social network connections of the speaker and audience members.[89] Consequently, the popularity of a social media post is highly dependent on kairos conditions such as "how appropriately the piece was timed for the specific platform,

85 Sarah Freeman, *Social Media Comments Can Impact Perceptions*, UGA Today (Feb. 26, 2020), https://news.uga.edu/social-media-comments-impact-perceptions/ #:~:text=New%20research%20from%20the%20University,Communication%20and%20the%20study's%20author.

86 Basaraba et al., *supra* note 66, at 382.

87 *Id.* at 383.

88 Daniel Boan, *A Woman Said Her $20 Eyeliner Still Looked Flawless After a Car Crash — and People Can't Stop Talking About Her Review*, Bus. Insider (Apr. 25, 2018, 3:04 PM EDT), https://www.businessinsider.com/woman-review-kat-von-d-tattoo-liner-car-accident-viral-2018-4.

89 John R. Gallagher, *Machine Time: Unifying Chronos and Kairos in an Era of Ubiquitous Technologies*, 39 Rhetoric Rev. 522, 529 (2020).

who ended up seeing it when it was posted, etc."[90] For example, the most viral hashtags are typically made in response to a current event, sometimes one that is quite local and not reported widely in the media. #RIPHarambe quickly comes to mind.[91]

These four rhetorical proofs—ethos, pathos, logos, and kairos—often work together to persuade an audience even in a digital context. And, as seen below, #MeToo stories, although brief and often anonymous, made use of all of these proofs.

D. Rhetoric and #MeToo

#MeToo is a social media movement that typifies the interplay between traditional rhetoric and digital communication, though it also has some unique traits. With regard to #MeToo posts, many of the indicators of situated ethos are missing. Most Twitter users do not display their real names or identities in their accounts so the speaker's existing reputation or credibility is difficult to ascertain. Moreover, the audience also is deprived of some of the indicators of invented ethos because the speech is done online with no images or video of the speaker, making it impossible for the audience to judge body language or be swayed by the speaker's physical or vocal attractiveness.[92] Instead, it is the poster's words alone that must persuade.

However, other indicators of trustworthiness may still be present. As noted by one scholar:

> In the case of first-person testimonials like #MeToo, where individuals are recounting an aspect of their own lives, the question of competence usually takes a back seat to the question of sincerity. That is, the issue is not typically "how did you come to know that?" but rather, "why should we believe you?" [93]

When it comes to stories of sexual assault and harassment, women are accustomed to not being believed. Indeed, rape is an extremely underreported crime because women do not think that the police will believe

90 Sara West & Adam Pope, *Corporate Kairos and the Impossibility of the Anonymous Ephemeral Messaging Dream*, 6 Present Tense: J. Rhetoric in Soc'y 1, 1 (2018), http://www.presenttensejournal.org/wp-content/uploads/2018/06/West_Pope.pdf.

91 Sam Judah, *How a Dead Gorilla Became the Meme of 2016*, BBC (Jan. 1, 2017), https://www.bbc.com/news/blogs-trending-38383126. Harambe was a gorilla at the Cincinnati Zoo who was killed by handlers when a young boy fell into his enclosure. The entire incident was captured on video and posted on YouTube where it led to viral memes and even public vigils.

92 The availability of anonymous posting has been linked to greater participation but also to greater incidence of harassment, threats, and other offensive speech. Maria Konnikova, *The Psychology of Online Comments*, New Yorker (Oct. 23, 2013), https://www.newyorker.com/tech/annals-of-technology/the-psychology-of-online-comments.

93 Karyn L. Freedman, *The Epistemic Significance of #MeToo*, 6 Feminist Phil. Q. 1, 16–17 (2020).

them.[94] Studies have shown that they are, unfortunately, correct. Sexual assaults are under-investigated by police,[95] and surveys of police officers have revealed that police officers typically estimate that 33 to 53 percent of all rape complaints they receive are false,[96] even though the actual false reporting rate is between 2 and 10 percent.[97]

But something different happened when women began telling their stories publicly using the #MeToo hashtag: they were believed and supported. Ethos may explain how these first-person testimonial stories contained an inherent trustworthiness, particularly when combined with the related concept of "mythos." Mythos has been described as "a mode of 'narrative ethos'" where the personal story of the speaker contributes "to the self-expressive aim of ethical/ethotic discourse."[98] According to mythos, first-person stories are a form of self-expression that are necessarily intertwined with the speaker's sense of identity as the speaker relays something that happened to them and their response to it.[99] Such personal stories make the speaker appear vulnerable and relatable, thereby increasing the speaker's credibility with the audience.

Specific #MeToo posts show that, though they may be scant on details, they are still obviously meaningful to the person telling them. For example, one post states: "The #MeToo movement has opened some wounds and allowed me to reflect. I was sexually assaulted on the night of my senior prom, by my date. I am not ashamed to tell my story, because I know I am not alone."[100] In addition to personal details, this

94 *See* Jeffrey S. Jones et al., *Why Women Don't Report Sexual Assault to the Police: The Influence of Psychosocial Variables and Traumatic Injury*, 36 J. Emergency Med. 417, 420 (2009); Denise-Marie Ordway, *Why Many Sexual Assault Survivors May Not Come Forward for Years*, Journalist's Resource (Oct. 5, 2018), https://journalistsresource.org/health/sexual-assault-report-why-research/ [https://perma.cc/7KAT-J4F3].

95 Moira Donegan, *'Who will protect you from rape without police?' Here's my answer to that question*, Guardian (June 17, 2020, 8:50 ET), https://www.theguardian.com/commentisfree/2020/jun/17/abolish-police-sexual-assault-violence. https://www.theguardian.com/commentisfree/2020/jun/17/abolish-police-sexual-assault-violence.

96 Rachel M. Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 Violence & Victims 176, 187 (2018); Lisa R. Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. Gender Race & Just. 459, 467 (2017); Lesley McMilan, *Police Officers' Perceptions of False Allegations of Rape*, 27 J. Gender Stud. 9, 11–12 (2018). Both the McMilan and Avalos studies included officers who indicated that as high as 90 percent of women falsely report. McMilan, *supra*, at 11–12; Avalos, *supra*, at 497.

97 Kimberly A. Lonsway, *Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports*, 16 Violence Against Women 1356, 1358, 1366 (2010); Avalos, *supra* note 96, at 468. The police are more likely to disbelieve a claim of sexual assault if the victim knew (or was in a relationship with) her assailant, was intoxicated, or delayed reporting, even though research shows that these kinds of sexual assault are the most common. Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-stranger Sexual Assault*, 16 Violence Against Women 1318, 1321–22 (2010).

98 Baumlin & Meyer, *supra* note 36, at 15–16.

99 *Id.* at 16.

100 Rachel AO (@iamrachelao), Twitter (Nov. 19, 2017, 7:23 PM), https://twitter.com/iamrachelao/status/932403898329042945?s=20.

post emphasizes the author's feelings about what happened to them in a very vulnerable way. Using phrases such as "opened some wounds," "not ashamed," and "I am not alone," the reader cannot help but feel sympathy.

Moreover, the credibility of #MeToo posts is manifest in how the public responded to them. Although there are plenty of people who have accused #MeToo of going "too far,"[101] and a few high-profile defamation cases where powerful men have alleged that the accusations against them are false,[102] no one has argued that #MeToo stories are generally false or not to be believed. These stories simply read as true, which, as discussed more fully below, is likely due in part to the inherent believability of all stories and particularly first-person narratives.

#MeToo's digital format has also had an impact on its credibility. Although each participant's story has not been altered by the digital community, they are often commented on, either with words of support or similar stories. Commenters will often praise the storyteller for their bravery: "Thank you for sharing your story. I passed it on to raise awareness. I agree, you are very brave for putting yourself out there like that and I admire you so much for it. I hope I can be so brave! #MeToo."[103] Other comments showed hope that the movement itself would change the status quo: "#HappyNewYear friends, #RESIST-ers and beloveds seeking to change the world. Dear #SusanBAnthony, #MeToo is a thing now, thanks to courageous trailblazers like you. But there is more work to be done. 2019 is a new day. #TimesUp 2018!"[104]

The hashtag itself makes it easy to search for similar stories and the sheer volume of #MeToo posts undoubtedly adds to the credibility of each story; it is hard to disbelieve one #MeToo post when there are millions just like it.

Further, although #MeToo posts typically do not contain logical appeals or data, logos is still a part of #MeToo. Alyssa Milano's original Tweet asking others to join the chorus of "me too," used the interactive

101 Tovia Smith, *On #MeToo, Americans More Divided By Party Than Gender*, NPR (Oct. 31, 2018, 5:00 AM), https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender.

102 *E.g.*, Elahe Izadi & Sarah Ellison, *Why Johnny Depp Lost His Libel Case in the U.K. but Won in the U.S.*, Wash. Post (June 1, 2022), https://www.washingtonpost.com/media/2022/06/01/johnny-depp-libel-law-uk-us/; Doha Madani & Diana Dasrath, *Marilyn Manson Files Defamation Lawsuit Against Evan Rachel Wood over Rape and Abuse Allegations*, NBC News (Mar. 3, 2022, 11:25 AM), https://www.nbcnews.com/pop-culture/pop-culture-news/marilyn-manson-files-defamation-lawsuit-evan-rachel-wood-rape-abuse-al-rcna18436; Madison Pauly, *She Said, He Sued*, Mother Jones, Mar.–Apr. 2020, at 28; Ashley Cullins, *Brett Ratner Defamation Settlement Signals End of First Major Time's Up Legal Battle*, Hollywood Rep. (Oct. 2, 2018, 1:50 PM), https://www.hollywoodreporter.com/business/business-news/brett-ratner-defamation-settlement-signals-end-first-major-times-up-legal-battle-1148735/.

103 April Hardy (@aprilhardy01), Twitter (May 1, 2018, 1:26 AM), https://x.com/aprilhardy01/status/991186965474267137?s=20.

104 Christine Beswick (@bychristinebswk), Twitter (Dec. 31, 2018, 6:19 PM), https://x.com/bychristinebswk/status/1079879798565027840?s=20.

power of digital communication by combining a vast array of responses to create a powerfully cohesive impression of how vast the problem is. The reach of #MeToo cannot be overstated. Within one year, there were over 19 million tweets with that hashtag in 85 countries.[105] The movement also spilled over into Facebook where "about 4.7 million users shared 12 million posts in fewer than 24 hours."[106] Though certainly only anecdotal evidence, the number of posts do provide data, which some scholars have studied empirically.[107]

Finally, the viral nature of #MeToo is the product of kairos and relies on several prior hashtag movements and real-life events. #MeToo began as a social media movement on MySpace in 2006 as a result of Tarana Burke's counselling of a girl who was a victim of sexual assault.[108] Years later, several other hashtag movements arose, each of them responding to a single event or trend. In 2013, four years before the Harvey Weinstein scandal was made public, social media erupted with satirical memes, comics and online commentary regarding the habit of men insisting that "not all men" are bad actors.[109] In May of 2014, the satire had transformed into the #YesAllWomen hashtag on Twitter, which was used to both mock the "not all men" argument "to re-center women's shared experiences of sexism and misogyny." [110] The #YesAllWomen network quickly became a space for women to candidly discuss experiences with sexism and find solidarity in others' tweets.[111] The hashtag had over one million Tweets after four days.[112]

#YesAllWomen has a lot in common with #MeToo. Its primary purpose was to show the world how pervasive sexual assault and harassment are and it did so by allowing women to share their personal stories of the abuse they experienced.[113] Many of the Tweets also used the phrasing "we," showing a solidarity among all women.[114]

105 *MeToo Movement: Five Years On, How A Hashtag Shook the World*, NDTV.com (last updated on Sept. 29, 2022, 10:48 AM), https://www.ndtv.com/world-news/metoo-movement-five-years-on-how-a-hashtag-shook-the-world-3387462.

106 Sherri Gordon, *The #MeToo Movement: History, Sexual Assault Statistics, Impact*, Verywell Mind (Apr. 28, 2023), https://www.verywellmind.com/what-is-the-metoo-movement-4774817.

107 *See, e.g.*, Sepideh Modrek & Bozhidar Chakalov, *The #MeToo Movement in the United States: Text Analysis of Early Twitter Conversations*, 2019 J. Med. Internet Rsch. 1, 6 (2019).

108 Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline To Show How Far We've Come—& How Far We Need To Go*, Refinery29 (last updated Oct. 5, 2019, 12:55 PM), https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein.

109 Jess Zimmerman, *Not All Men: A Brief History of Every Dude's Favorite Argument*, Time (Apr. 28, 2014, 11:49 AM), https://time.com/79357/not-all-men-a-brief-history-of-every-dudes-favorite-argument/.

110 Jackson et al., *supra* note 9, at 3.

111 *Id.* at 4.

112 *Id.* at 3.

113 Jackson & Banaszczyk, *supra* note 81, at 397.

114 *Id.*

The next viral hashtag appeared in 2015 after a *New York Magazine* cover showed a picture of several women sitting next to each other in chairs, all of whom had accused Bill Cosby of sexual assault.[115] The last chair on the cover, however, was left empty to symbolize the eleven women who had accused Cosby but did not feel comfortable coming forward publicly, as well as the women who did not feel comfortable coming forward at all.[116] The #TheEmptyChair hashtag was created in response to this image by journalist Elon James White who then tweeted over 150 stories from women who had messaged him with their personal experiences and wanted them published but did not want to do so using their own accounts.[117] As with #YesAllWomen, #TheEmptyChair showed the large scale of sexual violence against women but also emphasized why the problem can be invisible as well as why women do not want to publicly disclose their trauma.[118]

#MeToo was built on the backs of these and other prior movements. Without the "digital labor, consciousness-raising, alternative storytelling, and organizing" of #YesAllWomen and #TheEmptyChair, #MeToo would likely not have found its footing as easily.[119] Though they did not reach nearly as broad an audience,[120] these prior movements showed that the mode of communication—short stories on Twitter—was a viable way of quickly reaching across the country and around the world.[121]

These movements also showed that the timing of #MeToo was appropriate, and that timing was bolstered by a series of national events that made #MeToo's reemergence in 2017 seem almost inevitable. In October 2016, a 2005 video recording became public, showing that then-Republican nominee for President, Donald Trump, had said some incredibly vulgar things about women to the host of *Access Hollywood*.[122] Despite public outcry, Trump won the election and women responded by staging one of the largest marches in history the day after his inauguration

115 *#TheEmptyChair Amplifies Conversation About Sexual Assault*, NPR (July 30, 2015, 5:07 AM), *https*://www.npr.org/2015/07/30/427458729/-theemptychair-amplifies-conversation-about-sexual-assault.

116 Ella Ceron & Lainna Fader, *35 Women and #TheEmptyChair*, Cut (July 28, 2015), *https*://www.thecut.com/2015/07/35-women-and-theemptychair.html.

117 *Id.*

118 Jackson et al., *supra* note 9, at 15.

119 *Id.* at 18.

120 Sarah J. Jackson, Moya Bailey & Brooke Foucault Welles, *Women Tweet on Violence: From #YesAllWomen to #MeToo*, Ms. Mag. (Mar. 5, 2020), https://msmagazine.com/2020/03/05/women-tweet-on-violence-from-yesallwomen-to-metoo/; Lindsey Bever, *#TheEmptyChair on NY's Magazine's Cosby Cover Takes on a Life of Its Own*, Wash. Post (July 28, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/07/28/theemptychair-on-ny-magazines-cosby-takes-on-a-life-of-its-own/.

121 Jackson et al., *supra* note 9, at 18.

122 Mark Makela, *Transcript: Donald Trump's Taped Comments About Women*, N.Y. Times (Oct. 8, 2016), https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html.

in January 2017.[123] The Women's March spanned the entire world, including Antarctica.[124] In October 2017, the final match was struck: the *New Yorker Magazine* story about Harvey Weinstein's pattern of sexual harassment and assault.[125] It was that very story that prompted Alyssa Milano to write the Tweet that made #MeToo go viral in 2017.[126]

The kairos-inspired interplay between media stories and #MeToo stories is also an essential part of #MeToo's impact. Back in 2017, traditional media's reporting on the Weinstein scandal caused people to post on social media and then the traditional media highlighted both the content of some of those early posts and emphasized the viral scope of the social media response, which incentivized more people to participate on social media. Traditional media's early reporting of #MeToo combined all of these small stories into a larger theme and gave it context for the public at large. In fact, traditional media labeled the hashtag a "movement" in the first place. This interplay remains strong; the number of #MeToo Tweets continue to spike when there is a news story involving a high-profile man accused of sexual misconduct.[127]

The persuasiveness of #MeToo can be easily traced to all four of Aristotle's rhetorical proofs. However, there is another aspect of #MeToo that has yet to be fully explored: #MeToo's narrative structure.

III. Storytelling

At its heart, #MeToo is a series of stories and stories have their own unique persuasive power. Although they have many things in common, it is worth noting that a story is distinct from a mere narrative. A narrative is defined as a "forgiving, flexible cognitive frame for constructing, communicating, and reconstructing mentally projected worlds."[128] Likewise, "[a] story is not information itself, but a construct, a way of structuring information that creates context and relevance and that engages the audience."[129]

123 *See* Lyric Lewin, *Moments from a Historic Day of Worldwide Protests*, CNN (Jan. 2017), https://www.cnn.com/interactive/2017/01/politics/womens-march-photos/.

124 *Id.*

125 Ken Auletta, *Harvey Weinstein's Last Campaign*, New Yorker (May 30, 2022), https://www.newyorker.com/magazine/2022/06/06/harvey-weinsteins-last-campaign.

126 Joyce Chen, *Alyssa Milano Wants Her 'Me Too' Campaign to Elevate Harvey Weinstein Discussion*, Rolling Stone (Oct. 17, 2017), https://www.rollingstone.com/tv-movies/tv-movie-news/alyssa-milano-wants-her-me-too-campaign-to-elevate-harvey-weinstein-discussion-123610/.

127 *See* Anderson & Toor, *supra* note 6.

128 David Herman, Story Logic: Problems and Possibilities of Narrative 49 (2002).

129 Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 Legal Comm. & Rhetoric 27, 29 (2021).

At its most basic, a story is distinct from mere narrative because it has three characteristics, "character, goal, and obstacles."[130] These three additional characteristics can be expanded to include "the elements of character, conflict, plot, setting, theme, point of view, tone, and style."[131] An even more detailed definition of a story requires that the story contain the following parts: an initial steady state, a disruption of that state, the protagonist's efforts to redress that disruption, a resulting restoration of the original state or a transformation of that state, and a conclusion that connects the circumstances of the story to the circumstances of the storyteller and audience.[132]

In addition to these substantive elements, stories must also properly use the structural aspects of organization and descriptions.[133] These more technical aspects of a story include "timing, framing, pace, language, when the story begins, when it ends, what gets described fully, what gets left out, [and] setting."[134] The structure of a story is just as important as its contents because the structure makes "the story what it is, delivering it to the reader or listener in a form that he recognizes and responds to."[135]

That stories persuade seems to have been axiomatic to ancient scholars, who focused their scholarship on simply understanding why they are persuasive. As noted above, the ancient Greeks referred to storytelling as mythos and later contrasted it with logos; one being fiction and the other being fact.[136] In contrast to logical appeals, stories focus on "characters, their goals, and their struggles to achieve their goals."[137] However, although some scholars see storytelling as distinct from logos,[138] storytelling does connect to Aristotle's other proofs. More specifically, storytelling or narrative is considered a form of emotion-based appeal (pathos) that persuades an audience not through logic but by allowing an audience to identify with the protagonist.[139] Moreover, the characteristics

130 Steven J. Johansen, *Was Colonel Sanders a Terrorist: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 65 (2010).

131 Robbins, *supra* note 129, at 29.

132 Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 Yale J.L. & Human. 1, 31 (2014).

133 Robbins, *supra* note 129, at 29.

134 Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to Classroom*, 7 J. ALWD 37, 43 (2010).

135 *Id.*

136 Chiara Bottici, *Mythos and Logos: A Genealogical Approach*, 13 Epoché 1, 2 (2008).

137 Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1, 9 (2010).

138 At least one philosopher has argued that mythos and logos were once synonymous and should be seen that way again. Bottici, *supra* note 136, at 2.

139 *See* Chestek, *supra* note 137, at 2.

of the storyteller (ethos) are often an intrinsic part of storytelling as the speaker adjusts to the reaction of the audience as they tell the story.[140]

Stories persuade because they tap into the way people see the world, other people, and even themselves.[141] Stories are how we make meaning[142] and, therefore, people innately "organize experience into narrative form."[143] This familiarity of format leads to persuasiveness as does the story's centering of a protagonist that the audience can identify with.[144] For that reason, giving information through a story causes the audience to use an entirely different cognitive process than they would use if they were presented with facts "as a list, as a straight chronology, or as a syllogism."[145]

But not all stories are created equal in terms of their persuasiveness. For a story to be persuasive, it must have three characteristics: narrative coherence, narrative correspondence, and narrative fidelity.[146] Narrative coherence consists of internal consistency, or how the parts of a story fit together, and completeness, or whether the story has gaps that make it hard to follow or believe.[147] "The key phrase in terms of internal coherence is 'causally connected,'" which means that "the events must bear a relationship to one another, not just be adjacent to each other or be randomly ordered."[148]

Consistency is essential because it implicates an audience's expectations. Because storytelling is such an innate part of human experience, an audience will have intuitive expectations of what is necessary for a story to feel complete or even make logical sense.[149] Accordingly, stories that rely heavily on context must still provide enough information for the audience to understand the characters and their motivations.[150] Although an audience will make some inferences to fill in gaps or bridge possible inconsistencies, they will only go so far. A story with too many gaps or pieces that do not make intuitive sense to an audience will cease to be credible or persuasive.

140 Rodden, *supra* note 30, at 153–54.

141 Paul Ricoeur, *Narrative Identity*, 35 Phil. Today 73, 77 (1991).

142 *See* Patrick J. Lewis, *Storytelling as Research/Research as Storytelling*, 17 Qualitative Inquiry 505, 505 (2011).

143 Ralph, *supra* note 132, at 26 (internal quotation and citation omitted); *see also* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Legal Writing 53, 57 (2008).

144 Rodden, *supra* note 30, at 167.

145 Robbins, *supra* note 129, at 29.

146 Ralph, *supra* note 132, at 27.

147 *Id.* at 27–28.

148 J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 Legal Comm. & Rhetoric 67, 75 (2013).

149 Rideout, *supra* note 143, at 65.

150 Chestek, *supra* note 137, at 9.

Coherence requires that a story fit with what its audience "understands could happen in the ordinary course of the world." [151] This understanding comes from previously accepted stories that make up the audience's culture and broad understanding of how the world works. [152] In other words, a story must be within what an audience believes could have happened or what typically happens in similar situations.[153] Fidelity is a related concept that requires a story to conform to the audience's expectations of how the world works, not based on prior stories or cultural understanding, but based on the audience's own personal experience of the world. [154]

Once a story has satisfied these requirements, its persuasiveness lies in its ability to immerse its audience in the narrative, thereby "priming" an audience to accept the information contained in the story.[155] In short, stories can change people's minds by overcoming their resistance to the information or message contained therein. Research has shown that, particularly for fictional stories, "people usually have little motivation and sometimes are unable to discredit information" presented in those stories.[156]

When told using a digital medium, a story's persuasiveness can be enhanced. "Digital storytelling" is defined as "the art and craft of exploring different media and software applications to communicate stories in new and powerful ways using digital media."[157] The art of digital storytelling includes decisions about the format of the story, including the mode and genre, because these decisions have "consequences for how a text will be received and used by its intended audience."[158]

As noted above, communication on social media is an extremely "dialectic process" whereby communication is interactive and iterative as an audience can both respond to a social media post, share it with new audiences and, ultimately, transform it, either with or without the original speaker's participation.[159] This process of "circulation, production and interpretation of media content" both "effects—and is effected by—social

151 Ralph, *supra* note 132, at 29.

152 *Id.*

153 *See id.* at 30; Rideout, *supra* note 148, at 72.

154 Ralph, *supra* note 132, at 30.

155 Xiaoxia Cao, *The Influence of Fiction Versus Nonfiction on Political Attitudes*, 32 Commc'n. Rsch. Rep. 83, 84 (2015).

156 *Id.*

157 Hilary McLellan, *Digital Storytelling in Higher Education*, 19 J. Computing Higher Educ. 65, 66 (2007).

158 Basaraba et al., *supra* note 66, at 382.

159 Gino Canella, *Social Movement Documentary Practices: Digital Storytelling, Social Media and Organizing*, 28 Digit. Creativity 24, 25 (2017).

and cultural institutions."[160] People create discussions on social media in response to events they personally experienced or that were reported in the mainstream media, which generate comments and conversations. Modern mainstream media is actively involved in this process by using social media to source articles, including their authors' social media handles in the story, including comments sections with their articles, and even reading social media comments on the air.

For example, when an orthodontist posted on his tumblr account that he had to repair a teenaged patient's retainer after she clenched her jaw too hard while watching Michael B. Jordan in "Black Panther," the teenager tweeted about finding her orthodontist's post.[161] Teen Vogue magazine then found the teenager and interviewed her. The teenager then tweeted about being interviewed, Michael B. Jordan found out and tweeted to her that he would buy her a new retainer,[162] and, eventually, the whole affair was discussed by Michael B. Jordan on *The Graham Norton Show*.[163] A rather whimsical example, but one that shows how a story can travel back and forth between social media and mainstream media using multiple social platforms and media outlets, all the while evolving as different actors became involved. Without the accessibility and interactivity of social media, this story would never have been told beyond water cooler talk at an orthodontist's office.

Perhaps this accessibility and dialectic process explains why social media has been used so much to create digital campaigns and movements by "construct[ing] inclusive narratives, highlight[ing] marginalized histories, and empower[ing] users."[164] More specifically, "[t]his digital space provides an alternative structure for citizen voices and minority viewpoints as well as highlights stories and sources based on relevance and credibility."[165] The #BlackLives Matter and #SayHerName social media campaigns, both created by Black women, gave a space to Black women to

160 *Id.*

161 Lauren Rearick, *Michael B. Jordan in "Black Panther" Leads Girl to Break Her Retainer*, Teen Vogue (Mar. 6, 2018), https://www.teenvogue.com/story/michael-b-jordan-black-panther-girl-retainer.

162 Dan Neilan, *Michael B. Jordan Buys Teen a New Retainer After She Bit Through it During His Shirtless* Black Panther *Scene*, AV Club (Mar. 7, 2018), https://www.avclub.com/michael-b-jordan-buys-teen-a-new-retainer-after-she-bi-1823581527.

163 Brian Lloyd, *Michael B. Jordan Reads Your Thirst Tweets on 'Graham Norton,'* entertainment.ie, https://entertainment.ie/tv/tv-news/michael-b-jordan-reads-your-thirst-tweets-on-graham-norton-385866/ (last visited Mar. 8, 2024).

164 Jessica Marie Johnson, *Social Stories: Digital Storytelling and Social Media*, 32 Forum J. 39, 40 (2018); *see also* Sarah J. Jackson & Brooke Foucault Welles, *#Ferguson is Everywhere: Initiators in Emerging Counterpublic Networks*, 19 Info. Commc'n. & Soc'y 397, 398 (2016). Twitter has been especially useful for this kind of mobilization. Johnson, *supra*, at 39–40. ("As a global public platform—accessible to anyone with a cell phone—Twitter offers users across the political spectrum opportunities to raise awareness of pressing issues; turn the spotlight on social protest; and challenge the narratives presented by major media outlets, government officials, and law enforcement.").

165 Jackson & Foucault Welles, *supra* note 164, at 399 (internal quotation omitted).

discuss institutional racism and police brutality without being criticized for "speaking too loudly and/or aggressively."[166] These hashtags also give space for these women to discuss these issues using the intersectionality lenses of gender and sexual identity. Before these hashtags were created, there was simply no place for these conversations to happen because these women lacked meaningful access to traditional media and, as the hashtags themselves indicate, mainstream media had been erasing the deaths of Black women in police custody for decades.[167]

The uniquely accessible nature of social media also makes digital storytelling "highly personal and at the same time, universal."[168] Social media allows users to connect their own personal stories to larger trends or highly publicized events and, in so doing, these users shape "the surrounding cultural narrative in profound ways."[169]

Finally, digital storytelling often consists of "micro-narratives" that can be combined to create "broader, more macro-oriented narratives."[170] This macronarrative is essential for digital storytelling to create social change. When digital storytellers see their micronarrative in the context of the macronarrative, their experience is contextualized, "thereby reframing these phenomena not as personal problems—something that happened to me, for instance, because of what I was wearing, who I was with, or how much I had to drink—but rather as widespread sociological phenomena."[171]

A. #MeToo as storytelling

Although #MeToo posts are widely referred to as "stories," a majority of the posts consist solely of the words "me too." A study of the first week of #MeToo posts in October 2017 showed that only nineteen percent of those posts included a first-person story describing sexual assault or abuse.[172] Even the longer posts on Twitter, which can be no more than

166 Gabrielle Reed, *#SayHerName: Putting the "I" in Intersectionality in Black Female Social Movements*, 13 McNair Scholars Rsch. J. 103, 110—11 (2020).

167 Marianne Schnall, *'Begin With The Story': Kimberlé Crenshaw On #SayHerName, Her New Book And Working Toward Gender Inclusive Racial Justice*, Forbes (Dec. 15, 2023, 01:19pm EST), https://www.forbes.com/sites/marianneschnall/2023/12/15/begin-with-the-story-kimberl-crenshaw-on-sayhername-her-new-book-and-working-toward-gender-inclusive-racial-justice/?sh=7e1b20ac21b9.

168 McLellan, *supra* note 157, at 66; *see also* Gino Canella, *supra* note 159, at 25 (noting the personal nature of digital storytelling).

169 Johnson, *supra* note 164, at 41.

170 Maria Grafström & Lena Lid Falkman, *Everyday Narratives: CEO Rhetoric on Twitter*, 30 J. Organizational Change Mgmt. 312, 314 (2017).

171 Karyn L. Freedman, *supra* note 93, at 6.

172 Modrek & Chakalov, *supra* note 107, at 6 (2019).

280 characters, do not have all of the elements of a traditional story. For example, one Tweet states:

> #metoo tell my story. Well at age 11.6 years old. I was attacked behind my elementary school, by my best friend? Jimmy Cullen. Within 24 hour, I was again violently raped for hours by Bill Roberts. My sisters disowned me instead of offering me help.[173]

This story has characters and conflict but no stated goal or conclusion. However, despite the lack of details in #MeToo stories, such as no description of setting, minimal character description, and little sense of cause and effect, these stories are deeply moving. Their power lies in their ability to tap into preexisting "stock stories"[174] about sexual assault. The reader, unfortunately, does not need a lot of explicit detail to imagine what the writer means when they say "attacked behind my elementary school." For women in particular, these stories are sadly familiar.

Other familiar themes emerge when examining #MeToo stories, many of which have been discussed by scholars for decades. For example, the abuser is typically known to the victim and has a relationship of trust, often a friend or family member:

> Amen! I'm going to speak out about sexual abuse & I'll tell my story until I can't talk anymore, then I'll write! I was Sexually abused by my Dr in his office and the parking garage while I was on crutches! I waited too long to speak up bc I'm a #CSA. Law's need to change.#MeToo[175]

> My story is different. Dad was a sexual predator, confronted him multiple times and got beaten black & blue. Feel angry, that I couldn't stop him or help others #MeToo #IPromise[176]

> This happened to me in college. One of my male friends attacked me in my bedroom, and my other friends continued to be friends with him as though nothing had happened. They believed my story, they just didn't believe my trauma. #MeToo #CollegeYears[177]

173 Sandra Armstrong (@SandraA51466276), Twitter (Nov. 20, 2017, 12:17 PM), https://twitter.com/SandraA51466276/status/932659199833714689?s=20.

174 Rideout, *supra* note 148, at 72.

175 SumWhtGirl (@SumWht), Twitter (May 27, 2018, 1:16 PM), https://x.com/SumWht/status/1000787839854886913?s=20. The acronym "CSA" stands for "child sexual abuse." *What is Child Sexual Abuse?*, Joshua Center, https://uwjoshuacenter.org/what-child-sexual-abuse (last accessed Apr. 4, 2024).

176 Crystal Homer (@CrystalHomer), Twitter (Nov. 9, 2017, 5:36 PM), https://x.com/CrystalHomer/status/928753090395860992?s=20.

177 LiberalLucy (@noiwillnotbe), Twitter (June 6, 2018, 8:49 PM), https://x.com/noiwillnotbe/status/1004525614412517382?s=20.

In combination with the victim knowing her abuser, many women reported that their sexual assault happened when they were young:

> So I'm going to share my story because I can't seem to get people to understand. When I was 12 I was molested by my grandfather. When I tried to tell my own mom she said I was a liar and a slut, that there was no way her father was capable of that. And even if he did it #MeToo[178]
>
> #MeToo 14 year old James Harris of the 1100 block of Wallis Ave Farrell, Pa when I was only 8 years old. . .[179]

And because sexual assault starts at a young age, women are often abused repeatedly throughout their lives:

> As is true for many survivors, I've been sexually abused multiple times in my life by multiple people, beginning in childhood. Here is one part of my story.[180]
>
> #MeToo 1) I know this coming late but I wanted to share my story. I was assaulted multiple times by a certain person among my family. I finally reported it to the police and had rape kit done and gave my statement. It was humiliating.[181]

As shown in the sample of #MeToo stories above, another theme often reported is that when the victim told her story—to a family member, friend, or even the police—they were not believed and the perpetrator faced no consequences. When told as part of the #MeToo movement, however, these stories are now met with support and sympathy, but never surprise; women understand these "stock stories" all too well.

Clearly, these microstories do enough for readers to make the necessary inferences, particularly because they explicitly connect to each other with the use of the #MeToo hashtag, which readers can use to find other stories with the same hashtag. Even the phrase "me too," is well constructed, showing solidarity and personal connection with only two words. It presumes a rampant problem that women share; Alyssa Milano did not make her plea assuming that only a few women would be able to identify with Harvey Weinstein's victims. Indeed, multiple #MeToo posts

178 Not Mostly Jaded (@notmostlyjaded), Twitter (May 25, 2018, 1:27 PM), https://x.com/notmostlyjaded/status/1000065849498259457?s=20.

179 Keri D. (Smith)Rose (@Keri_D_Rose), Twitter (Nov. 29, 2019, 6:03 PM), https://x.com/Keri_D_Rose/status/1200550762671222784?s=20.

180 Cynthia Moon (@CynthiaMoonPoet), Twitter (Sept. 24, 2018, 10:29 PM), https://x.com/CynthiaMoonPoet/status/1044413625774080000?s=20.

181 Shaun (@steinshaun), Twitter (Jan. 23, 2018, 12:47 PM), https://x.com/steinshaun/status/955859534941110272?s=20.

emphasize that the other women who have told their stories are not alone and posts often speak positively about finally feeling like they can tell their own story and encourage others to do the same:

> As a victim of sexual assault, . . . I was not too weak to say no, because I did. I wasn't too weak to tell my story, because I did. The #metoo movement allowed me to speak freely about my experience instead of having to act like it never happened.[182]
>
> Because #WeMatter! #MeToo #Hopeful I know in my story I may change one person's life. I may never even know it but it fills my heart just thinking about it! #BecauseICan ♥ [183]
>
> Everyone has a story . Including me . What's yours ? #MeToo[184]

These posts show that #MeToo participants saw the macronarrative of shared experiences even as they added their own micronarratives to it. Accordingly, #MeToo is the epitome of how a collection of micronarratives can become a macronarrative with profound consequences. As one scholar has noted:

> The widely observed "#MeToo moment" is not so much a moment but a loud chorus of voices that has, for years, been using Twitter and other social networks to tell women's stories about violence in a way that challenges the simplistic frames relied on by mainstream media and politicians. In these networks women tell their own stories, women are believed, male and celebrity allies helped to elevate ordinary women's voices, and women—experts in their own lives—offer nuance to all too often oversimplified and inaccurately reported issues of violence and victimhood.[185]

#MeToo has offered not only a place for women to tell their stories, but a place where they will be believed, have their voices amplified, and ultimately see real-world effects from the macronarrative their story contributed to when powerful men began to be fired and even arrested.[186] This real-world impact encouraged even more women to come forward.[187]

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182 Baylee Pope (@bayleefork), Twitter (June 11, 2018, 10:44 PM), https://x.com/bayleefork/status/1006366523647291392?s=20.

183 Lee (@NJIvorygirl), Twitter (June 24, 2018, 10:27 PM), https://x.com/NJIvorygirl/status/1011073267774390273?s=20.

184 OrientalDoll (@Honeyy_Doll), Twitter (Apr. 30, 2018, 4:11 PM), https://x.com/Honeyy_Doll/status/991047406547431424?s=20.

185 Jackson et al., *supra* note 9, at 19.

186 Shelley Cavalieri, *On Amplification: Extralegal Acts of Feminist Resistance in the #MeToo Era*, 2019 Wis. L. Rev. 1489, 1491–93 (2019).

187 *See* Nicolaou & Smith, *supra* note 108.

It is no wonder then that the positive responses to and the real-world changes caused by #MeToo encouraged more and more women to come forward. Some told stories of what happened to them decades ago, and spoke out against very powerful men. E. Jean Carroll is a prime example of a women who credited #MeToo with her willingness to speak out after so many years.[188] This was a drastic change from the "whisper networks" women historically relied upon to learn about the potential abusers in their midst. Historically, women would warn others who came into their small, insular groups (typically at a specific company or in a certain industry) but did so privately and discreetly for fear of being targeted and punished for speaking out.[189]

By going public with their stories, women's micronarratives combined to become a macronarrative that was key to changing social perceptions. Instead of multiple women amplifying each other's stories by telling their stories about the same perpetrator,[190] the volume of #MeToo stories amplified every individual woman's claim so that "[s]urvivors' claims were believed not because they related to specific individual aggressors, but because the movement amplified ALL survivors' experiences of assault and harassment as credible."[191] As one scholar pointed out, by combining the large but silent group's voices, the narrative shifted from "he said, she said" to "he said vs. *they* said."[192]

The volume of responses was shocking to some men and forced them to reevaluate what they knew of how women are treated by society and what they can do about it.[193] This effect was enhanced as the women in their lives confirmed that they also had a #MeToo story, which brought the narrative closer to home.[194] The hashtag #HowIWillChange was created by Australian journalist Benjamin Law to encourage men to publicly commit to improving the existing culture of violence towards women.[195]

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188 E. Jean Carroll, *Hideous Men: Donald Trump Assaulted Me in a Bergdorf Goodman Dressing Room 23 Years Ago. But He's Not Alone on the List of Awful Men in My Life*, N.Y. Mag., June 24, 2019, at 28.

189 Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. Chi. Legal F. 273, 278—79 (2019). Their fears were well founded as Moira Donnegan, creator of the "Shitty Media Men" spreadsheet, found out. Isabel Vincent, *Reporter Behind 'Sh—y Media Men' Headed to Trial for Defamation*, N.Y. Post (Apr. 2, 2022, 2:52 PM), https://nypost.com/2022/04/02/reporter-behind-sh-y-media-men-headed-to-trial/.

190 Though, of course, that did happen. *See, e.g.*, Joe Sommerlad & Ariana Baio, *Larry Nassar: A Timeline of the Sexual Abuse Allegations Against the Former USA Gymnastics Team Doctor*, Indep. (July 10, 2023, 18:14 BST), https://www.the-independent.com/news/world/americas/crime/larry-nassar-now-abuse-timeline-b1920783.html.

191 Cavalieri, *supra* note 186, at 1517.

192 *Id.*

193 *E.g.*, Somak Ghoshal, *Why the #MeToo Movement Left Me Overwhelmed, and Should Be a Wake-Up Call for Other Men Too*, Huffington Post (Oct. 17, 2017, 4:07 AM), https://www.huffpost.com/archive/in/entry/why-the-metoo-movement-left-me-overwhelmed-and-should-be-a-wake-up-call-for-other-men-too_in_5c10f443e4b085260ba76bc5.

194 *Id.*

That hashtag was retweeted by Alyssa Milano and had over ten thousand unique posts eight days later.[196]

The storytelling aspect of #MeToo may also have helped the public overcome its resistance to the message. As noted above, the ubiquity of sexual assault and harassment has been public knowledge for some time. According to the CDC, "[o]ver half of women and almost 1 in 3 men have experienced sexual violence involving physical contact during their lifetimes. . . . Additionally, 1 in 3 women and about 1 in 9 men experienced sexual harassment in a public place."[197] Since the late 1960s, scholars and researchers have been trying to reframe sexual assault as a social problem through conferences, workshops, and political demonstrations[198] with only limited success.

Despite their efforts, a true understanding of rape culture failed to take root in the public consciousness, likely because the truths inherent in #MeToo and the other hashtag campaigns that sought to raise awareness about sexual assault and harassment also come into direct conflict with longstanding rape myths. As noted above, rape myths are "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists that trivialize the sexual assault or suggest that a sexual assault did not actually occur."[199] These beliefs are "deeply held"[200] and resistant to change because they "serve to comfort us that we live in a just world where people are not raped at random."[201] More cynically, men may continue to hold on to rape myths because doing so ultimately benefits them by allowing them to ignore how often people who do not look like them (because they are women or trans or gay or gender nonconforming) suffer from sexual violence at the hands of people who do look like them.[202]

195 Alanna Vagianos, *In Response to #MeToo, Men are Tweeting #HowIWillChange*, Huffington Post (last updated Oct. 19, 2017), https://www.huffpost.com/entry/in-response-to-metoo-men-are-tweeting-howiwillchange_n_59e79bd3e4b00905bdae455d.

196 Alyssa F. Harlow et al., *Bystander Prevention for Sexual Violence: #HowIWillChange and Gaps in Twitter Discourse*, 36 J. Interpersonal Violence NP5753, NP5756 (2021).

197 *Fast Facts: Preventing Sexual Violence*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html#:~:text=Sexual%20violence%20is%20common.&text=One%20in%204%20women%20and,harassment%20in%20a%20public%20place (last visited Mar. 8, 2024).

198 Vicki McNickle Rose, *Rape as a Social Problem: A Byproduct of the Feminist Movement,* 25 Soc. Problems 75, 76 (1977).

199 Dr. JoAnne Sweeny, *"Brock Turner Is Not a Rapist": The Danger of Rape Myths in Character Letters in Sexual Assault Cases*, 89 UMKC L. Rev. 121, 137 (2020) (internal quotation marks and citations omitted).

200 Lynn Hecht Schafran & Claudia Bayliff, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case, The Challenges of Adult Victim Sexual Assault Cases*, Nat'l Jud. Educ. Program, Legal Momentum 1, 2 (2011), https://www.legalmomentum.org/library/judges-tell-what-i-wish-i-had-known-i-presided-adult-victim-sexual-assault-case.

201 Sweeny, *supra* note 199, at 138 (citing Kate Harding, Asking for it: The Alarming Rise of Rape Culture—and What We Can Do About it 23 (2015)).

202 Freedman, *supra* note 93, at 9.

The storytelling aspect of #MeToo has been able to more effectively overcome longstanding resistance to the truth about rape culture because #MeToo provides "epistemic friction" or an alternative story to the ones inherent in rape myths, which can "mitigate against the widespread resistance among dominantly situated knowers to acknowledge, in this case, the realities of sexual violence and sexual harassment against women."[203] The thousands of stories from women that coalesced into a larger story allowed men to "learn something about the world as experienced from social positions other than [their] own," which has been extremely hard for them to ignore.[204]

B. #MeToo as legal storytelling

Not only is #MeToo an example of digital storytelling, it is also an example of legal storytelling. Legal storytelling focuses on "the idea that the law is made up of stories that are constructed by lawyers, clients, and decision makers."[205] Legal storytelling scholars have identified the power of storytelling in the legal context as a way to go beyond pure logical appeals to persuade an audience.[206]

Legal storytelling takes existing storytelling concepts to examine how stories persuade in the legal world.[207] For example, in the legal world, stories must still have coherence, correspondence, and fidelity for them to be accepted by a judge or jury.[208] Indeed, narrative coherence is particularly important for legal storytelling because lawyers are limited in what facts they can present to a jury based on the rules of evidence.[209]

Legal storytelling scholarship often focuses on the lawyer as a storyteller who is charged with telling their client's story and must decide how to tell that story in a way that advances their client's goals.[210] This scholarship places the legal world in the center of the analysis and applies storytelling concepts to what lawyers do. In addition, legal storytelling scholarship also looks at how the legal world can impact (or be impacted by) extralegal stories.[211]

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203 *Id.*

204 *Id.* at 13 ("And perhaps unsurprisingly, the more we know about people, the harder it is to deny their humanity.").

205 Grose, *supra* note 134, at 41.

206 Chestek, *supra* note 137, at 4–5.

207 *See* Michael Gagarin, *Rational Argument in Early Athenian Oratory*, *in* Logos: Rational Argument in Classical Rhetoric 9, 17 (Jonathan Powell ed., 2007).

208 *See* Rideout, *supra* note 143, at 66–67.

209 *Id.* at 64.

210 Grose, *supra* note 134, at 44.

211 *See* Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 Md. L. Rev. 747, 758 (2016) (discussing how preexisting racial biases in the

The law is clearly invoked in many #MeToo stories. For example, Tweets often include a reference to the police:

> I was abused by the bishop of my Amish church. I went to the police and they did not seem to know what to do because we were Amish. My abuser escaped to Canada. Need more awareness about abuse in strict churches. Speak out!! It could save others from being hurt![212]

> I've been breaking the silence since I escaped child sex trafficking at 17, 30 years ago. But no-one was listening. I went to the police four times and they did nothing. Even my vaginal scars weren't enough proof for them.[213]

A spinoff hashtag #PoliceMeToo, has been created just for stories of police officers' abuse—either by failing to properly investigate sexual assault and domestic violence cases or by being perpetrators themselves.[214] In addition, even if not directly referenced, the criminal justice system's failure to punish sexual abusers is inherent in every #MeToo story because the women who post with the #MeToo hashtag have invariably not reported the crime for fear of not being believed.[215] #MeToo is about breaking silence and, if the criminal justice system was working the way it was supposed to, that silence would not be necessary.

#MeToo has also influenced the law. By alerting the public to the pervasiveness of sexual assault and harassment, actual legislative changes have been made such as extended statutes of limitations for harassment and sexual abuse claims,[216] laws that ban the use of nondisclosure agreements in sexual misconduct cases, [217] lower requirements for

form of "stock stories" can influence police behavior); Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259, 260 (2009) (discussing how "outmoded metaphors, simplistic images, and unexamined narratives" can interfere with judges' ability to apply the best interests of the child standard in child custody cases).

212 Misty Griffin (@Misty_E_Griffin), Twitter (Nov. 8, 2017, 1:43 PM), https://twitter.com/Misty_E_Griffin/status/928332199367020545

213 Charlotte הרופיצ Issyvoo (@CIssyvoo), Twitter (Dec. 8, 2017, 9:32 PM), https://twitter.com/CIssyvoo/status/939321842736566272.

214 A UK website has been created to compile these stories. *See* Police Me Too, https://police-me-too.co.uk/ (last visited Mar. 8, 2024).

215 *See* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. Rev. 1146, 1150 (2019); Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. Crim. L. & Criminology 554, 560 (1994).

216 W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 Tex. L. Rev. 587, 650 (2023).

217 Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. Ill. L. Rev. 45, 60 (2019); Anna North, *7 Positive Changes That Have Come From the #MeToo Movement*, Vox (Oct. 4, 2019, 7:00 AM), https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019; Edward G. Phillips & Brandon L. Morrow, *Hush Hush Non-Disclosure Provisions in the Sexual Harassment Context*, 59 Tenn. Bar J. 38, 39 (Jan.–Feb. 2023).

the "severe and pervasive" standard,[218] and a federal law that limits the enforceability of agreements that prevent employees from disparaging their employer or speaking about their experience with workplace sexual assault or harassment if those agreements were signed before the sexual assault or harassment took place.[219] In other words, in certain contexts, employers cannot make employees sign these agreements as a regular part of their business in an effort to prevent their employees from later speaking out about their abuse. These legislative changes are widespread; since #MeToo began, 22 states and the District of Columbia have passed a total of more than 70 workplace anti-harassment bills, many with bipartisan support.[220]

There have also been changes to the law through the judicial system. Since #MeToo, attorneys have been more creative in their use of legal doctrine to get damages for their clients such as suing for defamation, RICO, and human trafficking.[221] In addition, there is evidence that, post-#MeToo, more sexual harassment cases are progressing past the summary judgment stage and, once they do, juries are awarding larger verdicts.[222] #MeToo is also increasingly referenced by courts in a wide variety of contexts such as anti-SLAPP lawsuits[223] and Title IX cases.[224] Though some of these changes may have come about organically, most likely trace their origin to the #TimesUp movement, which #MeToo inspired. In addition to the hashtag, #TimesUp is also the name of a legal defense fund founded by more than three hundred women in the entertainment industry that funds litigation and lobbying efforts.[225]

The law and #MeToo are therefore inextricably entwined. Although these stories did not begin in a courtroom and were not created by

218 Holly R. Lake, *#MeToo Movement's Impact on Law and Policy in Hollywood*, 42 L.A. Law. Mag. 52, 52 (May 2019).

219 Phillips & Morrow, *supra* note 217, at 39.

220 Andrea Johnson et al., *#MeToo Five Years Later: Progress & Pitfalls in State Workplace Anti-Harassment Laws*, Nat'l Women's L. Ctr. 2 (Oct. 2022), https://nwlc.org/wp-content/uploads/2022/10/final_2022_nwlcMeToo_Report-MM-edit-10.27.22.pdf.

221 Cardi & Chamallas, *supra* note 216, at 650.

222 Bobbi K. Dominick, *The Increasing Complexity of Workplace Harassment Investigations After #MeToo*, 62 Advoc. (Utah) 22, 22 (2019).

223 *E.g.*, Goldman v. Reddington, No. 18-CV-3662, 2021 U.S. Dist. LEXIS 78103 (E.D.N.Y. Apr. 21, 2021). "SLAPP" stands for "strategic litigation against public policy" and refers to defamation lawsuits brought against people to silence them. Anti-SLAPP laws are meant to give protection to defamation defendants if they can show that their statements are about a matter of public concern. Dr. JoAnne Sweeny, *Social Media Vigilantism*, 88 Brook. L. Rev. 1175, 1206 (2023).

224 *E.g.*, Doe v. Columbia Univ., 551 F. Supp. 3d 433 (S.D.N.Y. 2021); Simons v. Yale Univ., No. 19-cv-1547, 2020 U.S. Dist. LEXIS 180325 (D. Conn. 2020).

225 *TIME'S UP Was Born When Women Said "Enough Is Enough,"* Time's Up, (captured May 8, 2023), https://perma.cc/QS43-H2RH; *see* Jamillah Bowman Williams et al., *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. Chi. Legal F. 371, 376 (2019).

lawyers (although, statistically speaking, some of the storytellers are likely to be lawyers) #MeToo, ultimately, is legal storytelling.

IV. Conclusion

#MeToo has a lot to teach us about what makes stories persuasive both in and out of the courtroom. If the goal in legal storytelling is to learn how to persuade on behalf of one's client, #MeToo shows us what truly matters in a story and what can be left to the audience to infer. Crucially, personal stories carry inherent credibility (ethos) and even short or incomplete stories are credible if they have a "stock story" to rely on. Additionally, #MeToo's power lies in its macronarrative structure. Any one of the more detailed #MeToo stories, though harrowing, would never have sparked so many social and legal changes if not combined with the overwhelming chorus of "me too." And it is that chorus that caused traditional media to report on the hashtag and amplify these stories further, turning that chorus into a movement. The movement in turn both created and benefitted from kairos, a feeling that the time to deal with this issue had finally come, which made people more interested and willing to listen. The related hashtag "#TimesUp" emphasizes the historic moment that was being captured. #TimesUp also was a major player in ensuring that the social media movement has had real-life impact on the law, transforming #MeToo into a prime example of legal storytelling.

#MeToo ultimately shows the importance of context and how a story can fit in with what a silenced group already knows to such an extent that it disrupts the public's longstanding beliefs about how the world works. In so doing, #MeToo shows how an audience's resistance to information can be effectively worn down, paving the way for a new worldview. Though most attorneys' goals may not be so lofty, #MeToo still provides valuable lessons that we should not ignore.

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ARTICLE

Humility—A Path to More Persuasive Legal Writing

Bret Rappaport*†

It infuriates me to be wrong when I know I am right. —Molière[1]
Humility is '[t]he highest virtue, the mother of them all.' —Tennyson[2]

A morning walk

That morning, a crisp breeze blew off Lake Michigan as I walked to North Hall. The sun beamed as students walked by nodding their heads—*hello*.

That morning, my 11:30 appointment was with the Lake Forest College's new President. I teach English at the college. The meeting was at her invitation. An email blast some months earlier merely said that the President wished to meet with any staff or faculty who wished to meet with her. I made an appointment.

That morning, I happened to be carrying this humility article in my briefcase having tweaked the near final draft earlier that day. Then it struck me. Ask the President why she was meeting with me, or any of the other scores of employees she met with. Certainly, more pressing matters demanded her time.

* Lecturer in English, Lake Forest College. Bret, a practicing lawyer for more than thirty-five years, earned a J.D. from University of Illinois Chicago, a B.S. in Finance from Indiana University, Bloomington, Indiana, and a M.A. in Writing & Rhetoric from DePaul University, Chicago, Illinois. Bret is grateful to North Carolina District Judge Ashleigh Parker Dunston and Cook County, Illinois Associate Judge Patrick Stanton for their time and criticism. Thank you to Carol Austin PhD and Jeffrey Newman J.D. for their suggested changes to a near final draft. A sincere thank you to the editors at this journal, Amy Langenfeld and Kent Streseman, whose hard work made this article so much better. Mostly, Bret thanks his wife, Jina, for her continuing support of his scholarship and for being there. TFA.

† Lake Forest College student Ido Zimbleman served as a research assistant for this article. His insights and contributions proved invaluable. Thank you, Ido.

1 Quoted in Kathryn Schulz, Being Wrong: Adventures in the Margin of Error 3 (2010).

2 Alfred Lord Tennyson, *The Holy Grail*, in Idylls of the King [1859–1885] (available at https://d.lib.rochester.edu/camelot/text/tennyson-the-holy-grail).

That morning, we sat at a small round table for a bit.[3] The office was bright. We talked about the college, our personal academic journeys, a little this, a little that. Kids. As the meeting wound down, I told her about this article. I said that it seemed to me a humble gesture for THE college president to take hours and hours and hours over the first months at a new job to meet with *any* staff or teacher who wished to so meet. "Why?" I asked.

"On-boarding for me is a short window," she said. "I just want to know from the people on the front lines—the ones who teach and interact with the students. I want to learn from them."

To learn from them—a scholar with decades of experience and an alphabet of higher education degrees—wanted to learn from others. And in that moment, the sun shone a bit brighter.

I smiled, that morning.

Introduction—arrogance hampers effective legal writing

Confidence epitomizes most lawyers; over-confidence some; arrogance a few. While confidence may inspire,[4] overconfidence presents a hazard,[5] and arrogance, well arrogance just totally turns off any audience.[6] As trial lawyer Zach Wolfe puts it: "A pompous or arrogant lawyer is usually a less persuasive lawyer."[7]

On a more macro scale, as Leo Tolstoy observed, the real danger of arrogance is that "an arrogant person considers himself perfect. This is the chief harm of arrogance. It interferes with a person's main task in life—becoming a better person."[8]

Confidence and overconfidence stand at one side of a spectrum (least to most) of a lawyer's view of the correctness of their belief, and

3 Interview with Jill M. Barren, MD, President, Lake Forest Coll., Lake Forest, Ill. (Apr. 18, 2023).

4 *See* James Gray Robinson, *10 Tips for Lawyers to Establish Self-Confidence and Client Compassion*, ABA J. (July 19, 2022, 10:25 AM), https://www.abajournal.com/voice/article/how-attorneys-can-claim-their-power; *see also* Joseph Folkman, *How Self-Confidence Can Help or Hurt Leaders*, Forbes (Feb. 12, 2019, 5:54 PM), https://www.forbes.com/sites/joefolkman/2019/02/12/how-self-confidence-can-help-or-hurt-leaders/ ("High confidence leaders were rated as being more inspiring.").

5 *See* Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 Psych. Pub. Pol'y & L. 133 (2010).

6 *See generally* Stan Silverman et al., *Arrogance: A Formula for Leadership Failure*, 50 Indus. & Org. Psych. 21, 25 (2012) ("Individuals who are arrogant at work make interpersonal interactions difficult, create an uncomfortable and potentially stressful work environment for others, and have poor performance ratings.").

7 Zach Wolfe, *Do Narcissists Make Better Lawyers?*, Five Minute Law (Jan. 14, 2019), https://fiveminutelaw.com/2019/01/14/do-narcissists-make-better-lawyers/.

8 Leo Tolstoy, Path of Life 110 (1909).

the lawyer's projection (written or spoken) of that view onto their audience. On the opposite end of the spectrum from arrogance sits the character trait of pusillanimity[9]—more commonly called self-deprecation, cowardness, servility, or timidity. This form of self-deprecation is an equally odious quality to arrogance for a lawyer to possess and project. As the late Colorado Supreme Court Justice William Erickson observed, "Advocacy is not for the timid or meek."[10]

Some call the deep form of lack of confidence "humility." That is wrong. Self-deprecation and humility are different characteristics, and profoundly so.[11] While the former derives from low esteem,[12] the latter is rooted in restraint and the "realistic assessment of one's own worth and a willingness to give credit where it is due and to listen to others."[13] The word humility comes from the Latin word *humilitas*, which translates as "grounded" or "from the earth."[14]

From those roots we can see how "humility does not demand timidity, self-effacement, passiveness, or quietness, although it does urge circumspection, patience, respectfulness, and considered attention to others."[15] Viewed this way, humility lies on the spectrum at the "mid-point between two negative extremes of arrogance and lack of self-esteem."[16] Most simply, the essence of humility is "treating other things—especially other people—as if they really matter."[17]

Unfortunately, lawyers rarely possess humility or, if they do, even more rarely exemplify it. As one soon-to-be lawyer put it, "When one

9 Bruce C. Frohnen, *Augustine, Lawyers & the Lost Virtue of Humility*, 69 Cath. U. L. Rev. 1, 4 (2020).

10 William H. Erickson, *A Book Review with an Eye to Ethics*, 81 Mich. L. Rev. 1191, 1192 (1983).

11 Sang-Yeon Kim & Erin S. Parcell, *Construct-Validating Humility: Perceptions of a Humble Doctor*, 13 Frontiers Psych. 1, 4 (May 17, 2022), https://www.frontiersin.org/articles/10.3389/fpsyg.2022.882622/full.

12 Alessandra Tanesini, *Intellectual Servility and Timidity*, 43 J. Phil. Rsch. 21 (Nov. 13, 2018), http://imperfectcognitions.blogspot.com/2018/11/intellectual-servility-timidity.html.

13 Frohnen, *supra* note 9, at 4. The Supreme Court cited its view that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" as the basis to dismiss Myra Bradwell's claim that Illinois's denial of a law license was unconstitutional. Bradwell v. Illinois, 83 U.S. 130, 141 (1872). While the case holding was wrong, and disavowed, *see* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 896–97 (1992), the sentiment that a "timid" lawyer is not an effective one remains, *see* J. Gary Gwilliam, *Lessons from Losing: How to Beat Defeat*, Plaintiff Mag. (Nov. 2008), https://www.plaintiffmagazine.com/recent-issues/item/lessons-from-losing-how-to-beat-defeat ("A true trial lawyer is not timid and uncertain.").

14 *Humility*, Wikipedia, https://en.wikipedia.org/wiki/Humility (last modified Apr. 26, 2024, 2:04 PM).

15 Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. Davis L. Rev. 127, 162 (1998).

16 Dusya Vera & Antonio Rodriquez-Lopez, *Strategic Virtues: Humility as a Source of Competitive Advantage*, 33 Org. Dynamics 393, 395 (2004).

17 Scharffs, *supra* note 15, at 162. One could place narcissism furthest to the right of the spectrum of one's view of the correctness of his or her own beliefs. Narcissism is "one of several types of personality disorders—is a mental condition in which people have an inflated sense of their own importance, a deep need for excessive attention and admiration, troubled relationships, and a lack of empathy for others." Mayo Clinic, *Narcissistic Personality Disorder*, Patient Care & Health Info. (Apr. 6, 2023), https://www.mayoclinic.org/diseases-conditions/narcissistic-personality-disorder/symptoms-causes/syc-20366662. As a mental illness, and not a choice, narcissism is not germane to this article.

thinks of common traits in lawyers, I would venture to say that humility is at the very bottom of that list—if it even makes the list at all. But maybe it should."[18] The absence of humility in the legal profession is a problem, and McGill University's Phil Lord argues that the remedy starts with cultivating a sense of humility in law students.[19] He is right about starting with law students, but that does not mean we practicing lawyers cannot change. Humility can be learned.[20] And that skill should be manifested in persuasive legal writing.

Why? Let's step back. Lawyering is a profession in distress for a couple of big, and related reasons. First its practitioners, us lawyers, are mostly unpopular.[21] Second, us lawyers are mostly unsatisfied with our profession, especially lawyers in their early career.[22] As outlined in the landmark report from the National Task Force on Lawyer Well-Being, lawyers suffer high rights of burnout, depression, and suicide.[23] These twin interconnected realities of low public opinion and low practitioner satisfaction are not just a problem for lawyers (which is problem enough), but these realities are a problem for society.

Both public respect for lawyers and lawyers embracing what they do are critical to a functioning legal system and to achieving justice.[24] No article can begin to unpack the sources of these crises or rattle off solutions. Rather, here, I suggest one added tool to the lawyer's toolbox—humility—although it is better described as a mindset than as a tool.

18 Roma Gujarathi, *Intellectual Humility: Could I Be Wrong?*, BC Law: Impact (Mar. 31, 2022), https://bclawimpact.org/2022/03/31/intellectual-humility-could-i-be-wrong/.

19 Phil Lord, *Cultivating Humility*, 55 The Law Teacher 364 (2021).

20 *Infra* section II.

21 The 2023 Gallup Poll of Honesty and Ethics in Professions places lawyers in the bottom third. *See Honesty/Ethics in Professions*, Gallup (Dec. 2023), https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx.

22 Debra Cassens Weiss, *Survey Finds Decline in Lawyer Well-Being, Particularly for Early-Career Respondents*, ABA J. (June 30, 2021, 10:56 AM), https://www.abajournal.com/news/article/survey-finds-decline-in-lawyer-well-being-particularly-for-early-career-respondents.

23 Am. Bar Assoc. Nat'l Task Force on Law. Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, Inst. for Well-Being in Law (Aug. 14, 2017), https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf.

24 *See* John J. Parker, *A Profession Not a Skilled Trade*, 8 S.C. L. Rev. 179, 179 (1955) ("The practice of the law is a profession—not a business or a skilled trade. While the elements of gain and service are present in both, the difference between a business and a profession is essentially this: the chief end of a trade or business is personal gain; the chief end of a profession is public service. Of the three learned professions, . . . it pertains to the minister to teach, to the physician to heal and to the lawyer to give peace and order to society."); *see also* Stephen Breyer, Assoc. Justice, University of Pennsylvania Law School Commencement Remarks, Academy of Music, Phila., Pa. (May 19, 2003) (transcript at https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-19-03) ("The rule of law that this system reflects has served us well in protecting our liberty. It is a national treasure. But as John Marshall said, the 'people made the Constitution and the people can unmake it.' Its continued existence depends upon our willingness, and our ability, to make certain that the next generation of Americans participates in our democratic, governing process and understands the Constitutional importance of doing so. Your contribution to the transmission of those values, through teaching, through example, through participation in public life, is also a form of public service.").

Conceit is off-putting,[25] and conceited people tend to be stressed, depressed and anxious.[26] By contrast, people warm up to those who convey humility,[27] and people who are humble are generally more satisfied with who they are and what they do than those who are not humble.[28] Lawyers ply their trade with words—either spoken or written. Humility should hold a central role in both arenas. Humility in legal oration is a topic for another day (and maybe another article). This article examines humility in legal writing. Writing with such a mindset and in such a manner can help, maybe a little bit, to lessen the distress in which our profession is mired and also render lawyers more effective.

Turning now to writing with humility, we lawyers should not write as if we are Paul Simon's metaphorical boxer who hears "what he wants to hear and disregards the rest."[29] Rather, legal writers should write with a good dose of humility, as Chief Justice John Roberts advises. Responding to a student's question after a speech at Northwestern University Law School, Roberts noted the Supreme Court receives hundreds of briefs, all the same, that say, "my client clearly deserves to win," and then he noted a better way:

> When you come across a brief that begins more or less like "this is kind of a tough case and there are good arguments on the other side. We think we should prevail, though, because this is the important argument and we recognize this but here's why they shouldn't carry the day." That, you immediately develop sympathy with that because that lawyer is putting him or herself in your position. Because your job [as a judge] is to recognize there are good arguments on both sides and try to come up with the best solution. That lawyer recognizes that, and boy, I tell you, you read that brief a lot more carefully than the one that says guess what? "This is an easy case. I should win."[30]

A Washington Post article[31] about Roberts's speech inspired Vermont Law School Professor Gregory Johnson to write one of the few articles

25 Jessica Wortman & Dustin Wood, *The Personality Traits of Liked People*, 45 J. Rsch. Personality 519 (2011).

26 Nelson Cowan et al., *Foundations of Arrogance: A Broad Survey and Framework for Research*, 23 Rev. Gen. Psych. 425, 435 (2019) (author manuscript available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8101990/); *see also* David Owen & Jonathan Davidson, *Hubris Syndrome: An Acquired Personality Disorder? A Study of US Presidents and UK Prime Ministers over the Last 100 Years*, 132 Brain 1396 (2009).

27 Ai Ni Teoh &Livia Kriwangko, *Humility and Competence: Which Attribute Affects Social Relationships at Work?*, 19 Int'l J. Env't Rsch. Pub. Health 1, 9 (May 14, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9140553/.

28 *See infra* notes 82–83.

29 Simon & Garfunkel, The Boxer (Columbia Records 1969).

30 John Roberts, *Role of the Chief Justice*, C-SPAN (Feb. 1, 2007), https://www.c-span.org/video/?196510-1/role-chief-justice.

31 Robert Burns, *Chief Justice Counsels Humility*, Wash. Post, Feb. 6, 2007, at A15.

arguing for more humility in legal advocacy.[32] Rather than a single trigger, my impetus for advocating for some humility in legal writing arose from just getting tired, tired, tired of all the rancor and aggressiveness in legal writing recast as zealous advocacy.[33] It is not effective. I agree with Louisiana appellate lawyer Raymond P. Ward, who said, "If there is one virtue that makes a good legal writer, it is humility."[34]

This article argues that possessing and demonstrating intellectual humility in persuasive legal documents serves to make those documents *more* persuasive. To establish the thesis's validity, we will first explore humility as a character trait, and its power. We unpack the connection between humility of the speaker/writer and their credibility in the minds of their audience with respect to an argument. This article then turns to the role credibility plays in enhancing the persuasiveness of that argument, and how humility is viewed and studied now as a communication construct and not just a virtue. Finally, we tie these threads together showing that realizing intellectual humility and writing in a way that communicates sincere anti-arrogance as *confident humility* in persuasive legal writing makes writing more persuasive.

I. Intellectual humility: its study, source, power, and nexus with credibility

A. The study of intellectual humility and its evolutionary roots

For more than 100 years, religion stood as the primary—if not exclusive—locus for the exploration and application of humility, where it was seen as a virtue.[35] Recently, scholars have broadened that focus to explore how humility can be more than a virtue. It is also a character trait. As such, humility is a product of both Nature and the environment. Most important, for the purposes of this article, humility can be learned.

Humility has two aspects. First, humility is evidenced by "personal hallmarks."[36] These character traits include a calm accepting concept of self not hypersensitive to ego threats, an acceptance of personal strengths and weaknesses, and an openness to new information.[37]

32 Gregory Johnson, *Credibility in Advocacy: Humility is the First Step*, 39 Vt. B.J. 22 (2013).

33 Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751 (1994).

34 Raymond P. Ward, *Humility*, Certworthy 7, 7 (Winter 2003), https://raymondpward.typepad.com/newlegalwriter/files/Humility.pdf.

35 *Matthew* 18:4 (Jesus says: "Therefore, whoever humbles himself like this child is the greatest in the kingdom of heaven.").

36 Joseph Chancellor & Sonja Lyubomirsky, *Humble Beginnings: Current Trends, State Perspectives and Hallmarks of Humility*, 7 Soc. & Personality Psych. Compass 819, 823 (2013).

37 *Id*. at 823–26.

Second, humility is a relational trait that plays out not only in how we look in the mirror, but what we see out the window. These "relational hallmarks" include an appreciation of others and an egalitarian view of seeing others as having the same "intrinsic value and importance as oneself."[38]

This broader study of humility is part of a growing area of scholarship called "positive psychology."[39] Traditionally, psychology focused on identifying and helping to remedy human maladies. By contrast, positive psychology focuses on human strengths, virtues, and talents.[40] Primary topics of positive psychology include gratitude, forgiveness, and humility—what can be characterized as *other-oriented* behaviors.

Other-oriented behaviors boast evolutionary roots.[41] First, there is the "social oil" hypothesis that asserts humility is adaptive because it acts as a buffer to "reduce relational wear and tear."[42] Second, there is the "well-being" hypothesis that contends that humility fosters better relationships because humility enhances a personal sense of goodness and contributes to the quality of romantic relationships.[43] Finally, there is the "social bonds" hypothesis[44] positing that humility helps "build coalitions and alliances and create secure low-level stress environments with preparedness to care, support, and invest in others."[45] In this way, humility is a prosocial behavior building trust between individuals and within groups.[46]

Broadly, humility involves an accurate view of one's own abilities and a recognition of others' value.[47] There are several types of humility,

38 *Id*. at 826–27.

39 *See generally* Handbook of Humility: Theory, Research, and Applications (Everett l. Worthington, Jr., Don E. Davis & Joshua N. Hook eds., 2016) [hereinafter Handbook of Humility].

40 *See generally* Christopher Peterson & Martin Seligman, Character Strengths and Virtues: A Handbook and Classification (2004).

41 *See generally* Paul Gilbert & Jaskaran Basran, T*he Evolution of Prosocial and Antisocial Competitive Behavior and the Emergence of Prosocial and Antisocial Leadership Styles*, 10 Frontiers Psych. 1 (June 25, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6603082/; *see also* Darcia Narvaez, *Humility in Four Forms: Intrapersonal, Interpersonal, Community, and Ecological*, *in* Humility ch. 5 (Jennifer Cole Wright ed., 2019), *in* The Virtues (Oxford U. Press); Daryl R. Van Tongeren et al., *Humility*, 28 Current Directions in Psych. Sci. 463 (2019); Aiden P. Gregg & Nikhila Mahadevan, *Intellectual Arrogance and Intellectual Humility: An Evolutionary Epistemological Account*, 42 J. Psych. & Theology 7 (2014).

42 Van Tongeren et al., *supra* note 41, at 464.

43 *See* Rachel C. Garthe et al., *Humility in Romantic Relationships*, *in* Handbook of Humility, *supra* note 39, at 221.

44 Van Tongeren et al., *supra* note 41, at 464.

45 Gilbert & Basran, *supra* note 41, at 3.

46 Matthew A. Humphreys, *Mechanisms of Humility's Influence on Prosociality* (May 3, 2019) (Ph.D. dissertation, University of Maine), https://digitalcommons.library.umaine.edu/etd/2962.

47 *See generally* June Price Tangney, *Humility: Theoretical Perspectives, Empirical Findings, and Directions for Future Research*, 19 J. Soc. & Clinical Psych. 70 (2000).

including cultural humility,[48] generational humility,[49] and intellectual humility, the focus of the balance of this article.

Intellectual humility focuses on the intellectual domain and is part of a suite of intellectual virtues that also includes modesty, selflessness, respectfulness, and open-mindedness.[50] A spate of intellectual vices, opposite these virtues, includes vanity, arrogance, pride, dogmatism, and closed-mindedness.[51] Such virtues and vices do not generally coexist in an individual. This article focuses on promoting intellectual humility and thus avoiding these intellectual vices.

Simply, intellectual humility means realizing and manifesting that "I might be wrong." There are more robust definitions, a good example of which is offered by Hillsdale College philosophy professor Ian M. Church. He defines intellectual humility as "the virtue of valuing one's own beliefs as he/she ought"[52] and counsels that "intellectual humility is best thought of as a virtuous mean between intellectual arrogance and intellectual servility."[53] In this way, intellectual humility sits like Goldilocks on that middle bed. While the intellectually servile suffer from too little confidence, the intellectually arrogant suffer from too much. Neither serves the possessor well.

Too little confidence generates negative outcomes. Depression and anxiety can plague individuals with low confidence.[54] At the most extreme, lack of confidence can be a contributing factor to eating disorders, criminal behavior, and suicide.[55]

Too much confidence also generates negative outcomes. For, example, in one study, researchers showed that recreational basketball players overconfident about their shooting ability enjoyed the game less.[56] On a more serious level, overconfidence causes people to take unjustified

48 *See generally* Joshua N. Hook, *Cultural Humility: Measuring Openness to Culturally Diverse Clients*, 60 J. Counseling Psych. 353 (2013).

49 *See generally* Joshua Jauregui et al., *Generational 'Othering': The Myth of the Millennial Learner*, 54 Med. Educ. 60 (2020).

50 Mark Alfano & Emily Sullivan, *Humility in Social Networks*, *in* The Routledge Handbook of Philosophy of Humility 484 (Mark Alfano, Michael P. Lynch & Alessandra Tanesni eds., 2021) [hereinafter Philosophy of Humility].

51 *Id.*

52 Ian M. Church, *The Doxastic Account of Intellectual Humility*, 7 Logos & Episteme 413, 424 (2016).

53 *Id.* at 413–14; *see also* Ian M. Church & Justin L. Barrett, *Intellectual Humility*, *in* Handbook of Humility, *supra* note 39, at 63.

54 *See* Dat Tan Nguyen et al., *Low Self-Esteem and Its Association with Anxiety, Depression, and Suicidal Ideation in Vietnamese Secondary School Students: A Cross-Sectional Study*, 10 Frontiers Psych. 1, 3–4 (Sept. 27, 2019), 1https://www.frontiersin.org/articles/10.3389/fpsyt.2019.00698/full.

55 Kali Trzesniewski et al., *Low Self-Esteem During Adolescence Predicts Poor Health, Criminal Behavior, and Limited Economic Prospects During Adulthood*, 42 Dev. Psych. 381 (2006).

56 A.P. McGraw et al., *The Affective Costs of Overconfidence*, 17 J. Behav. Decision Making 281, 284–88 (2004).

financial risks as they reject helpful information.[57] In war, overconfidence can have fatal consequences;[58] just think George Custer. At the extreme, those saddled with too much confidence can succumb to the ultimate level of overconfidence—something called the Dunning-Kruger Effect.[59] This occurs where one's own incompetence masks his or her ability to recognize their own incompetence.[60] What about lawyers and this type of overconfidence?

B. Lawyers and intellectual humility

It turns out lawyers suffer "from a pervasive Dunning-Kruger problem."[61] When we are intellectually arrogant, we are less open "to revising our beliefs in light of new evidence, and . . . more likely to be led to errors in our inquiries."[62] Clients suffer. The profession suffers. Society suffers. It seems a bit of a paradox that lawyers are plagued with arrogance when you realize the Socratic Method employed in law schools works to instill a sense of intellectual humility.[63]

But too little confidence is also bad for lawyers. Those who suffer from low self-confidence fare poorly for themselves and their clients. Undervaluation of one's knowledge and understanding can be manifest in what social psychologists call the Imposter Syndrome.[64] Imposter Syndrome is characterized by a high level of self-doubt[65] and can infect legal writers, particularly novice ones.[66] As Professor Sara L. Ochs writes,

57 Syed Zain ul Abdin et al., *Overconfidence Bias and Investment Performance: A Mediating Effect of Risk Propensity*, 22 Borsa Istanbul Rev. 780 (July 2022), www.sciencedirect.com/science/article/pii/S2214845022000151.

58 Nicholas Light & Philip Fernbach, *The Role of Knowledge Calibration in Intellectual Humility*, *in* Philosophy of Humility, *supra* note 50, at 414; *see also* Rosa Hendijani & Babak Sohrabi, *The Effect of Humility on Emotional and Social Competencies: The Mediating Role of Judgment*, 6 Cogent Bus. & Mgmt. 1, 5 (July 20, 2019), https://www.tandfonline.com/doi/full/10.1080/23311975.2019.1641257 ("Overconfidence bias has been proposed as one of the main predictors of catastrophic phenomena such as wars, business failures, and stock market bubbles.").

59 Andrew Aberdein, *Intellectual Humility and Argumentation*, *in* Philosophy of Humility, *supra* note 50, at 326. *See generally* Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. Personality & Soc. Psych. 1121 (1999).

60 Errol Morris, *The Anosognosic's Dilemma: Something's Wrong but You'll Never Know What It Is (Part 1)*, N.Y. Times (June 20, 2010), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2010/06/20/the-anosognosics-dilemma-1/.

61 Bryan A. Garner, *Why Lawyers Can't Write*, ABA J. (Mar. 1, 2013), https://www.abajournal.com/magazine/article/why_lawyers_cant_write/.

62 J. Adam Carter & Emma C. Gordon, *Intellectual Humility and Assertion*, *in* Philosophy of Humility, *supra* note 50, at 335.

63 Megan C. Haggard, *Humility as Intellectual Virtue: Assessment and Uses of a Limitations-Owning Perspective of Intellectual Humility* 4 (Dec. 2016) (Ph.D. dissertation, Baylor University), https://baylor-ir.tdl.org/handle/2104/9925.

64 Aberdein, *supra* note 59, at 326.

65 Sara L. Ochs, *Imposter Syndrome & The Law School Caste System*, 42 Pace L. Rev. 373, 379 (2022).

66 Ivy B. Grey, *How Imposter Syndrome Leads to Bad Legal Writing (and Seven Tips to Fix It)*, PerfectIt Blog (Apr. 19, 2020), https://legal.intelligentediting.com/blog/how-imposter-syndrome-leads-to-bad-legal-writing-and-seven-tips-to-fix-it/.

"This insidious feeling, conceptualized as 'imposter syndrome,' can often cause us to question our arguments, our writing styles, and even our self-worth. And these imposter feelings can frequently manifest in unconfident writing."[67]

Back to Goldilocks. Too far to the right on the certainty spectrum and one is over-confident; even arrogant. Too far to the left of the certainty spectrum and one is bathed in self-doubt. Neither is effective at convincing an audience. It is the intellectually humble person who finds themselves in the center—neither too sure nor too doubting. And that is there where legal writers should strive to be—in every aspect of their practice. Today that space stands largely vacant.

Within the legal profession, humility finds limited residence with some judges where it is viewed as an "adjudicative virtue."[68] Famously, Justice Felix Frankfurter counseled that Supreme Court justices should bring "humility and an understanding of the range of problems and of their own inadequacy in dealing with them. . . ."[69] Deference and judicial restraint serve as examples of this virtue in practice.

But humility is more than just an adjudicative virtue.[70] As Edinburgh University law professor Amalia Amaya argues, humility plays important roles in the effective functioning of professional organizations like law firms and government agencies. Amaya highlights how humility is "essential to achieve excellence in legal practice."[71] In these settings, the presence of humility enhances group deliberation by favoring inclusiveness and a discussion of a broad range of ideas.[72] Amaya also shows how a novice lawyer with a good dose of humility will more likely grow into a better expert lawyer than will a novice lawyer who lacks humility.[73]

Finally, Amaya contends argumentation (the guiding practice of litigation) is conducive to humility.[74] Amaya points out humility and argumentation are synergistic, but only if the lawyer approaches argumentation with the proper mindset. Being "aggressively adversarial, abusive, and fiercely competitive, rather than enhancing humility, . . . encourages pedantic attitudes in the 'winners' and may seriously damage

67 Sara L. Ochs, *Embracing Confident Writing*, 85 Bench & Bar, July/Aug. 2021, at 46, 46 (2021).

68 Amalia Amaya, *Humility in Law*, *in* Philosophy of Humility, *supra* note 50, at 451–53. *See generally* Scharffs, *supra* note 15.

69 Felix Frankfurter, *Chief Justices I Have Known*, 39 Va. L. Rev. 883, 905 (1953).

70 Amaya, *supra* note 68, at 451.

71 *Id*. at 455.

72 *Id*. at 455–56.

73 *Id*. at 456–57.

74 *Id*. at 459–60.

the self-confidence of the 'losers.'"[75] Win some/lose some. Rather than an obstaacle, being a humble lawyer makes both winning and losing a learning process to the benefits of our clients and the judicial system.[76]

To that point, attorney Kimberly Shields was called out in an online article by a client, Daniel Wheeler, as a lawyer who exemplifies "the winning quality of humility."[77] Humble lawyers are hard to find, not because they do not exist, but because they don't brag, as Wheeler pointed out. Therefore, he counseled that the way to know if a lawyer possesses humility is to interview them.[78] So I called Ms. Shields, a litigation partner at a Bay Area law firm.

Ms. Shields represents clients in professional liability defense matters. She explained that people have always considered her a good listener, a characteristic she finds valuable as a lawyer.[79] A core principle of her practice is the view that prolonged litigation serves no one's best interest. To avoid this hazard, Ms. Shields told me about a practice of hers—a practice epitomizing humility.[80]

Ms. Shields explained that after she first analyzes a case, she sends the opposing counsel a letter aimed at settlement. Ms. Shields ends every such letter with an invitation. More or less, Ms. Shields writes "please let me know if there is anything in my analysis of the case that is missing or mistaken, or anything in my understanding of the facts that is incorrect."[81] In other words, she asks her opponent to *let me know where I am wrong.*

Ms. Shields explained that nine out of ten clients, and nine out of ten opposing counsel, are receptive to her entreaty. In some cases, she has learned something from opposing counsel, and in a few cases, she has changed her mind. More than that, however, Ms. Shields finds this approach opens meaningful dialogue. A conversation rather than a confrontation, she explained, that best represents her client.

While lawyers are advocates, they are also educators. We learn when we invite someone to comment or critique or correct. Armed with knowledge we become better lawyers; we become better advocates. Humility opens the door to learning.

75 *Id.* at 460.

76 Gwilliam, *supra* note 13.

77 Daniel Wheeler, *Hire Litigators for Humility; Fire for Arrogance*, LinkedIn Pulse (Oct. 11, 2021), https://www.linkedin.com/pulse/hire-litigators-humility-fire-arrogance-daniel-wheeler/.

78 *Id.*

79 Virtual video interview with Kimberly Shields, Shareholder, Murphy Pearson Bradley + Feeney, on Zoom (May 2, 2023).

80 *Id.*

81 *Id.*

C. Benefits of intellectual humility—personal and organizational

Individuals and organizations both benefit by possessing and exhibiting intellectual humility. On an individual level, a summary of studies shows that intellectual humility is positively correlated with open-mindedness, agreeableness, improved decisionmaking, and higher motivation to learn, and even that students with intellectual humility are "more receptive to assignment feedback and earn higher grades."[82] Humility is also associated with forgiveness, generosity, and physical health.[83]

Testing a person's level of humility—or where they sit along the continuum—presents a problem. The problem lies in the reality that most testing for intellectual humility is based on self-reporting, a notoriously unreliable way to measure a personality trait. Recent scholarship, however, has established that intellectual humility may be measurable on an objective basis called the General Intellectual Humility Scale.[84]

Regardless of the method of measuring, "intellectually humbler people are better able to differentiate between strong and weak arguments, even those arguments that go against their initial beliefs."[85] This aspect of intellectual humility holds strong currency with lawyers. Knowing a weak argument from a strong argument is an essential legal advocacy skill. As Chief Justice Roberts told a reporter, he takes "more seriously" the argument that admits to the court that "[t]his case [presents] a difficult, close question, and there are good arguments on both sides."[86] Intellectual humility persuades.

In addition to advantages for the individual, intellectual humility bestows profound group and organization benefits. These benefits include promoting social cohesion "by reducing group polarization and encouraging harmonious intergroup relationships."[87] Intellectual humility is also positively correlated with forgiveness, emotional diversity, and empathetic concern.[88]

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82 Tenelle Porter et al., *Predictors and Consequences of Intellectual Humility*, 1 Nature Revs. Psychol. 524, 530–32 (June 27, 2022), https://www.nature.com/articles/s44159-022-00081-9#citeas.

83 Tenelle Porter, *Intellectual Humility, Mindset, and Learning* 6 (May 2015) (Ph.D. dissertation, Stanford University), https://coa.stanford.edu/publications/intellectual-humility-mindset-and-learning.

84 Charles Westbrook, *The Validity of General Intellectual Humility Scale as a Measure of Intellectual Humility* 13–17 (Jan. 7, 2022) (Ph.D. dissertation, Georgia State University), https://scholarworks.gsu.edu/cps_diss/160/.

85 Porter, *supra* note 82, at 531.

86 Tony Mauro, *Roberts on Brief-Writing: 'Be Concise'*, Nat'l L.J. (Sept. 24, 2014, 2:31 PM), https://www.law.com/supremecourtbrief/almID/1202671205545/.

87 Porter, *supra* note 82, at 530.

88 *Id.*

The power of humility for groups is evident in leaders of all stripes: corporate, political, military, and athletic. In 2001, Jim Collins, a management consultant and former Stanford professor, published the results of a five-year study of business leaders. In an article entitled *Level 5 Leadership: The Triumph of Humility and Fierce Resolve*,[89] Collins demonstrated in corporate leadership "the most powerfully transformative executives possess a paradoxical mixture of personal humility and professional will."[90]

Collins highlighted corporate leaders like Darwin Smith, who took over as the chief executive of Kimberly Clark in 1971 and turned a "stodgy old paper company" into "the leading consumer paper products company in the world."[91] Collins showed how Smith, who was described as "awkward" and "unpretentious," harnessed his humility, and coupled it with fierce resolve to transform the company he led.[92] Collins highlighted other corporate leaders including Coleman M. Mockler,[93] CEO of Gillette, George Cain,[94] of Abbott Laboratories, and Charles R. "Cork" Walgreen III,[95] each of whom combined humility with resolve to transform the companies they led.[96]

Collins credited what he calls the "window and mirror" as the reason these leaders succeeded so magnificently. Collins explained how these leaders looked out the window to apportion credit—even undue credit—while simultaneously looking in the mirror to assign responsibility, and they never cited bad luck or something external when things went poorly.[97] Collins's research showed humble behavior stands in stark contrast to the personality traits of other less successful executives who "frequently looked out the window for factors to blame but preened in the mirror to credit themselves when things went well."[98]

Humility also serves political leaders. George Washington and Abraham Lincoln both possessed and exhibited humility.[99] So too did

89 Jim Collins, *Level 5 Leadership: The Triumph of Humility and Fierce Resolve*, 79 Harv. Bus. Rev. 66 (2001). *See generally* Merwyn A. Hayes & Michael D. Comer, Start with Humility: Lessons from America's Quiet CEOs on How to Build Trust and Inspire Followers (2010).

90 Collins, *supra* note 89, at 66.

91 *Id*. at 68.

92 *Id*.

93 *Id*. at 70–71.

94 *Id*. at 72–73.

95 *Id*. at 73–74.

96 *See generally* Vera & Rodriquez-Lopez, *supra* note 16 (discussing the benefits of an organizational leader possessing and expressing humility).

97 Collins, *supra* note 89, at 74.

98 *Id*. at 74–75.

99 *See generally* David J. Bobb, Humility: An Unlikely Biography of America's Greatest Virtue (2013).

Benjamin Franklin and Frederick Douglass.[100] Franklin wrote in his autobiography how humility was part of his core being:

> In reality, there is, perhaps, no one of our natural passions so hard to subdue as *pride*. Disguise it, struggle with it, beat it down, stifle it, mortify it as much as one pleases, it is still alive, and will every now and then peep out and show itself; you will see it, perhaps, often in this history; for, even if I could conceive that I had completely overcome it, I should probably be proud of my humility.[101]

World leaders like Gandhi and Nelson Mandela led with humility. Military leaders Ulysses Grant[102] and Dwight Eisenhower both led with humility. Eisenhower famously said, "[A]lways take your job seriously, but never yourself."[103] More recently, retired Army Gen. Martin E. Dempsey said in 2015 while serving as Chairman of the Joint Chiefs, "I think that humility is the trait that allows subordinates to enter into that trust relationship" and concluded those who are humble are "more approachable, more genuine and more trustworthy."[104]

In sports, humility holds currency. While Muhammad Ali famously said, "[I]t's hard to be humble when you're as great as I am,"[105] there is no more successful sports figure than coach John Wooden (664-162 record and ten NCAA championships). Wooden said, "Talent is God given. Be humble. Fame is man-given. Be grateful. Conceit is self-given. Be careful."[106]

In studying humility in coaching, researchers found humble coaches are successful not merely because of their experience or competence, "but because of their ability to build emotional bonds with their athletes[, which] suggests that humility enables coaches to establish secure, trusting relationships, exert a positive influence on their players, and build a

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100 *Id.*

101 Autobiography of Benjamin Franklin ch. IX (Frank Woodworth Pine ed. 1915) (e-book), https://www.gutenberg.org/files/20203/20203-h/20203-h.htm.

102 *See* Matt Lively, *To Lead, Be Humble—Ulysses S. Grant*, The Startup Blog (Aug. 19, 2019), https://medium.com/swlh/to-lead-be-humble-ulysses-s-grant-b3374233a99f.

103 Dwight D. Eisenhower, Address at the New England "Forward to '54" Dinner, Boston, Massachusetts (Sept. 21, 1953) (quotation at https://www.eisenhowerlibrary.gov/eisenhowers/quotes). *See generally* Lt. Commander Steven R. Moffitt, *Humility Is for Leaders*, 146 Proceedings 1405 (Mar. 2020), https://www.usni.org/magazines/proceedings/2020/march/humility-leaders.

104 Rick Maze, *War College Lessons for Everyone: Success Requires Patience, Humility, Clear Communication*, Army Mag., Aug. 1, 2018, at 36, 37.

105 Quoted in Leigh Montville, Sting Like a Bee: *Muhammad Ali vs. the United States of America*, 1966–1971, at 5 (2018).

106 Ho Phi Huynh, Clint E. Johnson & Hillary Wehe, *Humble Coaches and Their Influence on Players and Teams: The Mediating Role of Affect-Based (but Not Cognition-Based) Trust*, 123 Psychol. Reps. 1297, 1297 (2020).

productive team."[107] While research shows that humility works for these leaders for various reasons—at the heart is that possessing and exhibiting humility enhances trust in those who these leaders lead.[108]

D. Sources of intellectual humility and how to improve it

While the benefits of intellectual humility are clear, what are the factors that influence the development of intellectual humility in individuals? Specifically, can those lacking in such a trait acquire and enhance it? Like many personality traits, intellectual humility is a product of both genetics and nurture, including parenting, culture, and learning.[109] Interestingly, however, education can have opposing effects on intellectual humility. Education fosters confidence in one's knowledge and can thereby enhance arrogance. On the other hand, the more people learn the more they "see how much they do not know, and the more complicated, nuanced, and endless knowledge becomes."[110]

Perhaps this is the trap in which lawyers find themselves. Lawyers are highly educated experts trained to function "in an adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views."[111] These ingredients may seem to leave little room to encourage, foster, and deploy humility.

But that small room can be enlarged. A person can "boost" their intellectual humility.[112] Several studies demonstrate how. These studies, summarized by Professor Tenelle Porter and her colleagues, show that writing out detailed explanations of your position can foster intellectual humility. Two other studies show some connection between learning about intellectual humility and enhancing it.[113] According to Duke University's Mark R. Leary, "there is every reason to assume that [intellectual humility] can change."[114] In making this point, Leary notes that people change views or behaviors when they perceive such change is beneficial.

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107 *Id.* at 1314.

108 *See generally* Cam Caldwell, Riki Ichiho & Verl Anderson, *Understanding Level 5 Leaders: The Ethical Perspectives of Leadership Humility*, 36 J. Mgmt. Dev. 724 (June 17, 2017), https://doi.org/10.1108/JMD-09-2016-0184.

109 Mark R. Leary, *The Psychology of Intellectual Humility* 9–10 (2018), https://www.templeton.org/wp-content/uploads/2018/11/Intellectual-Humility-Leary-FullLength-Final.pdf.

110 *Id.* at 11.

111 Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1470 (1966).

112 Porter et al, *supra* note 82, at 532 fig.3.

113 *Id.* at 531–32.

114 Leary, *supra* note 109, at 12.

Curiosity nurtures humility.[115] Curiosity, at its core, is about asking questions. Curiosity can lead to humility because the more we learn and explore, the more we realize that we don't know. Turn to TV for the proof. The fictitious soccer coach Ted Lasso defeated an arrogant adversary in a game of darts. That adversary, Rupert, didn't bother to find out if Ted had ever played darts before challenging him to a match. As Ted Lasso prepared to throw the winning dart, he commented to Rupert the value of "be[ing] curious, not judgmental,"[116] for if Rupert were curious, he would have asked Ted about his dart game experience, instead of judging him off the bat as an American who didn't play the game. It tuns out that Ted *had* played a lot of darts in his youth. Rupert lost.

In the end, the benefits of intellectual humility are many including improved relationships, fostering positive interaction, and improving one's own decision-making.[117] The point of this article is to demonstrate the benefit to possessing and expressing intellectual humility in legal (and all persuasive) writing, and by doing so, this article provides a path for the change it advocates.

II. How to develop and demonstrate humility in legal writing

A. Humility in the practice of law

We employ an adversarial system to resolve disputes justly. This system is based on the view that the best way to find truth and achieve justice is a competitive process played out before a judge or jury to determine the facts and accurately apply the law. Lawyers are metaphorical warriors in this competitive truth-finding/justice-achieving process. Zealous advocacy stands then as a foundational principle on which the system in built.[118]

But advocating a position *requires* understanding the strengths of the other lawyer's arguments and the weaknesses of your own—in other words, intellectual humility. As critical thinking theorist Richard Paul puts it,

115 Brian Resnick, *Intellectual Humility: The Importance of Knowing You Might Be Wrong*, Vox (Jan. 4, 2019), https://www.vox.com/science-and-health/2019/1/4/17989224/intellectual-humility-explained-psychology-replication.

116 Ted Lasso: The Diamond Dogs (Apple TV television broadcast Sept. 18, 2020) (transcript available at https://www.imdb.com/title/tt11193418/?ref_=tt_ch).

117 Resnick, *supra* note 115.

118 Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 Hofstra L. Rev. 1319, 1324 (2006).

> We must feel *obliged* to hear [views we oppose] in their strongest form to ensure that we do not condemn them out of our own ignorance and bias. As this point we come full circle back to where we began: the need for *intellectual humility.*[119]

Brooklyn Law School's Heidi Brown argues that a remedy for bad legal writing is to instill intellectual humility in 1L legal writers.[120] She cites Supreme Court Justice Felix Frankfurter, who wrote "the indispensable judicial requisite is intellectual humility,"[121] and Judge Kenneth M. Ripple, who noted that "the [legal] writing process requires certain humility of mind and spirit. There must be an openness to the possibility that something 'won't write out' because it does not make sense and that a substantive course adjustment is necessary."[122]

Brown argues that legal writing professors should take this advice by emphasizing to students that writing is thinking, and that students should develop an internal dialogue as they write.[123] This approach to writing, she contends, will help law students to "grow both in humility and confidence."[124] McGill University Law Professor Phil Lord goes further, arguing that all law "professors should consciously attempt to show humility" to make students comfortable to "be vulnerable and become more self-aware."[125]

But not only do law students need to write with a "certain humility," to use Judge Ripple's words, but all lawyers need to understand writing with humility and appropriately demonstrating that humility makes them *better* legal writers. Below are some suggestions on *how* to humblize your writing—both by adjusting your attitude and by recrafting the text of the

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119 Richard Paul, *Critical Thinking, Moral Integrity and Citizenship: Teaching the Intellectual Virtues*, *in* Knowledge, Belief and Character: Readings in Virtue Epistemology 170 (Guy Axtell ed., 2020) (as quoted in Aberdein, *supra* note 59, at 327).

120 Heidi K. Brown, *Breaking Bad Briefs*, 41 J. Legal Pro. 259, 289 (2017). This idea of instilling humility in to-be professionals has been applied to future pharmacists, *see* Ike de la Pena & Jesse Koch, *Teaching Intellectual Humility is Essential in Preparing Collaborative Future Pharmacists*, 85 Am. J. Pharm. Educ. 1007 (2021), future dentists, *see* Xan R. Goodman, Ruby L. Nugent, *Teaching Cultural Competence and Cultural Humility in Dental Medicine*, 39 Med. Reference Servs. Q., 309 (2020), and researchers, *see generally* Kelly G. Manix, *Educating Future Researchers with an Eye Toward Intellectual Humility*, 15 Indus. & Org. Psych. 135 (2022).

121 Brown, *supra* note 120, at 292 (citing Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 557 (1949) (Frankfurter, J., concurring)).

122 *Id.* at 291 (citing Kenneth F. Ripple, *Legal Writing for the New Millennium: Lessons from a Special Teacher and a Special "Classroom"*, 74 Notre Dame L. Rev. 925, 926 (1999)).

123 *Id.* at 292.

124 *Id.*

125 Lord, *supra* note 19, at 372; *see also* Barbara A. Noah, *Teaching Bioethics; The Role of Empathy & Humility in the Teaching and Practice of Law*, 28 Health Matrix 201, 215 (2018) (stating that "[o]ne effective way to teach [law] students' humility and empathy is to models these qualities" as a teacher).

document. But first it is important to understand *why* humility in legal writing improves the effectiveness of that writing.

B. Why: nexus of intellectual humility and credibility (trust)

In the simplest terms, "people worth trusting admit to what they don't know."[126] As a corollary, those who don't (or can't) admit they are wrong or what they don't know prove untrustworthy.[127] Why? Because trust is intertwined with vulnerability.[128] Citing Annette Baier's seminal work,[129] the editors of an entire volume of the *International Journal of Philosophical Studies* dedicated to the interrelationship between trust and vulnerability nailed it:

> Annette Baier famously argued that a distinguishing mark of trust, as opposed to mere reliance and other attitudes in its neighbourhood, is that to trust is to accept vulnerability to another's will. In trusting someone you put yourself in their power to some extent, and in doing so, risk being harmed if they do not take seriously the ethical demands of having that power.[130]

"Practicing vulnerability," argues Professor Nathalie Martin, "helps us connect with others and build trust."[131] But for lawyers trust more than just connects us; trust grounds the entire practice of law. Judges need to trust lawyers.[132] The same holds true for juries, other lawyers, clients, and the public at large. All must have trust in what the lawyer says and writes.[133] Trust is not only an asset for a lawyer,[134] but a foundational trait necessary to do the job.

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126 Mattias Skipper, *The Humility Heuristic or: People Worth Trusting Admit to What They Don't Know*, 35 Soc. Epistemology 323, 323 (2021).

127 Marius Leckelt et al., *Behavioral Processes Underlying the Decline of Narcissists' Popularity Over Time*, 109 J. Personality & Soc. Psych. 856, 866 (2015).

128 Katie Miller, *Intellectual Humility, A Necessary Precondition to Building Trust in Court*, 12 Int'l J. Ct. Admin. 1, 13 (2021).

129 Annette Baier, *Trust and Antitrust*, 96 Ethics 231, 235 (1986).

130 Maria Baghramian, Danielle Petherbridge & Rowland Stout, *Vulnerability and Trust: An Introduction*, 28 Int'l J. Phil. Stud. 575, 575 (2020), https://www.tandfonline.com/doi/full/10.1080/09672559.2020.1855814.

131 Nathalie Martin, *The Virtue of Vulnerability: Mindfulness and Well-Being in Law Schools and the Legal Profession*, 48 Sw. L. Rev. 367, 373 (2019).

132 Joseph W. Quinn, *A Judge's View: Things Lawyers Do That Annoy Judges; Things They Do That Impress Judges*, available at https://www.oba.org/en/pdf/JudgesView.pdf (last visited May 8, 2024) ("Never lose sight of your role in the courtroom: it is to persuade. And, to persuade, you must have the trust of the court. If the judge does not trust you, only the manifestly clear issues will fall your way.").

133 *See generally* Sissela Bok, *Can Lawyers Be Trusted?*, 138 Penn. L. Rev. 913 (1990).

134 W. Bradley Wendell, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. Rev. 967, 972 (2003).

To be trustworthy, lawyers must learn to admit what they do not know—they must be humble. In persuasive writing, humility generally, and intellectual humility specifically, serve two purposes in enhancing trust. First, exercising intellectual humility promotes "effective epistemic self-trust."[135] In simplest terms, those with intellectual humility know what they know. This contrasts with the arrogant writer who *overestimates* their intellect and knowledge, and the servile writer who underestimates their intellect and knowledge.[136]

The intellectually humble person is more open to self-improvement and exploration, and more likely to accept criticism. Similarly, those writers plagued with excessive self-doubt reflect that in their writing and thus serve neither themselves professionally nor their clients representationally.[137] In the end, the intellectually humble person can trust themselves more in their final position than can the arrogant or servile writer.

But more important, the epistemic self-trust of intellectual humility when projected in the writing increases the credibility of the writer in the eyes of others. While self-trust relies on one's view of themselves, a reader must gauge competence of the writer, and can do so only based on the text.[138] Trusting a legal writer stands as a pillar of persuasion—at least a sub-pillar of ethos (credibility). The other classic pillars of persuasion, logos, and pathos are not addressed here. The three features of ethos are intelligence, character, and good will, according to Professor Michael Smith. Each serves to build trust between writer and reader.[139]

More broadly, trust can be seen a three-way relationship—a person trusts another for some thing or end.[140] Trust is more than reliance—reliance is predicable behavior while trust involves a "cooperative relationship."[141] A lawyer getting the audience to trust their assertions is essential to convincing them to adopt the lawyer's argument—to get them to your "yes."

According to recent research, a key to creating or enhancing trust—to find the right spot on the spectrum from self-aggrandizement to self-deprecation—is evidencing humility cues. While no study has been

135 Katherine Dormandy, *Intellectual Humility and Epistemic Trust*, *in* Philosophy of Humility, *supra* note 50, at 297.

136 *Id.*

137 Ochs, *supra* note 67, at 46.

138 Dormandy, *supra* note 135, at 297–99.

139 Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing ch. 7 (3d ed. 2013) (discussing ethos); *see also* J. Christopher Rideout, *Ethos, Character, and Discoursal Self in Persuasive Legal Writing*, 21 Legal Writing 19 (2016).

140 Dormandy, *supra* note 135, at 292.

141 *Id.*

conducted on lawyers, much less legal writing, other studies offer findings that we can apply to lawyers.

For example, Professor Sang-Yeon Kim and Professor Erin Sahlstein Parcell joined forces to look at humility as a communication construct rather than a personality characteristic of virtue.[142] This study examined a doctor's advice, providing two random groups with varying introductory dialogues from the doctor.[143] The study showed that arrogance does not improve an expert's credibility (or likability either). Self-depreciating cues (the other end of the spectrum) outperforms arrogance because such cues make people more likable, but self-deprecation reduces perceived expertise. The research showed that not too full of yourself, and not too wishy washy, but rather the middle ground of confident humility is where maximum credibility and likeability lives.[144] Goldilocks.

There are two aspects to being a humble legal writer, one internal and the other external. Legal writers must approach legal writing with humility. Armed with this attitude, the legal writer can write more humbly. But humility cannot be faked. While projecting the appearance of a good character trait like humility is important to foster ethos, "insincerity, if revealed, has disastrous consequences."[145] With this caution, we turn to the hows of humility and legal writing—how to internalize humility and how to demonstrate it to the reader.

C. How to *internalize* humility in legal writing

At its most basic level, humility is about the way we view ourselves. As Rick Warren put it, "true humility is not thinking less of yourself; it is thinking of yourself less."[146] Putting this view to writing means that understanding writing is a never-ending process, that encouraging comments, edits, and suggestions from others, and that working on a humble mindset are each central to that process.

1. Understand the never-ending need to improve your writing

No writer is ever good enough. No one. No writing is perfect. None. Barbara Kingsolver, a pretty good writer, advises all writers to approach their task with "the humility to keep trying until you've gotten it right."[147]

142 Kim & Parcell, *supra* note 11, at 4.

143 *Id.*

144 *Id.*

145 Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as a Relationship*, 9 Legal Comm. & Rhetoric 229, 268 (2012).

146 Rick Warren, The Purpose Driven Life 265 (2012).

147 Barbara Kingsolver, *5 Writing Tips: Barbara Kingsolver*, Publishers Wkly. (Oct. 12, 2018), https://www.publishersweekly.com/pw/by-topic/industry-news/tip-sheet/article/78305-5-writing-tips-barbara-kingsolver.html.

She is correct. Humility forces you to write, revise, edit, and rewrite until you get it right, not perfect but right. A never-ending process of improving writing makes writing better because good writing is recursive[148] and iterative.[149] Legal writing is no different—it too is recursive and iterative.[150]

Recursive means writing presents as a process, not a product. Iterative means with every draft the writer hones the message for the audience. These processes involve pre-writing, writing, revising, rewriting.[151] At each stage, the writer is almost certainly going to discover improvement in some or all the prior processes. This kind of writing stimulates thinking. The more writing is treated as a recursive process, the more thinking happens and the better the written product. Writers move back and forth between the stages and continually improve the text.

As one scholar put it, because writing is a recursive process that calls upon the writer to "see" many things at once, revision must serve as more than the last stage on an assembly line where the writer corrects errors. Recursive writing "encourages exploration of new paths to success and empowers writers to make informed decisions and to revisit those decisions."[152] Revision is literally "re-vision"—the process where the writer becomes the reader and sees the writing with new eyes.[153]

Arrogance wears blinders. Arrogance sees writing only as a product; something the writer creates rather than a journey of learning the writer undertakes. Legal writers must be humble writers who know writing is a recursive process from pre-writing to final brief. It is a process that stimulates thinking in ways that the writer was unaware when he or she first sat down with pencil and paper, or more likely today to just type away. Vladimir Nabokov is reported to have said "My pencils outlast their erasers."[154] Writing, erasing, and writing and erasing makes writing better.

148 Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 Coll. Composition & Commc'n 365, 366–67 (1981).

149 *See* Peter Elbow, Writing with Power: Techniques for Mastering the Writing Process 47 (1998) ("There is no good reason why you must try to produce something in your first cycle of writing that resembles the form of what you want to end up with.").

150 Tamar Ezer, *Teaching Written Advocacy in A Law Clinic Setting*, 27 Clinical L. Rev. 167, 174 (2021).

151 Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719, 722 (1997); *see also* Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See Through the Eyes of the Reader*, 14 Legal Writing 291, 304 (2008).

152 Christopher M. Anzidei, *The Revision Process in Legal Writing: Seeing Better to Write Better*, 8 Legal Writing 23, 52 (2002).

153 *Id.* at 25.

154 *Id.* at 23 (citing Thomas Cooley, the Norton Guide to Writing 87 (W.W. Norton & Co. 1992)).

2. "Get over yourself": be open to criticism and seek advice from others

Your writing is not the product of genius, and you should submit your work to others and accept constructive criticism.[155] This is the essence of intellectual humility—the recognition of the value of the opinion, views, and input of others. This applies to writing. Stephen King advises to "skip as much of the self-illusion as possible."[156]

What we write can always be improved by criticism and advice of others. "A clear sentence is no accident. Few sentences come out right the first time, or even the third time."[157] The same is true for paragraphs, sections, and the entire brief! A humble approach to writing is the highest form of professionalism, says Wake County North Carolina District Judge Ashleigh Parker Dunston.[158] She learned this lesson early in her career.

Two years out of law school, the then Ms. Dunston served as a North Carolina Assistant Attorney General when a senior lawyer in the division asked her to review his appellate brief.[159] Puzzled, she asked the more experienced lawyer *why*. He responded that her review and criticism "offered a different perspective" on the case. She would help "expose holes" in his argument he told the young attorney.[160] She did as asked. The senior lawyer grew to be a mentor to Ms. Dunston and an inspiration to her on the importance of humility. Not being open to criticism, and not seeking advice in your arguments, Judge Dunston explained years later, is the "epitome of a terrible lawyer."[161]

In sum, humility is the recognition you might be wrong and that your writing needs improvement. In legal writing, "humility" is the recognition "that all writers, even the best ones, need editing."[162] As Judge Lebovits puts it, "the humble seek advice from others . . . welcome suggestions, adopt good ones, and learn from them."[163]

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155 Ward, *supra* note 34; Gerald Lebovits, *Sin and Virtue in Legal Writing: Vanity and Humility*, 79 N.Y. St. Bar Ass'n J., Mar./Apr. 2007, at 59, 64.

156 Quoted in Elizabeth Ruiz Frost, *Good Writing Comes from Hard Work, Stephen King Says: Tips from A Master Storyteller*, 80 Or. St. Bar Bull., July 2020, at 15.

157 Gerald Lebovits, *Legal-Writing Myths*, 16 Scribes J. Legal Writing 113, 119–20 (2014–15) (citing William Zinsser, On Writing Well: The Classic Guide to Writing Nonfiction 9 (7th ed. 2006)).

158 Ashleigh Parker Dunston, *Humility Is the Highest Form of Professionalism*, Wake Cty. Bar Ass'n Blog (Sept. 30, 2019), https://www.wakecountybar.org/blogpost/727449/332106/Humility-is-the-Highest-Form-of-Professionalism.

159 Interview with Ashleigh Parker Dunston (Mar. 20, 2022).

160 *Id.*

161 *Id.*

162 Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 Scribes J. Legal Writing 1, 20 (2003–04).

163 Lebovits, *supra* note 155, at 59.

3. Other suggestions on how to internalize (cultivate) humility

Being self-centered is a motivation where "you" come first. Being arrogant is where "you" project an air of superiority. Because those who care about themselves often possess and project superiority, these concepts are related. They are not the same. This article seeks to help lawyers be more humble—less arrogant—in their how they act and how they write. This article is not arguing that lawyers are self-centered (although some may be, just like any some member of any group may be).

Most lawyers are not self-centered: rather, in most cases, lawyers care about their clients and helping to solve their problems. Whether it is the system of zealous advocacy, the pressures of the "law business," society, or some other reason, whether lawyers care or not, lawyers generally lack humility. That absence of humility pervades the profession, and as argued throughout this article, that is a problem.

Just reading this article starts the path to recognition of the problem. This realization opens the door to consideration of a few suggestions on how to cultivate humility. One step on the road to solving that problem is the aim of this article.

Humility is a mindset and not a skill. And it will make being a caring lawyer more effective. And because it is a mindset, there is no one-size-fits-all recipe to setting your mind to "humble." Research shows that teaching and practicing virtues, like humility, can lead those virtues to becoming part of your character.[164] Internalizing humility is a progression. First, there must be a recognition of the problem—arrogance in lawyering in general and legal writing in particular. Second, there must be a commitment to do something about it. And finally, those willing to do something need to create a system that promotes humility to take hold, grow, and flourish, in other words, to cultivate a humility mindset.

On a broad scale, research has shown that humility can be cultivated by in by early life experience, by a spiritual practice in many faiths, and by meditation.[165] A further discussion of those means to cultivate humility exceeds the scope of this short article. Even so, there are some small things we can do to cultivate humility. For one, we can try to realize our smallness "such as seeing the earth from space, as one tiny blue dot in the vastness of the universe or standing on the edge of the Grand Canyon."[166] As Professor Jennifer Cole Wright puts it, these are a type of "revelatory encounter with—and the shifting and quieting of—our natural centered-ness."[167]

164 *See generally* The Theory and Practice of Virtue Education (Tom Harrison & David Walker eds., 2019).

165 Jennifer Cole Wright, *Humility as a Foundational Virtue*, *in* Humility, *supra* note 41, at 180–82.

166 *Id.* at 182 (citing Lisa Gerber, *Standing Humbly Before Nature*, 7 Ethics & the Env't 39 (2002)).

167 *Id.* at 182.

We can look for some guidance to the ancient Stoic philosophers who preached humility.[168] Modern Stoicism builds on these ancient thinkers like Seneca and Marcus Aurelius.[169] A practice employed by Stoics, ancient and modern, is what one modern author calls "the Stoic Morning Routine."[170] The practice is best articulated by Marcus Aurelius in *Meditations*, when he writes, "[w]hen you arise in the morning, think of what a precious privilege it is to be alive—to breathe, to think, to enjoy, to love."[171] Gratitude and a realization of the temporal nature of our existence is—to say the least—humbling. And it dials your mind to that setting.

And when you go to bed at night, take five minutes, reflect on the day and be your own most harsh critic. In what modern Stoics call "retrospective mediation,"[172] the Roman Stoic Seneca advised of the moments before sleep,

> I make use of this opportunity, daily pleading my case at my own court. When the light has been taken away and my wife has fallen silent, aware as she is of my habit, I examine my entire day, going through what I have done and said. I conceal nothing from myself, I pass nothing by. I have nothing to fear from my errors when I can say: "See that you do not do this anymore. For the moment, I excuse you."[173]

Creating this mindset in one's daily life is central to applying the mindset to one's profession. Humility is not a switch turned on when the lawyer starts writing. A mindset are the beliefs that shape how a person makes sense of the world, themselves, and their place in the world. Humility is a mindset.

Beyond the few suggestions above, there are many more practices set out in the literature to help cultivate humility.[174] Suffice it to say, that cultivating humility requires a desire to achieve that mindset, an understanding of what it is, and a commitment to keep it present in your mind.

168 Sophie Grace Chappell, *Humility Among the Ancient Greeks*, *in* Philosophy of Humility, *supra* note 50, at 198. *See generally* Jonas Salzgeber, The Little Book of Stoicism: Timeless Wisdom to Gain Resilience, Confidence, and Calmness (2019).

169 Salzgeber, *supra* note 168, at 26–35.

170 *Id*. at 137.

171 Quoted in *id.* at 135.

172 Matthew J. Van Natta, The Good Fortune Handbook: Developing a Stoic Outlook Day by Day, Episode Five (2017) (e-book), https://pressbooks.pub/goodfortune/chapter/a-stoic-end-to-the-day/.

173 Quoted in Salzgeber, *supra* note 168, at 137; *see also* Bernard Marr, *The Power of Mindset: How Curiosity and Humility Can Drive Career Success*, Forbes (Apr. 21, 2023), https://www.forbes.com/sites/bernardmarr/2023/04/21/the-power-of-mindset-how-curiosity-and-humility-can-drive-career-success/?sh=3f55e15c5e0c ("Be honest with yourself. Think honestly about your weaknesses as well as your strengths. Be willing to admit your mistakes and take responsibility without relying on excuses. These mistakes or weaknesses show where you have room to grow.").

174 *See generally* Salzgeber, *supra* note 168; Van Natta, *supra* note 172.

Cultivating the mindset need not precede practicing humility, however. Each feed off the other, and now we turn to how to demonstrate humility in legal writing.

D. How to *demonstrate* humility in persuasive legal writing

"Boastful or arrogant writing is as repellent as a boastful or arrogant person."[175] The suggestions below will yield writing that is inviting, not "repellent."

1. Audience first, last, and only

"I write for me," said famed American playwright Edward Albee. "The audience of me."[176] While all the world may be a stage, lawyers are not playwrights and courtrooms are not Broadway.

Lawyers write for a specific client for a specific reason for a specific audience.[177] Lawyers write for a judge, or some decision maker, with the aim of getting that reader to "yes." The process of writing for the audience requires the writer to "'de-centre' from his or her own understanding of what is being written and project an interpretation from the reader's perspective."[178] As an audience driven endeavor, the writer must never write for the audience of me. This kind of writing requires putting their ego aside, in other words, humility.

Recently, a Chicago attorney offered a stellar example of how to not write "for the audience." Following dismissal of the case, the lawyer filed a motion to amend, and in doing so caused District Court Judge Steven C. Seeger to pen a Memorandum Opinion and Order that started with this: "Most of us say things in our heads that we wouldn't say out loud. And most of us say things out loud that we wouldn't say in a court filing. But not everyone is blessed with the same filter, or with the same willingness to use the brake pedal."[179]

Judge Seeger then went on to quote from the motion passage after passage that demonstrated disrespect for the Court. Disrespecting an audience is not writing with humility. Examples of this disrespect in the

175 Richard Palmer, Write in Style: Guide to Good English 72 (1993).

176 Quoted in Donald M. Murray, *Teaching the Other Self: The Writer's First Reader*, 33 Coll. Composition & Commc'n 140, 140 (1982).

177 *See generally* Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1093 (1986) (seminal article arguing legal writing should reject the "current-traditional paradigm," which failed to emphasize the role of the audience and the writer).

178 Debra Myhill, Helen Lines & Susan Jones, *Writing Like a Reader: Developing Metalinguistic Understanding to Support Reading-Writing Connections*, *in* Reading-Writing Connections: Towards Integrative Literacy Sci. 107 (Rui A. Alves, Teresa Limpo & R. Malatesha Joshi eds., 2020), https://ore.exeter.ac.uk/repository/bitstream/handle/10871/29969/2018MyhillLinesJonesWritinglikeaReaderReading%26Writing.pdf?sequence=3.

179 Porch v. Univ. of Ill. at Chi., Sch. of Med., No. 21-CV-3848, 2023 WL 2429348, at *1 (N.D. Ill. Mar. 9, 2023).

motion included statements that questioned whether the Court's clerk wrote the order dismissing the complaint, and other statements that intimated that the Judge did not even "take the time to carefully read" a prior order.[180] After offering a few pages of examples, Judge Seeger wrote "The Court could go on. Counsel did. After 28 pages, counsel finally ran out of gas."[181] The attorneys motion offered an example of writing *for the audience of me*. Judge Seeger offered counsel leave to file an amended motion.[182]

Generally, the way to write for "the audience" is to focus on the decision maker reading the brief—the judge.[183] The dos and don'ts of writing for the audience include use of short sentences, being precise, concise, simple, and clear, employing signals like headings and transitions, and all other matter of writing methods and elements that help guide the reader. But the purpose of this article is not to rattle off the ways to put "audience first." Rather, the purpose here is to remind the legal writer to keep the *perspective* of the reader front and center. To recast a quote from *Caddyshack* "be the reader."[184] The best way to do this is to start with that mindset, and when the writing is complete, come back to it and pretend that you did not write it. Again "be the reader."

"Be the reader" means focusing on the composition of the text from the judge's perspective. In other words, ask what the judge is looking for in the brief. Patrick Stanton, Circuit Court of Cook County Associate Judge, offers insight in that regard.[185] "A good judge wants to be right. And the pathway to winning is to show the judge the way to the right decision."[186] Central to that task, Judge Stanton explained, is for the lawyer to "be credible, and to be credible the lawyer should remember to show humility, and acknowledging the other side's argument while explaining that your argument is the one that leads to the right result."[187] In this way, the brief should be structured to "educate" the judge with clear logical steps to that "right decision" the judge wants to deliver.[188] The brief writer is an

180 *Id.* at *2.

181 *Id.*

182 Minute entry granting leave to file amended motion, Porch v. Univ. of Ill. at Chi., Sch. of Med., No. 21-CV-3848 (N.D. Ill. June 27, 2023).

183 Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 5 (2008).

184 The movie shows the Chevy Chase character advising teenage Danny that the way to best play golf is to "be the ball." *See* Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. Cooley L. Rev. 267, 272 (2008) (citing Caddyshack (Warner Bros. 1980)).

185 Interview with Patrick Stanton, Chi., Ill. (Mar. 2, 2023).

186 *Id.*

187 *Id.*

188 *See* Laura A. Webb, *Why Legal Writers Should Think Like Teachers*, 67 J. Legal Educ. 315, 320 (2017).

educator for the judge, not a combatant with opposing counsel. "Arrogant writing," Stanton concluded, "is not helpful."[189] Says the audience.

2. Simplify

Simplify, simplify, simplify.[190] A chorus repeated over and over and over when it comes to suggestions on improving legal writing.[191] Why? One reason is cognitive: long words long sentences long paragraphs are harder to remember than short ones.[192] Simpler is also easier to read, an aspect of a brief readers appreciate.

Another reason to simplify is the process of simplifying writing works to help the writer better understand his or her points. The better the writer understands the argument, the better teacher that lawyer will be for the judge. Wisconsin Supreme Court Justice William Bablitch advised that "[a] lawyer should write the brief at a level a 12th grader could understand. That's a good rule of thumb. It also aids the writer. Working hard to make a brief simple is extremely rewarding because it helps a lawyer to understand, clarify and distill the issue. At the same time, it scores points with the court."[193]

Streamlined writing respects readers. As Joseph Kimble observed thirty years ago, "[w]riting is a public act that presumes someone else's time. We have no right to waste it with dense, inflated, obscure prose."[194] Moreover, using simple and plain language increases fluency. A reader experiencing fluency—something called "cognitive ease"[195]—is a happier reader.

This is how simple writing respects readers. Respect for another is the essence of humility. As David Mellinkoff, late Professor at UCLA School of Law, wrote decades ago, "Pompousness and verbosity go hand in hand, indifference to readers. A touch of humility kills off verbosity."[196] Examples of how to simplify writing include using shorter words, shorter sentences,

189 Interview with Patrick Stanton, *supra* note 185.

190 Douglas E. Abrams, *What Great Writers Can Teach Lawyers and Judges: Wisdom from Plato to Mark Twain to Stephen King (Part 2)*, 5 Precedent 21 (2011), https://scholarship.law.missouri.edu/facpubs/889.

191 *See, e.g.*, Robert E. Bacharach, Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word 109 (2020).

192 *Id.*

193 Mark Rust, *Mistakes to Avoid on Appeal*, ABA J., Sept. 1, 1988, at 78, 80 (cited in Bryan Garner, *Judges on Effective Writing: The Importance of Plain Language*, 73 Mich. Bar J. 326, 326 (1994)).

194 Joseph Kimble, *Plain English: A Charter for Clear Writing: (Part Three)*, 71 Mich. Bar J. 1302, 1305 (1992).

195 Raymond P. Ward, *The Science Behind Plain Language*, 19 Scribes J. Legal Writing 181, 184 (2020) (citing Daniel Kahneman, Thinking Fast and Slow 60 (2011)).

196 David Mellinkoff, Legal Writing: Sense and Nonsense 122 (1982); *see also* Charles A. Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles!*, 16 Cal. Bar J. 65 (1941).

shorter paragraphs, few if any modifiers, and use of the active voice—think Hemingway![197]

3. Be plain spoken

Reading the word "pusillanimity" triggers reader resentment for the author not admiration. Wasn't that you're feeling when you came upon that word early on in this article? That was the point.

Unnecessarily complicated and long words offend readers. They demonstrate arrogance. Arrogant writing uses complicated words, what us lawyers call *legalese*. Humble writing is plain spoken. When asked his opinion of legalese, Associate Supreme Court Justice Stephen G. Breyer said "Terrible! Terrible! I would try to avoid it as much as possible. No point. Adds nothing. I'm sure there are some instances where there is a necessity for it, but I have not found one, or I can't find many."[198]

Here is an example. *Union Carbide Corp. v. American Can Co.*[199] involved a dispute over plastic bags used in meat-packing plants. In an affidavit, an expert witness and lawyer, wrote the dispute involved "beef fabrication plants."[200] Rather than persuade or impress the judge, this failure to be plain spoken met with derision. District Judge Prentice Marshall wrote,

> A "beef fabrication plant" must be an interesting place. We had always thought that beef was "fabricated" by Mother Nature. We assume, however, that Mr. Fischer meant to refer to what is commonly known as a meat packing plant. Perhaps this confusion illustrates the wisdom behind Beardsley's Warning to Lawyers: "Beware of and eschew pompous prolixity."[201]

Judges find pompous language ineffective. For example, Texas Supreme Court Justice Wallace Jefferson said his biggest "pet peeve" was "when the brief is pompous."[202] He continued to explain why, saying such briefs "are condescending or disrespectful" and concluded simply, "That doesn't get you anywhere."[203] Late Second Circuit Court of Appeals Judge

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197 Gerald Lebovits, *Thoughts on Legal Writing from the Greatest of Them All: Ernest Hemingway*, NYSBA Online (Mar. 23, 2021), https://nysba.org/thoughts-on-legal-writing-from-the-greatest-of-them-all-ernest-hemingway/.

198 Bryan Garner, *Interviews with United States Supreme Court Justices: Justice Stephen G. Breyer*, 13 Scribes J. Legal Writing 145, 156 (2010).

199 558 F. Supp. 1154 (N.D. Ill. 1983).

200 *Id.* at 1159.

201 *Id.* at 1159 n.6.

202 David M. Hugin, *Judicial Spotlight: An Interview with Chief Justice Wallace Jefferson*, 17 App. Advoc., Spring 2004, at 13, 18.

203 *Id.*

Roger J. Miner echoed this point, writing that "we prefer briefs that are not pompous."[204]

Lawyers want to appear intelligent. We need to. It is an element of ethos.[205] In what may seem a paradox, research reveals that use of clear, simple words in place of complex words makes authors appear more intelligent.[206] Writers, lawyers included, tend to believe that "million-dollar words lead readers to believe the author is smart."[207] Five separate experiments on groups of Stanford University students showed the opposite: "needless complexity leads to negative evaluations."[208]

Readers find it difficult to read difficult words. Hardly surprising. Reading fluency is positively correlated with readers' intelligence judgments about the writer. A belief the writer knows what they are writing about is the key to being persuasive. This is shown by the clear and concise writing, and sound logic. Given that reality, why be arrogant in your writing by employing needless complexity?

4. Respect opponents

Demonstrating respect for opponents shows humility.[209] Attacking opponents shows arrogance. Respect works with judges. Arrogance does not. As Judge Miner advises, "Ad hominem attacks are particularly distasteful to appellate judges. Attacks in the brief on brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court."[210] To that point, Texas Supreme Court Justice Wallace Jefferson explains how this tactic fails to persuade a judge:

> If you are rude to your opponent in the brief it negatively impacts your case. If you have to go to those lengths, then there is often something fundamentally wrong with your argument. I prefer to see the logic of an argument carry the day. The same is true of an opinion. If it is unsound, a dissent's logical critique will expose the flaws. Why clutter that critique with personal attacks?[211]

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204 Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 Scribes J. Legal Writing 19, 20 (1992).

205 Smith, *supra* note 139, at 148 (listing eleven qualities an intelligent legal writer is perceived to have).

206 David M. Oppenheimer, *Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly*, 20 Applied Cognitive Psych. 139 (2006).

207 *Id.* at 140.

208 *Id.* at 151.

209 *See* Matthew L. Stanley, Alyssa H. Sinclair & Paul Seli, *Intellectual Humility and Perceptions of Political Opponents*, 88 Personality 1196 (2020).

210 Miner, *supra* note 204, at 25.

211 Hugin, *supra* note 202, at 19; *see also* Bank of Am., N.A. v. Atkin, 305 So. 3d 305, 307 (Fla. App. 2018) ("Insults or disparaging comments by lawyers to courts in court filings cannot be justified as zealous advocacy because they risk alienating the very judges the lawyer was hired to persuade. Insults normally reflect—not attempts at persuasion—but the abandonment of any attempt to persuade.").

The American College of Trial Lawyers puts it this way in its *Code of Pretrial and Trial Conduct*: "A lawyer should not make disparaging personal remarks or display acrimony toward opposing counsel, and must avoid demeaning or humiliating words in written and oral communication with adversaries."[212] Social science research confirms that being disrespectful, insulting, or demeaning to others is repellent, not persuasive.[213] As the late Associate Justice Scalia noted, attacking opposing counsel "undercuts the persuasive force of any legal argument. The practice is uncalled for, unpleasant, and ineffective."[214]

Rarely is insulting and demeaning language directly aimed at an opponent. Rather, disrespectful language often more often finds a home in adjectives describing arguments presented by an opponent. A distinction without a difference. Adjectives should be avoided as a rule, but if compelled to describe a noun (an opposing point, case, or argument), don't use adjectives like *utterly* before meritless, *totally* before irrelevant, *disingenuously* before claims.[215] Point made.

5. Don't overstate your claims

"'[O]ver the top' language will diminish your credibility and risk alienating the court."[216] Hyperbole "is deliberate overstatement or exaggeration used to express strong feeling or make a vivid impression."[217] While a deft use of what Michael Smith calls "literary hyperbole" can be sparingly used,[218] exaggeration should be avoided in persuasive legal writing.

Avoid superlatives like *always*, *never*, *best*, *worst*, *most*, *biggest*, *smallest*, *greatest*. Similarly, intensifier adverbs that end in "ly" should be avoided. Words like *obviously*, *plainly*, *outrageously*, or *unbelievably* are coercive, not persuasive.[219] They signal weak arguments,[220] and disrespect

212 Am. Coll. of Trial Lawyers, Code of Pretrial and Trial Conduct 4 (2009), https://www.vawd.uscourts.gov/sites/Public/assets/File/pretrial_and_trial_conduct.pdf.

213 Robert P. Abelson & James C. Miller, *Negative Persuasion Via Personal Insult*, 3 J. Experimental Soc. Psych. 321, 321 (1976) (finding that an individual directly insulted by a communicator attempting to persuade him will show a "boomerang effect" by increasing the extremity of his initial attitude position).

214 Scalia & Garner, *supra* note 183, at 34–35.

215 *See* Megan Boyd & Adam Lamparello, *Legal Writing for the Real World: A Practical Guide to Success*, 46 J. Marshall L. Rev. 487, 515 (2013); *see also* Savannah Blackwell, *Legal Writing Tip: Never Insult Your Opponents or Their Arguments*, The Bar Ass'n of S.F. Blog (June 23, 2017), https://www.sfbar.org/blog/legal-writing-tip-never-insult-your-opponents-or-their-arguments/ ("If you wish to be taken seriously by the court, whether in oral or written argument, never malign or belittle your opponents or their position.").

216 Boyd & Lamparello, *supra* note 215, at 515.

217 Karin Ciano, *Legal Writing Notebook: Why Hyperbole Is a Complete Disaster*, Minn. Law. (Nov. 3, 2016), https://minnlawyer.com/2016/11/03/legal-writing-notebook-why-hyperbole-is-a-complete-disaster/.

218 Smith, *supra* note 139, at 265–67 (providing an example of Lanier v. State, 709 So. 2d 112, 117 (Fla. App. 1998) (Levy, J., concurring), comparing loot left behind by defendants to the trail of pebbles and bread crumbs left by Hansel and Gretel).

219 Ciano, *supra* note 217.

opposing counsel as noted above. One study found that appellate briefs that use more intensifiers are less effective and less likely to succeed than briefs with fewer intensifiers.[221] Finally, adjectives of absolute like *everyone*, *forever*, and *always* are also unpersuasive.[222] They convey arrogance.

To this point, Illinois Appellate Court Justice Michael Hyman offered his views in a recent decision. In *APS Holmes Group v. Sorkin*,[223] Judge Hyman took the occasion to point out just how ineffective "intensifiers" are in appellate briefs. Words like *clearly* and *merely* and *very* "hamper rather than enhance prose, making it clunky, disconcerting, and, typically, hyperbolic."[224]

Justice Hyman then rattled off just how many times the lawyers in the case before his panel chose to use such words. For example, *clearly* was used fifteen times in appellant's brief and ten times in appellee's brief, and other words like *actually*, *certainly*, *brazenly*, *utterly*, and others "ornamented" the briefs.[225] Concluding, Judge Hyman wrote that these "weasel words"[226] are a cop-out that "only push the reader away."[227] Offering advice to every lawyer who pens a brief, Justice Hyman concluded that "briefs benefit from not merely limiting, but clearly avoiding, the very occurrence of intensifiers."[228] Including intensifiers is arrogant. Excluding them is humble.

6. Avoid personal opinions—show don't tell

A lawyer's argument is about the argument, not about the lawyer. Judges, decisionmakers, and others whom a lawyer seeks to persuade become so because of the soundness of the argument. The opinion of the writer is just that—his or her opinion. Show the reader why the case is not applicable; show the reader why the statute must be read broadly; show the reader why the "floodgates will open" if they accept the other side's argument. Don't tell the reader.

220 Wayne Schiess, *Using Intensifiers Is Literally a Crime*, 96 Mich. Bar J. 48–49 (Aug. 2017), https://www.michbar.org/file/barjournal/article/documents/pdf4article3187.pdf. *See generally* Jacob Gershman, *Why Adverbs, Maligned by Many, Flourish in the American Legal System*, Wall St. J. (Oct. 8, 2014), https://www.wsj.com/articles/why-adverbs-maligned-by-many-flourish-in-the-american-legal-system-1412735402.

221 Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers is Very Bad—or Is It?*, 45 Idaho L. Rev. 171, 180–84 (2008).

222 Ellen B. Zweibel &Virginia McRae, *Adverbs and Adjectives Alarm Bells*, Point First Legal Writing Acad. Blog (last visited Mar. 25, 2024) ("Excessive adverbs and adjectives create redundancies, strain credibility, weaken your message by overkill, and get in the way of the reader's own thinking."), http://pointfirstwriting.com/edit-your-own-work/alarm-bell.html.

223 2023 IL App (1st) 211668-U, ¶ 40 (Hyman, J., concurring).

224 *Id.* ¶ 42.

225 *Id.* ¶ 43

226 *Id.* ¶ 46.

227 *Id.* ¶ 45 (citing Bennett v. State Farm Mut. Auto Ins. Co., 731 F.3d 584, 584–85 (6th Cir. 2013)).

228 *Id.* ¶ 47.

Opinionated equals arrogant.[229] Telling someone a fact or proposition imposes your opinion on the reader—it's a lecture. Showing the reader takes them on a journey where they discover the same opinion but with a helping hand not a cudgel. The maxim to *show don't tell* has long been a staple of fiction writing.[230] The reason relates to how we read.

As Canadian poet Jan Zwicky explains,

> Telling the reader "What happened" makes the mind's eye glaze over in just the way that it glazes over when it is forced to memorize formulae that it does not understand. Showing is like offering an elegant proof; the mind reaches to understand what is going on. When it succeeds, it feels the satisfaction of having grasped meaning.[231]

For the same reason, the maxim *show them don't tell* them also finds currency in non-fiction writing,[232] including legal writing.[233]

Ways to *show not tell* in persuasive legal writing include, most obviously, avoiding phrases such as "in my opinion" or "I think." Less obvious but also important in showing not telling a reader is 1) to avoid forms of "to be," including "is" and "was"; 2) use concrete sensory descriptors; and 3) use juxtaposition of place and causation.[234] Lawyers should avoid "telling verbs" which summarize how the actor in the story is feeling, because they block reader participation in the narrative.[235] The point here is not to provide a primer on descriptive prose, but to raise awareness that telling someone is arrogant; showing them is humble.

III. Conclusion: confident humility in persuasive legal writing

In persuasive writing, lawyers need to strike a balance and be neither arrogant nor servile. Being open to being wrong is a good thing, not a bad thing. Lawyers can look to other professions for proof.

229 Cowan et al., *supra* note 26, at 431.

230 *See, e.g.*, William Noble, Show Don't Tell: A Writer's Guide (1991).

231 Jan Zwicky, *Show, Don't Tell*, 87 Theoria 897, 897 (2021); *see also* Cynthia Dollins, *Crafting Creative Nonfiction: From Close Reading to Close Writing*, 70 Reading Teacher 49 (2016).

232 Phillip Lopate, To Show and to Tell: The Craft of Literary Nonfiction (2013).

233 Rebecca Talbott, *Show, Don't Tell: How to (Invisibly) Persuade through Facts*, 74 Wash. St. Bar News, June 2020, at 30; *see also* Handel Destinvil, *Four Tips from Creative Nonfiction for Better Legal Writing*, ABA Minority Trial Law. Comm. Prac. Points (May 26, 2016), https://web.archive.org/web/20200923203743/https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/4-tips-from-creative-nonfiction-better-legal-writing/ ("The extra factual details show that you have a better grasp of your facts, make your argument more memorable, and also allows [sic] the reader to feel as if they came to a conclusion on the facts on their own."); *see also* Patrick Barry, *Show and Tell*, 26 Persps. 76, 76 (2018) (urging legal writers to "be particular in writing" and to "show and not just tell"), https://repository.law.umich.edu/articles/2534.

234 Talbott, *supra* note 233, at 31.

235 K.M. Wieland, *Most Common Writing Mistakes: Are Your Verbs Showing or Telling?*, Helping Writers Become Authors Blog (Dec. 19, 2010), https://www.helpingwritersbecomeauthors.com/most-common-mistakes-series-are-your/.

For example, while scientists may not like being wrong, intellectual humility is a core ethic of their profession.[236] To that point, Carl Sagan said "in science it often happens that scientists say, 'You know that's a really good argument; mine is mistaken,' and then actually change their minds and you never hear the old view again."[237] Far to the other end of the culturally important spectrum from science, social media also values intellectual humility. In a recent study, researchers found that admitting wrongfulness on a Facebook post leads to better interpersonal impressions.[238]

Lawyers are advocates. Their goal is, most often, to win or at least secure the best possible outcome for their client considering the law and the facts. Central to this endeavor is having and projecting confidence that your client should win or walk away with the best possible outcome.[239] Confidence and humility are not inconsistent. Arrogance and humility are inconsistent.

While studies of this phenomenon with respect to lawyers do not exist, athletes have been studied. The combination of confidence and humility is a potent potion.[240] Many professional athletes possess and display confident humility. Soccer's Lionel Messi,[241] baseball's Mike Trout,[242] and gymnastics' Simone Biles[243] come to mind. While these athletes are known for being talented, what makes them so great is not just talent. Rather what makes them great is talent *combined* with confident humility.

These athletes are confident because they practice, and they work hard—harder than others. And they practice and work hard not because

236 *See generally* Rink Hoekstra & Simine Vazire, *Aspiring to Greater Intellectual Humility in Science*, 5 Nature Hum. Behav. 1602 (2021).

237 Carl Sagan, *The Burden of Skepticism*, keynote address at CSICOP Committee for the Scientific Investigation of Claims of the Paranormal conference (Apr. 1987), *in* 12 Skeptical Inquirer 38 (Fall 1987), https://skepticalinquirer.org/1987/10/the-burden-of-skepticism/.

238 Adam K. Fetterman et al., *When You Are Wrong on Facebook, Just Admit It: Wrongness Leads to Better Interpersonal Impressions on Social Media*, 53 Soc. Psych. 24 (2022).

239 Jonathan J. O'Konek, *Agreeing to Be Agreeable: A Proposal for the Introduction of "The Reasonable Legal Advocate Standard" in a Lawyer's Professional Ethos*, 97 N.D. L. Rev. 49, 56 (2022) ("[A] lawyer demonstrates 'reasonableness' by promoting fairness to opposing counsel in discussions, plea negotiations, and courtroom demeanor. By incorporating these traits, a 'reasonable lawyer' projects confidence, knowledge, and—most importantly—trust. When a court, or jury, must decide who to believe in a given matter, they look to the confidence, knowledge, and trust of the advocate presenting the argument."); *see also* Christopher M. Varano, *Projecting Confidence Is Fundamental to Career Success*, The Legal Intelligencer (Online) (Apr. 10, 2014, 12:00 AM), https://www.law.com/thelegalintelligencer/almID/1202650460609/.

240 Michael W. Austin, *Is Humility a Virtue in the Context of Sport?*, 31 J. Applied Phil. 203 (2014).

241 Josh O'Brien, *Lionel Messi Discusses Importance of Staying Humble and Disliking Being a Role Model*, Mirror (Dec. 4, 2021, 10:52 PM), https://www.mirror.co.uk/sport/football/news/lionel-messi-psg-role-model-25618918.

242 Jim Alexander, *Mike Trout's Angels Deal Rewards Baseball's Best, and Most Humble, Star*, Orange Cty. Reg. (Mar. 19, 2019, 6:37 PM) https://www.ocregister.com/2019/03/19/alexander-mike-trouts-angels-deal-rewards-baseballs-best-and-most-humble-star/.

243 David Barron, *Biles Staying Humble Despite Dominating Efforts*, Chron (Aug. 24, 2014, 6:41 PM), https://www.chron.com/olympics/article/Biles-staying-humble-despite-dominating-efforts-5709510.php.

they are extraordinary but because they are humble. An athlete, talented and competitive as each of these athletes is, cannot get better *without the recognition* that they can get better. This recognition requires humility. For example, in a Nike ad, the sometimes-humble Michael Jordan said, "I've missed more than 9,000 shots in my career. I've lost almost 300 games. Twenty-six times I've been trusted to take the game-winning shot and missed. I've failed over and over and over again in my life. And that is why I succeed."[244]

Humility in sports, like humility in legal writing, has two aspects. First, there is *behind the scenes*—for the athlete this takes the form of practice; for the brief writing lawyer this takes the form of reviewing, revising, rewriting. For both the legal writer and the athlete, humility behind the scenes is recognizing that there is always room for improvement.

Second, there is the *public face* of the athlete and the lawyer. For the athlete, this is "game time" when behind-the-scenes humility plays out with confidence. So too with legal writers—their briefs written for the audience and, having other elements set out in this article, demonstrate confident humility. This works. As philosopher Ian James Kidd points out, disciplined argumentation (what lawyers do) can foster humility, and that humility fosters better argumentation.[245]

Judge Parker Dunston's short essay, discussed earlier in this article, should be required reading in law school and for the practicing bar.[246] She highlighted confidence in the practice of advocacy is healthy until it ceases to be appropriately momentary and becomes, instead, a character trait. At that point, confidence becomes arrogance. Confidence is situational; arrogance a way of being.

Judge Dunston counsels that "[h]umility means recognizing that we shouldn't be too proud to be transparent about our faults and shortcomings. . . ."[247] She continued, "We practice humility by making a conscious effort to thank our staff, celebrate the successes of others, ask for and accept feedback, and always be willing to learn new and better ways to do things."[248] Humility is not about surrendering confidence helpful in prevailing in the lawsuit. Arrogance is the villain. Arrogance is confidence gone awry. Arrogance is the Achilles Heel of athletes and lawyers alike.

244 Nike, *Failure* (May 1997), https://www.youtube.com/watch?v=GuXZFQKKF7As.

245 Ian James Kidd, *Intellectual Humility, Confidence, and Argumentation*, 35(2) Topoi 395 (2016).

246 Dunston, *supra* note 158.

247 *Id.*

248 *Id.*

Judge Dunston's words mirror Lionel Messi's credo. The world's greatest soccer player recognizes his imperfection: "I'm never satisfied. I always push my limits and I always try to get better every day."[249] And Messi credits others: "I'm lucky to be part of a team who help to make me look good, and they deserve as much of the credit for my success as I do for the hard work we have all put in on the training ground."[250] We lawyers should find and then celebrate our inner Messi, or Biles, or Trout.

We lawyers are better lawyers when we recognize our imperfections as writers, and the shortcomings of our arguments. We lawyers must credit others, including opposing counsel. To be sure, as writers trying to convince our audience of the correctness of our position, our writing needs to be approachable (the humble part) and convincing (the confident part).[251] But too many lawyers too often exclusively embrace too much convincing/confidence, and then confidence morphs into arrogance, and you are less convincing.

Lawyers should not get too cozy with confidence to where it morphs into arrogance. Rather, lawyers who write persuasive documents should heed the advice of author Flannery O'Connor and learn the lessons of Icarus. O'Connor wrote, "[T]o know oneself is, above all, to know what one lacks. It is to measure oneself against Truth and not the other way around. The first product of self-knowledge is humility. . . ."[252] Legal writers, all lawyers, need to always know what they lack because in that realization lies being a better writer and a more effective lawyer.

Greek mythology offers perhaps the best example of the consequence of confidence morphing into arrogance. Icarus was ready to escape from the Labyrinth on the Island of Crete with wings fashioned of feathers and wax as his father, Daedalus, cautioned, "Let me warn you, Icarus, to take the middle way, in case the moisture weighs down your wings, if you fly too low, or if you go too high, the sun scorches them. Travel between the extremes."[253]

Upon hearing his father's advice, Icarus assented, then ascended. Soon confidence morphed into arrogance. Icarus flew higher and higher, and "His nearness to the devouring sun softened the fragrant wax that

249 *40 Lionel Messi Quotes That Will Inspire You to Pursue Your Dreams*, Highlights Blog (Nov. 23, 2023, 10:19 AM), https://www.thehighlightsapp.com/blog/lionel-messi-quotes.

250 *Id.*

251 Like legal writers, physicians must strike a similar balance and physicians who possess and exhibit the right level of humility "promote approachability while maintain perceived expertise." Kim & Parcell, *supra* note 11, at 1.

252 Flannery O'Connor, *The Fiction Writer & His Country*, *in* Mystery and Manners: Occasional Prose 35 (Sally & Robert Fitzgerald eds., 1969) (quoted in Ward, *supra* note 34, at 7).

253 Ovid, *The Myth of Daedalus and Icarus*, Metamorphoses, Book VIII, https://www.commonlit.org/en/texts/the-myth-of-daedalus-and-icarus (last visited May 8, 2024).

held the wings: and the wax melted: he flailed with bare arms, but losing his oar-like wings, could not ride the air. Even as his mouth was crying his father's name, it vanished into the dark blue sea."[254]

We legal writers should not believe we can fly close to the sun. We can't. We shouldn't. Confidence must be held in check by sincere humility lest confidence morphs into arrogance. Instead, have and project confident humility to be a more effective persuasive writer.

254 *Id.*

Judicial Writing and Case Management

A Bibliography

Aliza Milner*

I. Introduction

The work of the judiciary is manifold. On the one hand, judges develop law and answer weighty questions for all aspects of life and human relationships. On the other hand, they process cases and resolve disputes in workaday government fashion. And while we rely on courts to safeguard rights and uphold democratic principles, we also expect them to function well within prescribed budgets regardless of the number of cases they have. The mix of these expectations, lofty and routine, analytical and administrative, explains why the study of judicial work continues to absorb our attention as teachers, students, judges, and practitioners. It explains, too, the great volume of scholarship about judicial work, which fed this project.

This bibliography focuses on two aspects of judicial work: written opinions and decisions; and management of cases to resolution. I chose these categories because the writings of courts are the best-known aspect of judicial work, and case management supports that work. These categories also reflect the lofty and routine mix of expectations in judicial work.

Primarily, this bibliography includes material from January 2000 to December 2023. But it also updates portions of two bibliographies from 2011: Ruth Vance's annotated bibliography about judicial opinion writing and Mary Dunnewold, Beth Honetschlager, and Brenda Tofte's bibliography about judicial clerkships. Vance focused on "the craft of drafting an opinion primarily for courses on judicial writing."[1] She selected

* Director of Legal Communication and Research, Syracuse University College of Law. Thank you to Amy Griffin and Rachel Goldberg for their expert editorial advice and to my husband, Daniel Kornfeld, for his enduring support.

1 Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 Legal Writing 197, 199 (2011).

"how-to" materials published mostly between 1990 and 2010. Dunnewold, Honetschlager, and Tofte's bibliography included material about writing opinions, as well as material about applying to clerkships and a clerk's role in chambers.[2] It included material published from 1980 through 2011. These earlier bibliographies, then, focused on clerkships, whereas this compilation focuses on judicial work. A few sources from 2000 to 2011 about writing opinions appear in these previous bibliographies, but otherwise the content included in this bibliography is new.

II. The bibliography

A bibliography about judicial work cannot be too tidy because the work and commentary about it defy categories. Yet, I strove to define the scope of the bibliography intentionally, with several demarcations to assist readers in using the bibliography effectively. The first demarcation is that this bibliography concerns what judges do, rather than who they are. It does not include, for example, scholarship about judicial selection,[3] temperament, ideology, or education. Nor does it include scholarship analyzing an individual judge's style or tributes for individual judges, as meaningful as those tend to be.

Another demarcation is that the bibliography considers some, but not all, aspects of judicial work. In concentrating on writing and case management, it does not include scholarship about how judges reach decisions, mostly because that burgeoning material would be better served in a bibliography of its own. That bibliography, not this one, might focus on the psychology of judicial decisions and include topics of deliberation, collegiality, and jurisprudence.[4] Similarly, another bibliography, not this one, might chart scholarly conversations about judicial reasoning, statutory interpretation, stare decisis, and citation practices. All those topics affect what judges write and how they manage cases, but I do not include them here. Finally, Barbara Gotthelf prepared an excellent bibliography of oral argument in 2002, which I do not repeat.[5]

2 Mary Dunnewold, Beth Honetschlager & Brenda Tofte, *Judicial Clerkships: A Bibliography*, 8 Legal Comm. & Rhetoric 239 (2011). Readers also may be interested in an earlier bibliography about workflow in the federal courts. *See* Thomas E. Baker, *A Bibliography for the United States Courts of Appeals*, 25 Tex. Tech L. Rev. 335 (1994).

3 *See* Suzanne L. Cassidy, *Judicial Selection: A Selective Bibliography*, 56 Mercer L. Rev. 1019 (2005); Amy B. Atchison, Lawrence Tobe Liebert & Denise K. Russell, *Judicial Independence and Judicial Accountability, A Selected Bibliography*, 72 S. Calif. L. Rev. 723 (1999).

4 For writings by judges about decisionmaking, see Shirley S. Abrahamson, Susan M. Fieber & Gabrielle Lessard, *Judges on Judging: A Bibliography*, 24 St. Mary's L.J. 995 (1993). For sources concerning narrative theory in judicial writing and reasoning, see J. Christoper Rideout, *Applied Legal Storytelling: A Bibliography*, 12 Legal Comm. & Rhetoric 247 (2015).

5 Barbara Gotthelf, *Oral Advocacy: A Bibliography*, 19 Legal Comm. & Rhetoric 239 (2022).

Most, but not all, of the sources included are books and articles written for law journals because adding material prepared primarily for readers of political science or psychology quickly became unwieldy. Also, the bibliography includes writings about federal and state courts, as well as trial courts, intermediate appellate courts, and courts of last resort. The bibliography shows that legal scholarship is uneven, favoring federal appellate courts and state courts of last resort over state intermediate appellate courts and trial courts. Finally, this bibliography does not include scholarship about courts outside of the United States or comparative analyses of courts from different countries.

Often as I returned to this project, I saw different ways to organize and select material. The structure I chose is one among several possibilities. Nonetheless, this bibliography provides a wealth of reading about the judicial work of writing and managing cases. I hope the bibliography inspires new questions, research, and discussions. Years of clerking in the Maryland appellate courts taught me that judicial work is a noble endeavor, and I have yet to forget that lesson.

A. Judicial writing

Scholarly attention for judicial writing shifts between descriptions of what courts do and prescriptions for what they ought to do. Overall, the material in this section reflects that twofold attention. Subsections 1 and 2 include scholarship about the rules and customs of judicial writing in federal and state courts. These sources track when courts write and how those writings are treated. Common subjects, for example, are the different forms that appellate opinions take and their precedential effect. Next, subsection 3 explores the purpose and ethics of judicial writing. These sources are more prescriptive than descriptive, suggesting how judges should approach writing to meet their professional responsibility. Subsection 4 covers style in judicial writing. Subsection 5 lists scholarship exploring dissents and concurrences, and subsection 6 collects new scholarship about artificial intelligence and judicial writing, a conversation that is sure to grow.

1. Rules and customs of judicial writing in federal courts

For federal material in this section, the precedential weight of judicial opinions continues to gather attention even after Federal Rule of Appellate Procedure 32.1 allowed for citation to unpublished opinions issued after 2007. Also, among federal courts, disproportionate attention is given to the U.S. Court of Appeals for the Federal Circuit because it allows affirmance of patent law cases without written explanation. Separating the material devoted to federal courts from that devoted to state courts

should assist future research, but a few of the sources in this subsection also discuss state courts.

Jill Barton, *Supreme Court Splits . . . on Grammar and Writing Style*, 17 Scribes J. Legal Writing 33 (2017).

Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1 (2021).

Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 Fla. St. U. L. Rev. 1077 (2005).

Dennis Crouch, *Wrongly Affirmed Without Opinion*, 52 Wake Forest L. Rev. 561 (2017).

Matthew J. Dowd, *Rule 36 Decisions at the Federal Circuit: Statutory Authority*, 21 Vand. J. Ent. & Tech. L. 857 (2019).

Ben Grunwald, *Strategic Publication*, 92 Tul. L. Rev. 745 (2018).

Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 Vand. L. Rev. 765 (2018).

Deborah L. Heller, *To Cite or Not to Cite: Is That Still a Question?*, 112 Law Libr. J. 393 (2020).

Andrew Hoffman, *The Federal Circuit's Summary Affirmance Habit*, 2018 BYU L. Rev. 419 (2018).

Kenneth F. Hunt, *Saving Time or Killing Time: How the Use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources*, 61 Syracuse L. Rev. 315 (2011).

Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 Geo. L.J. 683 (2018).

Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 Harv. L. Rev. 540 (2014).

Rebecca A. Lindhorst, *Because I Said So: The Federal Circuit, the PTAB, and the Problem with Rule 36 Affirmances*, 69 Case W. Res. L. Rev. 247 (2018).

Zina Makar, *Per Curiam Signals in the Supreme Court's Shadow Docket*, 98 Wash. L. Rev. 427 (2023).

Peter W. Martin, *District Court Opinions That Remain Hidden Despite a Long-Standing Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference*, 110 Law Libr. J. 305 (2018).

Peter W. Martin, *Judges Revising Opinions After Their Release*, 4 J.L.: Periodical Lab'y Legal Scholarship 243 (2014).

Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 Mich. L. Rev. 533 (2020).

Elizabeth Y. McCuskey, *Submerged Precedent*, 16 Nev. L.J. 515 (2016).

Alexander A. Reinert, *Measuring Selection Bias in Publicly Available Judicial Opinions*, 38 Rev. Litig. 255 (2019).

Scott Rempell, *Unpublished Decisions and Precedent Shaping: A Case Study of Asylum Claims*, 31 Geo. Immigr. L.J. 1 (2016).

Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 Ind. L. Rev. 399 (2002).

Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 Cornell L. Rev. 1307 (2011).

Hayley Stillwell, *Shadow Dockets Lite*, 99 Denv. L. Rev. 361 (2022).

Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 Campbell L. Rev. 333 (2015).

2. Rules and customs of judicial writing in state courts

The scholarship for judicial writing considers state courts, too, as this subsection demonstrates. Yet, the rules and customs of judicial writing vary considerably across states and between levels of state courts, so reasonably one might expect more attention for state courts than federal courts. That has not happened, perhaps because academic scholarship favors federal courts or because the variation in state practices complicates neat analysis. Nonetheless, opportunities abound for future exploration of judicial writing in state courts.

David R. Cleveland, *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, 16 J. App. Prac. & Process 257 (2015).[6]

Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. App. Prac. & Process 105 (2010).

6 Cleveland's article includes federal and state rules. It updated two previous surveys: Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. App. Prac. & Process 349 (2004), and Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001).

Steven N. Gosney, *"What Are My Chances on Appeal?" Comparing Full Appellate Decisions to Per Curiam Affirmances*, 18 J. App. Prac. & Process 115 (2017).

Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y. L. Sch. L. Rev. 481 (2011).

Logan Hetherington, *Keeping Up with Your Sister Court: Unpublished Memorandums, No-Citation Rules, and the Superior Court of Pennsylvania*, 122 Dick. L. Rev. 741 (2018).

Blake Koemans, *The Big Sky Shadow Docket: Noncite Opinions and the Montana Supreme Court*, 84 Mont. L. Rev. 317 (2023).

Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 Wm. Mitchell L. Rev. 206 (2010).

Rafi Moghadam, *Judge Nullification: A Perception of Unpublished Opinions*, 62 Hastings L.J. 1397 (2011).

Michael L. Smith, *The Citation of Unpublished Cases in the Wake of COVID-19*, 25 Chap. L. Rev. 97 (2021).

Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. App. Prac. & Process 159 (2013).

Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 Loy. L. Rev. 535 (2013).

William C. Vickrey, Douglas G. Denton & Wallace B. Jefferson, *Opinions as the Voice of the Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness*, 48 Ct. Rev. 74 (2012).

Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. Balt. L. Rev. 561 (2016).

3. Purpose and ethics of judicial writing

The sources in this subsection discuss what judicial writing means, most often for the audience, but sometimes for the writers. And that discussion of meaning tends to blend with sharp recommendations for what should or should not be done in judicial writing. The sources here lean interdisciplinary, offering, for example, historical reviews of judicial writing or linking judicial writing to cognitive science and writing theory. Some of the sources in this subsection discuss federal or state courts, but most cover all courts, so I did not distinguish between them.

Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483 (2015).

Michael Conklin, *"Be A Lot Cooler If You Didn't": Why Judges Should Refrain from Pop Culture References in Judicial Opinions*, 46 J. Legal Prof. 139 (2021).

Skylar Reese Croy, *The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court*, 26 Suffolk J. Trial & App. Advoc. 1 (2021).

Perry Dane, *Law Clerks: A Jurisprudential Lens*, 88 Geo. Wash. L. Rev. 54 (2020).

Adam Feldman, *All Copying Is Not Created Equal: Borrowed Language in Supreme Court Opinions*, 17 J. App. Prac. & Process 21 (2016).

Peter Friedman, *What Is a Judicial Author?*, 62 Mercer L. Rev. 519 (2011).

Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 Widener L.J. 597 (2003).

Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. App. Prac. & Process 247 (2009).

Gerald Lebovits, Alifyah V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 Geo. J. Legal Ethics 237 (2008).

Gerald Lebovits, *What Trial Judges Want (and Don't Want) in Appellate Opinions*, 23 J. App. Prac. & Process 375 (2023).

James Markham, *Against Individually Signed Judicial Opinions*, 56 Duke L.J. 923 (2006).

David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509 (2001).

Anne E. Mullins, *Jedi or Judge: How the Human Mind Redefines Judicial Opinions*, 16 Wyo. L. Rev. 325 (2016).

Anne E. Mullins, *Source-Relational Ethos in Judicial Opinions*, 54 Wake Forest L. Rev. 1089 (2019).

Chad M. Oldfather, *Error Correction*, 85 Ind. L.J. 49 (2010).

Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Geo. L.J. 1283 (2008).

Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism*, 45 Ariz. St. L.J. 1077 (2013).

Joel Schumm, *No Names, Please: The Virtual Victimization of Children . . . in Appellate Court Opinions*, 42 Ga. L. Rev. 471 (2008).

Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 Iowa L. Rev. 181 (2020).

Justin Simard, *Citing Slavery*, 72 Stan. L. Rev. 79 (2020).

Annie M. Smith, *Great Judicial Opinions Versus Great Literature: Should the Two Be Measured by the Same Criteria*?, 36 McGeorge L. Rev. 757 (2005).

Barry Sullivan & Ramon Feldbrin, *The Supreme Court and the People: Communicating Decisions to the Public*, 24 U. Pa. J. Const. L. 1 (2022).

Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 Hous. L. Rev. 103 (2021).

Ryan Benjamin Witte, *The Judge as Author / The Author as Judge*, 40 Golden Gate U. L. Rev. 37 (2009).

4. Style in judicial writing

Beyond the earlier subsections of rules, customs, purpose, and ethics, this subsection explores the style of judicial writing, mostly for appellate opinions. The scholarship discusses structure, language, tone, and length of opinions, but it also considers added flourishes like humor or images.

Articles

Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 Vill. Sports & Ent. L.J. 1 (2010).

Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 Cardozo L. Rev. 1 (2009).

Jill Barton, *So Ordered: The Techniques of Great Judicial Stylists*, 18 Scribes J. Legal Writing 1 (2019).

Luke Burton, *Less Is More: One Law Clerk's Case Against Lengthy Judicial Opinions*, 21 J. App. Prac. & Process 105 (2021).

Frank B. Cross & James W Pennbaker, *The Language of the Roberts Court*, 2014 Mich. St. L. Rev. 853 (2014).

Lisa Eichhorn, *Declaring, Exploring, Instructing, and (Wait for It) Joking: Tonal Variation in Majority Opinions*, 18 Legal Comm. & Rhetoric 1 (2021).

Ross Guberman, *What A Breeze: The Case for the "Impure" Opinion*, 16 Scribes J. Legal Writing 57 (2015).

Lucas K. Hori, Bons Mots*, Buffoonery, and the Bench: The Role of Humor in Judicial Opinions*, 60 UCLA L. Rev. 16 (2012).

Stephen Johnson, *The Changing Discourse of the Supreme Cour*t, 12 U.N.H. L. Rev. 29 (2014).

Andrew Jensen Kerr, *The Perfect Opinion*, 12 Wash. U. Juris. Rev. 221 (2020).

Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 Scribes J. Legal Writing 1 (2003).

Nancy Marder, *The Court and the Visual Images and Artifacts in U.S. Supreme Court Opinions*, 88 Chi.-Kent L. Rev. 331 (2013).

Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017).

S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. Disp. Resol. 93 (2015).

Mary B. Trevor, *From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions*, 45 U. Tol. L. Rev. 291 (2014).

Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 Me. L. Rev. 47 (2002).

Books

Ruggero J. Aldisert, Opinion Writing (2012).

Jill Barton, So Ordered: The Writer's Guide for Aspiring Judges, Judicial Clerks, and Interns (2017).

Mary L. Dunnewold, Beth A. Honetschlager & Brenda L. Tofte, Judicial Clerkships: A Practical Guide (2010).

Federal Judicial Center, Law Clerk Handbook (4th ed. 2020).

Joyce J. George, Judicial Opinion Writing Handbook (4th ed. 2000).

Ross Guberman, Point Taken: How to Write Like the World's Best Judges (2015).

Aliza Milner, Judicial Clerkships: Legal Methods in Motion (2011).

Abigail L. Perdue, The All-Inclusive Guide to Judicial Clerking (2017).

William Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles (2007).

Richard A. Posner, Reflections on Judging (2013).

Jennifer L. Sheppard, In Chambers: A Guide for Judicial Clerks and Externs (2012).

5. Dissents and concurrences

In the scholarship about dissents and concurrences a lingering question is whether separate opinions benefit courts and the people they serve. Do dissents, for example, represent healthy debate or strained collegiality? Are concurrences useful for law development? This subsection includes scholarship about federal and state courts.

Articles

Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 Cornell L. Rev. 817 (2018).

Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012).

Sarah M.R. Cravens, *In Good Conscience: Expressions of Judicial Conscience in Federal Appellate Opinions*, 51 Duq. L. Rev. 95 (2013).

Bernice B. Donald, *Judicial Independence, Collegiality, and the Problem of Dissent in Multi-Member Courts*, 94 N.Y.U. L. Rev. 317 (2019).

Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. Rev. 1451 (2009).

Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. Legal Analysis 101 (2011).

Greg Goelzhauser, *Silent Concurrences*, 31 Const. Comment. 351 (2016).

M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 Sup. Ct. Rev. 283 (2007).

Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. Pa. L. Rev. 1719 (2015).

Allison Orr Larsen, *Perpetual Dissents*, 15 Geo. Mason L. Rev. 447 (2008).

Joseph P. Mastrosimone, *Benchslaps*, 2017 Utah L. Rev. 331 (2017).

Joseph Scott Miller, *A Judge Never Writes More Freely: A Separate-Opinions Citation-Network Approach to Assessing Judicial Ideology*, 2022 Mich. St. L. Rev. 901 (2022).

Jonathan Remy Nash, *Measuring Judicial Collegiality Through Dissent*, 70 Buff. L. Rev. 1561 (2022).

Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 Harv. L. Rev. 1305 (2011).

David Orentlicher, *Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously*, 54 Conn. L. Rev. 303 (2022).

Meg Penrose, *Goodbye to Concurring Opinions*, 15 Duke J. Const. L. & Pub. Pol'y 25 (2020).

Alexander I. Platt, *Deciding Not to Decide: A Limited Defense of the Silent Concurrence*, 17 J. App. Prac. & Process 141 (2016).

Laura Krugman Ray, *Circumstance and Strategy: Jointly Authored Supreme Court Opinions*, 12 Nev. L. J. 727 (2012).

Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 Yale J.L. & Human. 507 (2012).

Joan Steinman, *Signed Opinions, Concurrences, Dissents, and Vote Counts in the U.S. Supreme Court: Boon or Bane? (A Response to Professors Penrose and Sherry)*, 53 Akron L. Rev. 525 (2019).

Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc,* 2006 Wis. L. Rev. 1315 (2006).

Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 Duke J. Const. L. & Pub. Pol'y 285 (2019).

Books

Pamela C. Corley, Concurring Opinion Writing on the U.S. Supreme Court (2010).

Mark Tushnet, I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases (2008).

Michael A. Zilis, The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions (2015).

6. Artificial intelligence and judicial writing

This subsection includes recent scholarship about artificial intelligence. The technology is new, but the conversations reflected here are familiar, asking once again what judicial writing means to American courts, and attempting once again to parse the analytical and administrative functions of courts.

Ray Worthy Campbell, *Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning*, 18 Colo. Tech. L.J. 323 (2020).

Cary Coglianese & Lavi M. Ben Dor, *AI in Adjudication and Administration*, 86 Brook. L. Rev. 791 (2021).

Joshua P. Davis, *Of Robolawyers and Robojudges*, 73 Hastings L.J. 1173 (2022).

Aziz Z. Huq, *A Right to A Human Decision*, 106 Va. L. Rev. 611 (2020).

Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 Stan. Tech. L. Rev. 242 (2019).

Eugene Volokh, *Chief Justice Robots*, 68 Duke L.J. 1135 (2019).

B. Case management

Courts must manage their dockets. Written opinions and decisions are important components of judicial work, but they are not the only considerations. The sources in this section tackle other considerations of judicial work like timeliness, efficiency, and the division of labor between judges and law clerks. At times, I paused in deciding whether to include a source in section A, Judicial writing, or this section devoted to case management. As caseloads and time pressures increase, for example, courts are more likely to forego written and fully reasoned opinions. With that said, I was able generally to separate scholarship focused primarily on writing opinions from scholarship focused on managing cases.

Along with the sources listed below, several excellent collections exist regarding case management. *Duke Law Journal* and the *New England Law Review* have hosted symposia exploring evaluation and measurement of judicial work.[7] *Marquette Law Review* hosted a comprehensive discussion about law clerks.[8] More recently, the *Nevada Law Journal* devoted a volume to the U.S. Supreme Court's shadow docket.[9] For state courts, the *Journal of Appellate Process and Procedure* collected writings about expedited appeals[10] and the *Indiana Law Review* honed its lens on state intermediate appellate courts.[11] *Kentucky Law Journal* hosted a symposium about state court funding.[12]

7 *See, e.g.*, Jeffrey M. Chemerinsky & Jonathan L. Williams, *Measuring Judges and Justice*, 58 Duke L.J. 1173 (2009); Jordan M. Singer, *Foreword: Productivity in Public Adjudication*, 48 New Eng. L. Rev. 445 (2014).

8 *See, e.g.*, Chad Oldfather & Todd C. Peppers, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 Marq. L. Rev. 1 (2014).

9 *See* Leslie C. Griffin, *The Shadow Docket: A Symposium*, 23 Nev. L.J. 669 (2023).

1. Case management in federal courts

As in section A, I divided the material about case management between federal and state courts. The U.S. Courts of Appeals are a popular focus for case management, along with the U.S. Supreme Court's shadow docket. There are several articles studying law clerks and staff attorneys in federal courts.

Articles

David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 Clev. St. L. Rev. 47 (2013).

Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 Vand. L. Rev. 605 (2020).

Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 Wis. L. Rev. 1063 (2022).

Miguel F. P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 Cornell L. Rev. 363 (2020).

Adam Heavin, *Short-Circuited: How Constitutional Silence and Politicized Federalism Led to Erosion of "Judicial Hallmarks" in Federal Appellate Process*, 56 Tulsa L. Rev. 109 (2020).

Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 Marq. L. Rev. 289 (2014).

Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 Stan. L. & Pol'y Rev. 57 (2016).

Steve Leben, *Getting It Right Isn't Enough: The Appellate Court's Role in Procedural Justice*, 69 U. Kan. L. Rev. 13 (2020).

Marin K. Levy, *Judicial Attention as A Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 Geo. Wash. L. Rev. 401 (2013).

Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 Cornell L. Rev. 65 (2017).

Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. Rich. L. Rev. 659 (2007).

10 *See* Coleen M. Barger, *Expedited Appeals in Selected State Appellate Courts*, 4 J. App. Prac. & Process 191 (2002).

11 *See, e.g.*, Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 Ind. L. Rev. 329 (2002).

12 *See, e.g.*, Erwin Chemerinsky, *Symposium on State Court Funding: Keynote Address*, 100 Ky. L.J. 743 (2012).

Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 Or. L. Rev. 97 (2016).

Merritt E. McAlister, *Bottom-Rung Appeals*, 91 Fordham L. Rev. 1355 (2023).

Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137 (2022).

Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 Wake Forest L. Rev. 1021 (2021).

Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting A Path for Federal Judiciary Reform*, 108 Calif. L. Rev. 789 (2020).

Donald W. Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 Law & Contemp. Probs. 133 (2019).

Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 Alb. L. Rev. 623 (2008).

Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1 (2007).

Richard A. Posner, *Demand and Supply Trends in Federal and State Courts over the Last Half Century*, 8 J. App. Prac. & Process 133 (2006).

Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 Penn St. L. Rev. 243 (2013).

Diane P. Wood & Zachary D. Clopton, *Managerial Judging in the Courts of Appeals*, 43 Rev. Litig. 87 (2023).

William G. Young & Jordan M. Singer, *Bench Presence: Toward A More Complete Model of Federal District Court Productivity*, 118 Penn St. L. Rev. 55 (2013).

Books

Jennifer Barnes Bowie, Donald R. Songer & John Szmer, The View from the Bench and Chambers: Examining Judicial Process and Decision Making on the U.S. Court of Appeals (2014).

Jonathan Matthew Cohen, Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Court of Appeals (2002).

Todd C. Peppers, Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk (2006).

Artemus Ward & David L. Weiden, Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court (2006).

2. Case management in state courts

Counting law journal articles, less has been written about case management in state courts as compared to federal courts. But the material in this subsection is a strong start for further study. Note that the scholarship differentiates between intermediate appellate courts and courts of last resort.

Articles

W. Warren H. Binford, Preston C. Greene, Maria C. Schmidlkofer, Robert M. Wilsey & Hillary A. Taylor, *Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey*, 9 J. App. Prac. & Process 37 (2007).

Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency,* 21 Mich. J. Race & L. 205 (2016).

Stephen J. Choi, Mitu Gulati & Eric Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 Duke L.J. 1313 (2009).

Mathilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 Am. J. Comp. L. 951 (2014).

Council of Chief Judges of the State Courts of Appeal, *The Role of State Intermediate Appellate Courts: Principles for Adapting to Change* (Nov. 2012), https://www.sji.gov/wp/wp-content/uploads/Report_5_CCJSCA_Report.pdf.

Roger A. Hanson & Brian J. Ostrom, *Introduction: Achieving Better Court Management Through Better Data*, 15 J. App. Prac. & Process 19 (2014).

Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 Ind. L. Rev. 467 (2002).

Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611 (2014).

Judson R. Peverall, *Inside State Courts: Improving the Market for State Trial Court Law Clerks*, 55 U. Rich. L. Rev. 277 (2020).

Pamela Rasmussen, *A History of the Missouri Court of Appeals: The Role of Regional Conflicts in Shaping Intermediate Appellate Court Structure*, 17 J. App. Prac. & Process 245 (2016).

Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 Fla. St. U. L. Rev. 931 (2012).

Edwin H. Stern, *The 2008 Chief Justice Joseph Weintraub Lecture: Frustrations of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey)*, 60 Rutgers L. Rev. 971 (2008).

Laura Denvir Stith, *Just Because You Can Measure Something, Does It Really Count?*, 58 Duke L.J. 1743 (2009).

Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 Harv. L. Rev. F. 167 (2018).

Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 Just. Sys. J. 24 (2008).

Books

Victor E. Flango & Thomas M. Clarke, Reimagining Courts: A Design for the Twenty-First Century (2015).

Brian J. Ostrom, Charles W. Ostrom, Jr., Roger A. Hanson & Matthew Kleiman, Trial Courts as Organizations (2007).

BOOK REVIEW

Telling Untold Stories

The 272: The Families Who Were Enslaved and Sold to Build the American Catholic Church
Rachel L. Swarns (Penguin Random House 2023), 320 pages

Aysha S. Ames, rev'r*

In April 2016, I read an article in *The New York Times* in which journalist Rachel Swarns described that on June 19, 1838, the Maryland Society of Jesus ("Jesuits"), a Catholic religious order, and Georgetown College (now Georgetown University) sold more than 272 enslaved people from Jesuit-owned plantations in southern Maryland to plantation owners in southern Louisiana.[1] The article explained that the school sold the enslaved men, women, and children to cover some of its debts.[2] The sale was instrumental in supporting Georgetown, and more broadly, ultimately growing Catholicism.[3] At the end of the article, there was a call for descendants—who were Black, Catholic, with ties to several plantations in Louisiana.[4] Although I descend from a Black Catholic family, my family's roots are in Southern Maryland. I made a mental note but did not think more about the article until six months later when my father received a call from Malissa Ruffner, a genealogist with the Georgetown Memory Project. Ms. Ruffner explained that approximately one-third of the enslaved people sold in the 1838 sale, 91 in all, were nowhere to be found in any historical record in Louisiana.[5] These "lost Jesuit slaves" never left

* Director of Legal Writing, Fordham Law School and Descendant of Ann Joice, Harry Mahoney, Bibiana Mahoney, Nace Butler, and several others who were enslaved by the Jesuits.

1 Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown. What Does it Owe Their Descendants?*, N.Y. Times, Apr. 16, 2016, https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html.

2 *Id.*

3 *Id.*; Rachel L. Swarns, The 272: The Families Who Were Enslaved and Sold to Build the American Catholic Church 179 (2023).

4 Swarns, *supra* note 1.

5 Terrence McCoy, *They Thought Georgetown's Missing Slaves were 'Lost.' The Truth Was Closer to Home Than Anyone Knew*, Wash. Post, Apr. 28, 2018, https://www.washingtonpost.com/local/social-issues/they-thought-georgetowns-missing-slaves-were-lost-the-truth-was-closer-to-home-than-anyone-knew/2018/04/28/074beb66-3e65-11e8-a7d1-e4efec6389f0_story.html.

Maryland.[6] I am a descendant of Nace Butler, one of those "lost" enslaved people.[7]

In *The* 272*: The Families Who Were Enslaved and Sold to Build the American Catholic Church*, Rachel Swarns tells the stories that could not be told in a series of newspaper articles.[8] In doing so, she elevates the voices of those enslaved and their descendants—those repeatedly left out of the narrative. [9] In challenging the prevailing narrative of enslaved Black people and their ability to resist, and by telling the story of the Jesuits and enslavement, Swarns's counter storytelling recasts those enslaved as empowered agents while simultaneously taking a critical look at the institution that enslaved them. Her counter storytelling creates space for untold narratives and truths from "outsiders"—those who are left out of the dominant stories.[10] As professors, lawyers, and judges, we are storytellers and advocates. Swarns provides us with a model to create space for these "outsider" stories as well.

I. "Our liberty was stolen. We should be free people."[11]

Swarns traces the Mahoney family through two hundred years beginning with the matriarch Ann Joice's wrongful enslavement and ends with the present day. Throughout this compelling counter storytelling journey, she centers untold narratives of my ancestors and others. In uplifting these "outsider" stories, Swarns dispels the narrative that those enslaved were disempowered and that slavery was central to their identity.[12] She instead views them as whole people with complex identities—people who were dedicated to their families, their faith, and securing their freedom.

Throughout the book, Swarns contests the narrative that enslaved people, like the Mahoneys, were disempowered. She begins by documenting the Jesuits' arrival to colonial Maryland in the seventeenth century but quickly shifts the reader's focus to the arrival of Ann Joice, the

6 *Id.*

7 Malissa Ruffner, *Ignatius "Nace" Butler, Jr. (GMP-199)*, Georgetown Memory Project Genealogical Rep., 2–3, https://www.georgetownmemoryproject.org/.

8 Swarns, *supra* note 3.

9 *Id.* at 143.

10 Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2323 (1989).

11 Swarns, *supra* note 3 at 12.

12 *Id.*

Mahoney matriarch, a few decades later.[13] Although Ann Joice came to colonial Maryland as an indentured servant, her papers were intentionally destroyed in a successful attempt to enslave her and her descendants.[14] To resist their enslavement, the descendants of Ann Joice passed down from generation to generation the knowledge that they were wrongly enslaved;[15] used force against their oppressors;[16] filed freedom suits;[17] hid to prevent being transported to Louisiana in the 1838 sale; [18] and, most impressively, took ownership of the religion of their oppressors.[19]

II. Counter storytelling and the Catholic Church

Swarns also joins the conversation of reevaluating the Catholic Church's and the Jesuits' narrative related to slavery. The evolution of Church law related to slavery ranged from the existence of "natural slaves," to rationalizing the enslavement of those captured in war, foreigners, as well as racist ideologies about Africans to justify the trade.[20] Contrary to many previously published works about slavery and the Catholic Church, Swarns informs the reader that the Jesuits would ultimately justify, "defend, and participate in, the enslavement of Africans and their descendants."[21] One Jesuit, Father James Ryder, even "described slaveholders as noble protectors of the enslaved, who could take comfort in the 'kindness of his compassionate' enslavers."[22]

In offering this perspective, Swarns joins others who challenge the Catholic Church's record on enslavement,[23] including Father Christopher

13 Swarns, *supra* note 3 at 1–8.

14 *Id*. at 8.

15 *Id*. at 17, 27.

16 *Id*. at 16–19.

17 *Id*. at 27.

18 *Id*. at 130–31.

19 *Id*. at 219.

20 Although much has been documented about Jesuit slaveholding and how the Jesuits treated the human beings they enslaved, (*see, e.g.,* Christopher J. Kellerman, All Oppression Shall Cease: A History of Slavery, Abolitionism, and the Catholic Church 29 (2022); Robert Emmett Curran, Shaping American Catholicism: Maryland and New York, 1805–1915 (2012); Thomas Murphy, S.J., Jesuit Slaveholding in Maryland, 1717–1838 7–8 (2001); Edward F. Beckett, S.J., Listening to Our History: Inculturation and Jesuit Slaveholding (1996), https://openlibrary.org/books/OL25462592M/Listening_to_our_history (last visited May 15, 2024); Kenneth J. Zanca, American Catholics and Slavery, 1789–1866: An Anthology of Primary Documents, 23–26 (1994)), modern narratives describing the history of the Jesuits omit Jesuit slaveholding. *See e.g.,* John W. O'Malley, S.J., The Jesuits: A History from Ignatius to the Present (2014).

21 Swarns, *supra* note 3, at 9, 12.

22 *Id.* at 98.

23 *Id*. at 1, 9.

Kellerman, who has stated that the Catholic Church "embraced slavery in theory and in practice."[24] Swarns's narrative illustrates that "practice." By telling the stories of a single family's ordeal, she details the inhumanity and brutality of slavery. Not only is she able to trace the impact that the horrors of slavery had on generations of descendants, but she is also able to demonstrate the benefits that Georgetown and the Society of Jesus received.

III. Rethinking universities and slavery

Finally, in this book Swarns continues the conversation that her April 2016 article began—forcing us to challenge and confront the often hidden and troubling histories of the institutions of higher learning that that we as lawyers attended, support, and, in my case, are employed by. Swarns' counter storytelling is a reminder that connections to colonialism, enslavement, and oppression impact all global communities, but those narratives are often fictionalized, falsified, or simply ignored. In challenging the prevailing narrative of enslaved Black people and their ability to resist, and by telling the story of the Jesuits and enslavement, Swarns's counter storytelling recasts those enslaved as empowered agents while simultaneously taking a critical look at the institution that enslaved them—imploring us to be critical of the stories we are told, the stories we tell ourselves, and the stories we tell when we advocate for others.

24 Christopher J. Kellerman, *Slavery and the Catholic Church: It's Time to Correct the Historical Record*, Am: Jesuit R., Feb. 15, 2023, https://www.americamagazine.org/faith/2023/02/15/catholic-church-slavery-244703. For a comprehensive account of the evolution of the Church's teaching on and slavery, see also Kellerman, *supra* note 20.

BOOK REVIEW

Transcending Genre

Lessons from the Poet on Good Writing

The Triggering Town
Richard Hugo (W.W. Norton and Co. 1979), 109 pages

Sara Cates, rev'r*

A friend of mine, an accomplished trial lawyer, recently told me about a mediation statement he had written for a medical malpractice case involving the death of a young woman. "I used a series of short, declarative sentences," he said, "in an attempt to create dramatic tension. I wanted the mediator to be there in the room as this terrible scene plays out and for him to experience it as much as possible." This anecdote illustrates a core fact: lawyers write. And, we are always looking for ways to do it better because the better we are at it, the more effective advocates we will be.

There is a world of discourse studying the relationship between law and literature. A component of that discourse discusses the relationship between law and poetry, examining, among other things, how law and poetry are alike and how they are different, as well as what lawyers might glean from looking at law from a poetic lens.[1] For me, though, what permeates the discourse on law and literature is the fact that, regardless of the connection between the two, what remains is that lawyers write, and it is good for us to think about how we might write better. One way to improve our writing is to look at how other writers approach the writing process to see what we might learn. It was with that goal in mind that I reread a classic in the books-for-poets genre, *The Triggering Town*, by American poet and creative writing professor Richard Hugo.[2]

* Assistant Professor of Legal Skills, Quinnipiac University School of Law.

1 *See, e.g.*, Edward J. Eberle & Bernhard Grossfeld, *Law and Poetry*, 11 Roger Williams U. L. Rev. 353, 353 (2006) (proposing that law and poetry are both "human creations of imagination and ingenuity, communicate their essence through language, provide order, form and structure to a dizzying array of phenomena present in daily life, and reflect and reshape the culture from which they arise"); George D. Gopen, *Rhyme and Reason: Why the Study of Poetry Is the Best Preparation for the Study of Law*, 46 Coll. English 333, 334 (1984) (arguing that the "formalistic study of poetry is the best preparation for the study of law").

The Triggering Town is a collection of lectures and essays on poetry and writing, dedicated to "all students of creative writing—and their teachers."[3] The book is divided into nine sections, each of which addresses writing poetry and the teaching of poets with Hugo's characteristic wit and humor. Despite its focus on the poet, there are lessons in Hugo's book valuable to legal writers and those that teach and mentor legal writers.

Hugo's book, which is funny and sentimental in the right ways and a delight to read, reminded me that facets of good writing transcend genre and purpose. I have attempted to capture some of those facets below, but given Hugo's main premise for teaching writing—the focus on the writer and the writer's process—all legal writers should read *The Triggering Town* and cull for themselves the components of it that will lead to better writing.

Develop a writing identity.

Certain aspects of writing transcend audience and purpose. First, all writers must come to know themselves *as writers*. Hugo's central approach to teaching creative writing is to have his students develop the self-criticism essential to all writers: he says, of the teaching of writing, that "[u]ltimately the most important things a poet will learn about writing are from himself in the process."[4] He encourages learning to write by writing, again and again, letting the poet's imagination take off in the words she chooses and how she uses them.[5] "Once you have a certain amount of accumulated technique, you can forget it in the act of writing. These moves that are naturally yours will stay with you and will come forth mysteriously when needed."[6]

Hugo's advice for developing a writing identity is to ignore the reader. He says, "Never worry about the reader, what the reader can understand."[7] Hugo's advice is worthy of lawyers' consideration, at least to some extent. Lawyers are trained to write for a specific audience—a

2 Hugo (born 1923, died 1982) studied creative writing at the University of Washington where he was a pupil of the poet Theodore Roethke. *See* Poets.org, https://poets.org/poet/richard-hugo (last visited May 11, 2024). In 1952, he began to work at Boeing as a technical writer, where he remained for thirteen years. *Id.* He went on to teach English and creative writing at the University of Montana, and taught there for nearly eighteen years. *Id.*

3 Richard Hugo, The Triggering Town: Lectures and Essays on Poetry and Writing (1979).

4 *Id.* at 33.

5 *Id.* at 12–15.

6 *Id.* at 17.

7 *Id.* at 5. Other poets take an adverse position. Ted Kooser, for instance, advises as follows: "I recommend that when you sit down to write you have in mind an imaginary reader, some person you'd like to reach with your words. . . . If you keep the shadow of that reader—like a whiff of perfume—in the room where you write, you'll be a better writer." Ted Kooser, The Poetry home Repair Manual 20 (2005).

client, a judge, opposing counsel. Despite the validity of considering the audience when we write as lawyers, it is helpful to step back (maybe even for just short moments) and consider our own writing identities. If there must be a writer before there is a reader, there is value in honing the self-criticism and accumulated technique personal to us that will help us be better writers. There is also value in considering what moves us in a given advocacy situation. To convince someone else that our way is the right way, we must thoroughly convince ourselves first. We must find the angle—the way of looking at and understanding the case and the emotional response it creates—that first and foremost works for us. Hugo notes that "if you are not *risking* sentimentality, you are not close to your inner self."[8] There is freedom in ignoring the reader that may allow us to understand who we are, truly, as advocates and writers that will make us even more impactful in those pursuits.

Find power in creating a theory of the case.

The fun of writing also transcends audience and purpose. All writers can experience the fulfillment that comes with having created something. All writers can enjoy discovering the power of language. Hugo advises poets, "If you feel pressure to say what you know others want to hear and don't have enough devil in you to surprise them, shut up."[9] This is a powerful lesson for advocates, particularly when crafting a theory of the case, a theme that will carry through a mediation position and opening and closing arguments. The theme must stand out and grab the attention of the mediator or juror. The lawyer's theme—the lawyer's words—must move others so viscerally they want to take decisive action—declare someone not guilty, send a person to jail, award large sums of money to someone they have never met.

Lawyers can find joy and fulfillment in coming up with a compelling argument or theory of the case. The greatest professional satisfaction is, of course, when our words get us the desired result for the client—that settlement, that verdict. Hugo's book reminds us that "once language exists only to convey information, it is dying."[10] Lawyers—in particular young ones, will do well to remember that the goal of legal writing is not just the conveyance of information—it is persuasion.

8 Hugo, *supra* note 3, at 7.

9 *Id.* at 5.

10 *Id.* at 11.

Find power in language itself.

Young poets, according to Hugo, often pay attention to big ideas to the exclusion of small matters.[11] "A student may love the sound of Yeats's 'stumbling upon the blood dark track once more' and not know that the single-syllable word with a hard consonant ending is a unit of power in English and that's one reason 'blood dark track' goes off like rifle shots."[12] While this is "simple stuff," he says, only "few people notice it."[13] "But little matters are what make and break poems, and if a teacher can make the poet aware of it, he has given him a generous shove in the only direction. In poetry, the big things tend to take care of themselves."[14]

Lawyers must focus on the big picture. We must understand the facts and the law, and create writing that is accurate and thorough, logical and well-reasoned. But, smaller matters are also highly impactful. Paying attention to diction, employing rhetorical devices, even thinking about the impact of single-syllable words with a hard consonant ending, gives legal writers the tools they need to take their writing from communicative to persuasive.

In his chapter entitled "Nuts and Bolts," Hugo offers pages of excellent suggestions to employ in thinking about the small matters, a couple of which particularly resonated with me (and likely none of which I have applied here):

"Make your first line interesting and immediate."[15]

"End more than half your lines and more than two-thirds of your sentences on words of one syllable."[16]

"Don't use the same subject in two consecutive sentences."[17]

"Don't overuse the verb 'to be.' (I do this myself.) It may force what would have been the active verb into the participle and weaken it."[18]

"Maximum sentence length: seventeen words. Minimum: one."[19]

"No semicolons. Semicolons indicate relationships that only idiots need defined by punctuation. Besides, they are ugly."[20]

11 *Id.* at 32.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 38.

16 *Id.* at 39.

17 *Id.*

18 *Id.*

19 *Id.* at 40.

20 *Id.*

"Make sure each sentence is at least four words longer or shorter than the one before it."[21]

Hugo's nuts and bolts may very well help lawyers in their lofty pursuit of moving writing from communicative to persuasive. Strategies such as varying lengths of sentences and ending sentences with single-syllable words are helpful to consider, especially when the writing will be read aloud, such as an opening or closing statement or a judicial opinion read from the bench. Remembering to pay attention not only to the meaning of words, but how they sound, is a worthwhile endeavor. Likewise, techniques such as starting an introduction to a brief with an attention-grabbing statement and varying the subject from sentence to sentence in a statement of facts may be highly impactful in persuading the reader.

Tell a compelling story.

The innate human drive to tell stories also transcends varied types of writing. Lawyers are storytellers. Hugo's book reaffirms how important the lawyer's role is as guardians of our client's stories. The book's title comes from Hugo's personal creative spark. He refers to the subject of the poem—the idea behind it—as the "triggering subject."[22] For Hugo, "a small town that has seen better days often works" as a triggering subject, not because he knows a lot about the towns that trigger his poems, but because the towns provide a base from which his imagination can take off.[23] The "triggering subjects are those that ignite your need for words."[24] It is easy to see how a poem can be a product of the poet's emotional investment—that something in the universe or within the poet compels the poet to write the poem. Finding emotional investment in legal writing is often far more difficult. Lack of it, however, can result in writing devoid of persuasion and power, and an adverse result for the client.

Is there a "triggering town" for legal writing? As a practicing attorney, I encountered some highly contentious cases, some of which involved parties or arguments in which I did not wholly believe. Yet, there was always something I could find—some broader ideal or principle— I could get behind. That was my angle, and once I found it, I could begin to create a narrative of the client's case from a compelling place.

21 *Id.*

22 *Id.* at 5.

23 *Id.* at 5–6, 12.

24 *Id.* at 15.

The lawyer's triggering town can be found by looking at a case to glean the broad ideal or principle. It might also be found by looking at a case on a personal level. In his chapter "In Defense of Creative-Writing Classes," Hugo tells the story of a classmate in his high school creative writing class who read aloud an essay he had written about a time some older boys took him to a whorehouse and, despite his best efforts to appear cool and calm, he panicked and ran away.[25] Hugo observes that it was 1940, and the story the classmate told could have gotten him into trouble, but instead, the teacher applauded.[26] Hugo reflects on this moment as instilling in him an important lesson:

> we realized we had just heard a special moment in a person's life, offered in honesty and generosity, and we better damn well appreciate it. It may have been the most important lesson I ever learned, and maybe the most important lesson one can teach. You are someone and you have a right to your life.[27]

He observes that he's "seen the world tell us with wars and real estate development and bad politics and odd court decisions that our lives don't matter. . . . A creative writing class may be one of the last places you can go where your life still matters."[28] An attorney has the same broad goal of instilling in his or her audience that the client's life matters. We tell our client's story to make their voice heard, and in so doing, give the client an opportunity to seek redress or redemption, to shape law or foment the zeitgeist.

Finally, Hugo's book reminds us that telling stories, regardless of in what genre, can have redemptive power. In fact, he shows this point best when he tells the story of how he came to write the poem "The Squatter on Company Land," the impetus of which was a legal proceeding. In the final chapter, entitled "How Poets Make a Living," Hugo recalls a story he heard from his supervisor at Boeing: the supervisor was tasked with evicting a couple who were squatting on company land, and his story of the situation inspired Hugo's poem.[29]

Although Hugo—a poet, not a lawyer—does not focus on the legal aspect of the story, I could not help but think about it from that lens. Hugo reflected on the possibility of the supervisor's complicated feelings

25 *Id.* at 64–65.

26 *Id.*

27 *Id.* at 65.

28 *Id.*

29 *Id.* at 102–04.

over being part of the eviction, imagining the supervisor "admired, almost envied," the squatter because the squatter "was not civilized and I suppose basically no one wants to be civilized. In his own way, [the supervisor] was civilized and at what a price."[30] I think part of what spoke to Hugo about the situation was the tension created between the rule of law and individual liberties, between societal norms and those who are content to buck them. This is a reminder that the writing we do as lawyers is part of a process that deeply impacts people's lives, and touches on monumental philosophical questions that get to the core of the human condition. We write to shepherd our client's stories through the legal process and to persuade others that our sought-after outcome is best and just.

Hugo says this is the only time he "found the initiating subject of a poem where [he] worked."[31] After the poem was published, colleagues at Boeing responded positively to it.[32] In reflecting on his poem, "The Squatter on Company Land," and the response to it, Hugo says,

> I suppose I haven't done anything but demonstrated how I came to write a poem, shown what turns me on. . . . But it seems important (to me even gratifying) that the same region lies untouched and unchanged in a lot of people, and in my innocent way I wonder if it is reason for hope. Hope for what? I don't know. Maybe hope that humanity will always survive civilization.[33]

The poet can focus on the story of the squatters. He can, as Hugo did, embellish it, use it as a starting place for his imagination. The poet can take bits of truth and change them. The poet can make things up. Lawyers do not have such liberties. But lawyers have something else. The lawyer has the skills and expertise to execute the legal process and craft legal documents along the way. And, a good lawyer will do so with an acute recognition that the legal process has significant impact on the lives of the people involved.

In conclusion, why read *The Triggering Town*? It gave me new ways to think about the mechanics and techniques of writing, and renewed my faith in the intrinsic value of writing and writers. You, with your individual writing identity and processes, will likely find other lessons from Hugo. Either way, he is a good writer, which may be the most important point after all.

30 *Id.* at 104.

31 *Id.* at 101.

32 *Id.* at 104–09.

33 *Id.* at 109.

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BOOK REVIEW

Sticks and Stones May Break Bones, But Words May Upset the Court

Bad Words: A Legal Writer's Guide to What Not to Say
David L. Horan (Carolina Academic Press 2024), 236 pages

Amanda M. Fisher, rev'r*

Bad Words: A Legal Writer's Guide to What Not to Say by David L. Horan[1] is a witty and informative reference manual. The book starts by giving some background on the author, who is a United States Magistrate Judge for the Northern District of Texas. The book then explains to the reader what it is not: "This is not a book on how to write a first draft of a legal brief or motion."[2] The introduction goes on to explain that the book, "offers a guide to words, phrases, rhetorical devices, and at least one punctuation mark[3] that you should not use or should at least think twice, or even three times (not 'thrice'), before using . . . in formal legal writing."[4] As Judge Horan mentions, the advice in the book is familiar, but I found his presentation of the information unique because it takes a closer look at specific words that are commonly misused in legal writing. Because the author is also a federal judge, the book will likely influence the practice community differently than advice from legal writing scholars.

The book is split into three main sections. The first section is titled "Top 50 to Avoid" where he lists the top 50 adverbs or adjectives that legal writers should avoid. In this section Judge Horan briefly explains his reasoning for avoiding each word, but there is also a list at the back of the

* Assistant Professor of Law, University of Arkansas, Fayetteville, School of Law.

1 David L. Horan, Bad Words: A Legal Writer's Guide to What Not to Say (2023).

2 *Id.* at ix.

3 *Id.* at 64. The punctuation mark that Judge Horan has a specific disdain for is the exclamation mark. He notes that using them is the same as raising your voice to a judge, which an attorney should not do.

4 *Id.*

book of just the words without the explanations. For example, "[g]eneral, generally" is on the list and Judge Horan explains that these words are unclear and unhelpful by pointing out that these terms tell your reader that "something occurs or is true more often than occasionally or even more regularly than sometimes and certainly more frequently than rarely, but less often than always or mostly. . . . In other words, they don't tell the court much."[5] This same term can be found in the list without explanation[6] but the reader would miss out on Judge Horan's thoughtful illustration contained in the list with explanation. The option for both lists is useful so the reader can decide the level of detail needed. As an academic, I find myself engrossed in the explanations, but I imagine the simple list is more useful for practitioners who are completing a late-stage round of final edits. Most of the words on this list come as no surprise as many relate to avoiding absolutes such as "always" and "never." This list also includes common modifiers often used improperly or unnecessarily such as "almost" and "very."

The second section is titled, "More Words and Phrases to Use Less or Not at All" and it includes words, phrases, and rhetorical devices for legal writers to avoid in addition to the top 50 list. Much like in the first section, Judge Horan explains why he is including each item on this list. This list includes some words that I imagine are less obvious "no-nos" than the top 50 words to avoid. For example, "[a]bnegating, abnegated," "[a]bstemious, abstemiously," and "[p]rolix, prolixly" all were words I was not familiar with, which caused me to stop and read the explanations carefully. I was, however, surprised to see "likely" on this list. According to Judge Horan, "You're probably overusing this word. A good rule of thumb: If you couldn't say that there is a high probability, give this term a pass."[7] In predictive writing courses, students are taught that the word "likely" is used to give the writer wiggle room, particularly if the written work product will be read by the client. This example indicates that the book may be most useful for written work product that is meant for a court's consideration.

The final section is titled, "Bonus Materials," and this section includes lists of words without explanations but that are grouped topically in Judge Horan's comedic tone. For example, "Adverbs whose company even adjectives prefer not to keep" and "Lawyerly words to use only under legal obligation or duress." My personal favorite list in this section is, "Fancy words you're not sure you know (or want to know) the meanings of"

5 *Id.* at 24.

6 *Id.* at 149.

7 *Id.* at 86.

because it led me to take a deep dive into the dictionary. For example, I learned that "bowdlerize" means to edit literature in a way that removes anything vulgar. Although I cannot imagine using this in legal writing, it gave me perspective about the writing styles that judges may face.

Overall, this book was both entertaining and useful. The information will be most useful for writing documents that will end up being filed with a court, though most of the advice is sound for all legal documents. On occasion I wished that there was a brief definition within Judge Horan's explanations, though most explanations included enough context for the reader to understand the proper definition or use of each word or rhetorical device. Judge Horan mentions that the book could be used as a reference for legal writers, which is exactly how I plan to recommend the text to others.

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BOOK REVIEW

Style, Substance, and Process

An Elegant Trio

Elegant Legal Writing
Ryan McCarl (University of California Press 2024), 199 pages

Justin Iverson, rev'r*

Legal writing is a skill that must be developed over time. Like with any skill, however, people come to the table with different competency baselines. These variations stem from the diverse backgrounds of law students on spectrums of age, undergraduate majors, work history, and intuition derived from life experiences, among other factors. Their professors have similarly diverse backgrounds that inform their teaching.[1] Skill gaps are often exaggerated over the course of law school as some students adapt to legal writing techniques faster than others. The effect of these accumulations is that everyone starts and ends their pursuit of legal writing competency at different places.

Scholars of legal writing doctrine have devoted countless pages to describing the theory underlying these variations and proscribing solutions for teachers and students alike.[2] Many of the foundational texts in the profession have been authored by people I'm proud to call colleagues.[3] Within legal writing scholarship, some techniques are universally accepted while others present emerging theories. And there

* Research Librarian & Assistant Professor, William S. Boyd School of Law, University of Nevada, Las Vegas.

1 *See* Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 Drexel L. Rev. 41 (2009) (describing the expectations and experiences of Black women law professors who teach legal writing compared to those of their overwhelmingly white and male doctrinal colleagues).

2 *See, e.g.*, Johanna K. P. Dennis, *Ensuring a Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 Tex. Wesleyan L. Rev. 613 (2010); Emily A. Kline, *Teaching Social Justice in the Legal Writing Classroom through Personal Narrative*, 25 Legal Writing 29 (2021).

3 *See, e.g.*, Mary Beth Beazley, A Practical Guide to Appellate Advocacy (6th ed. 2022); Linda H. Edwards, Legal Writing: Process, Analysis, and Organization (7th ed. 2018); Richard K. Neumann, Jr., Ellie Margolis & Kathryn M. Stanchi, Legal Reasoning and Legal Writing (9th ed. 2021).

are as many ways to teach effective legal writing as there are people to teach it.[4]

However, the shelf of legal writing texts aimed at practitioners is far from full.[5] Ryan McCarl, a partner at Rushing McCarl LLP and adjunct professor at Loyola Law School, seeks to remind us of this important segment of the legal community in his book, *Elegant Legal Writing*.[6] For some in this audience, legal writing class is a distant memory while others newer to practice simply never developed mastery of the skill. Still others pride themselves on their competency with little understanding of the importance of continuing to develop towards mastery. And, in the end, practitioners are often overwhelmed with the work of the law, including their core job duties, continuing legal education requirements, service commitments, networking, and personal life obligations.

Recognizing the difficulty for practitioners to devote significant time to learning legal writing from more complex texts, *Elegant Legal Writing* endeavors to be approachable and succinct. The book is meticulously divided between three primary sections, which in turn subdivide into dozens of smaller sections that often take up less than a page. It also helpfully sports both a robust index and detailed table of contents to help readers navigate to the section of immediate relevance. There is no need to read the book cover-to-cover to improve legal writing competency, though doing so would surely benefit the reader.

The first main section of *Elegant Legal Writing* is titled "Style" and focuses on core principles of legal writing, concision, plain language, sentence structure, organization, and tone. McCarl's primary purpose in this section seems to be encouraging attorneys to interrogate every aspect of our professional word choice and look for ways to make legal documents more approachable. For example, when presented with the choice to use a Latin phrase, the attorney should determine whether it's a term of art or legalese. If the word can be replaced with an English equivalent—i.e., "among others" instead of "*inter alia*"—it is legalese and should decorate the cutting floor. By comparison, some words and phrases carry meanings so specialized they cannot be easily replaced, such as "negligence." Finally, some Latin phrases have been broadly incorporated

4 I am surrounded by brilliant and generous colleagues who teach in and think progressively about legal writing, including Mary Beth Beazley, Lori Johnson, Joe Regalia, Nantiya Ruan, Rebecca Scharf, and Kathy Stanchi. I was fortunate to learn legal writing from the phenomenal Elizabeth Berenguer (Stetson), to find a mentor in Linda Edwards (UNLV, emerita), and to stay close with a peer who never stops pushing me to be my best in Amanda Fisher (Arkansas).

5 There are, of course, notable titles occupying the space. *See, e.g.*, Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice (3d ed. 2015); Bryan A. Garner, Legal Writing in Plain English (3d ed. 2023); Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008).

6 Ryan McCarl, Elegant Legal Writing (2024).

into English such that there is no functional equivalent to replace them with—think "alter ego."

Admittedly, writing a review of this book is difficult because I feel the need to practice many of *Elegant Legal Writing*'s teachings in my own work product. This is, of course, the point. As legal writers, we should be challenged to continue developing our craft. I have attempted in this review to keep most sentences short, delete unnecessary intensifiers, and reduce hedging. Nevertheless, legal writing is still writing and writing is still a mix of science and art. Thus, my compliance (or not) is voluntary and imperfect, which is also the point. As legal writers, we must balance good technique (science) with instinct and preference (art). McCarl's book can help to recalibrate our instincts so there is less of a gulf between the two halves of our brains.

The second main section of the book is titled "Substance," and it reminds us in the opening paragraphs that "[a] beautifully written brief cannot salvage an untenable argument."[7] Readers should not be misled by McCarl's choice to open the book with discussions of style when substance is the more important piece. Rather, style should be thought of as foundational to the more advanced drafting considerations of substance. Specifically, it makes sense to focus on asserting propositions only after the writer knows how to craft strong sentences with forward momentum, active voice, and a professional tone. Similarly, legal writers should support their propositions with relevant authority, but they will do so more effectively after learning to insert unobtrusive citations.

Substance's three main subsections—briefs and motions, legal citation, and legal storytelling—collaborate to illustrate the importance of writing with intention. McCarl instructs the reader to "[t]ake off the IRAC and CREAC training wheels"[8] and focus on crafting audience-focused arguments with clear reasoning, contextual citations to authority, and persuasive storytelling. As this is a section about substance, McCarl's advice is less about the various components of legal briefs and citation than first year course textbooks. Instead, his advice emphasizes making powerful arguments with precision, omitting unnecessary adherence to past norms.

In the end, "every legal dispute is a story about people in conflict," so an effective legal writer should craft narratives that address and seek to resolve that conflict in ways that feel inevitable and just.[9] Moreover, though many lawyers overlook the import of legal storytelling, "humans

7 *Id.* at 89.

8 *Id.* at 93.

9 *Id.* at 121.

are hardwired to remember information when it is delivered as part of a story."[10] This focus on storytelling is not merely a memory game, however, as storytelling is also a powerful form of persuasion derived from the combination of pathos and logos (i.e., emotion and logic).[11] Thus, to focus on substance is more than choosing which words to use—it is to focus on the types of words to employ for maximum efficacy.

The final section of *Elegant Legal Writing* is titled "Process." Becoming an effective legal writer requires more than the ability to prepare stylish and substantive sentences—you must also do the writing. In this last section, McCarl implores the reader to prepare themselves for "the mental game of writing" by reducing distractions, budgeting time, avoiding perfectionism, and ultimately putting words onto the page by any means necessary.[12] These suggestions might be familiar to writers. What makes these contributions worthy of separate consideration in this book, however, is that they're offered in conversation with the first two sections. Readers are not writing the same terrible first draft unaided—they have, in theory, incorporated lessons from earlier discussions to produce a higher quality draft. This incorporation of best practices into early drafts allows writers to produce consistently better work in the same amount of time, which leads to more impactful edits in later stages.

In addition to encouraging the act of writing, *Elegant Legal Writing* provides helpful tips for working with technology to improve efficiency, legibility, and overall attractiveness of the document. Many of these tips will be familiar to younger lawyers but awareness does not equate with implementation. For example, McCarl recommends legal writers use a text editing program, such as Notepad or Scrivener, as opposed to Microsoft Word or Google Docs for initial drafts. In supporting his proposition, McCarl notes that larger word processing documents get bloated and slow down with the heavy work of formatting, and writers often get distracted fiddling with formatting quirks that slow down the writing process. By comparison, text editors can only do indentations for headings, allowing the writer to stay organized but otherwise ignore formatting decisions until the editing phase.

Elegant Legal Writing is, overall, an easy read and well suited to teaching writing hacks to lawyers and law students alike. The sections are divided in obvious and useful ways to guide the reader and the finding aids are meticulously crafted to navigate through the book as needed.

10 Ruth Anne Robbins, Steve Johansen & Ken Chestek, Your Client's Story: Effective Legal Writing 64 (3d ed. 2018).

11 *Id.* at 54.

12 McCarl, *supra* note 6, at 135–53.

While this book lacks the content necessary to instruct first-year students in the mechanics of preparing legal memoranda and briefs, it will likely aid students who struggle to engage with the writing process. It is also useful for new attorneys and those seeking to mentor young attorneys on efficient legal writing practices. I would recommend *Elegant Legal Writing* as a valuable supplement to any program of legal writing, and encourage attorneys to incorporate these lessons into their own writing practice.

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BOOK REVIEW

Thinking About Co-Intelligence

Co-Intelligence: Living and Working with AI
Ethan Mollick (Portfolio | Penguin Random House 2024),
234 pages

Katrina Robinson, rev'r*

Generative AI can feel like a runaway train. Even if you were one of the lucky ones who saw the train coming and managed to clamber aboard, the breakneck pace and uncharted destination make it difficult for you to keep your foothold. For those who watched the train race by in shock, looked the other way in denial, or were caught blissfully unaware, the train is now so far in the distance that catching up to it can seem impossible. This reality is problematic for members of the bench, bar, and academy, as AI is poised to have profound effects on legal practice and education. Fortunately, a new book, *Co-Intelligence: Living and Working with AI*, offers guidance for both groups—the experienced riders and the would-be passengers.

The book's author, Ethan Mollick, is a professor of innovation and entrepreneurship at the Wharton School of the University of Pennsylvania. He describes his research as studying "how to teach people to become more effective leaders and innovators" and "how technologies are *used*."[1] Working in these areas led him to be an early enthusiast for AI's applications in education and business. In November 2022, he began writing a free newsletter, *One Useful Thing*, to provide a "research-based view on the implications of AI."[2] His newsletter now has a significant following, and his recent book is likely to enjoy similar success.

* Assistant Professor of Law, Cornell Law School.

1 Ethan Mollick, LinkedIn Profile, https://www.linkedin.com/in/emollick/ (last visited May 15, 2024); Ethan Mollick, Co-Intelligence: Living and Working with AI xix (2024).

2 Ethan Mollick, *Welcome to One Useful Thing*, One Useful Thing, https://www.oneusefulthing.org/about (last visited May 16, 2024); Ethan Mollick, *How to . . . Be More Creative*, One Useful Thing (Nov. 10, 2022), https://www.oneusefulthing.org/p/how-to-be-more-creative.

Drawing on his experience teaching undergraduate and MBA students, his experiments with previous iterations of AI tools, and his active involvement in emerging research on practical uses for AI, Mollick has crafted a thought-provoking and accessible book about AI. The book proceeds in two Parts: Mollick describes Part I as answering the basic question of "What is AI?" so that readers have a basis for thinking about how to work with AI systems, and Part II as discussing "how AI can change our lives by acting as a coworker, a teacher, an expert, and even a companion."[3]

Three Sleepless Nights

The book opens with a cautionary note: Getting to know AI will cost the reader at least three sleepless nights. For Mollick, the insomnia began shortly after the release of ChatGPT in November 2022. He had typed a paragraph-long prompt asking the bot to fill the role of a teacher in creating a detailed negotiation simulation, providing feedback on his performance in the simulation, and assigning him a grade. Simulations like the one he described in the prompt are a key feature of Mollick's own pedagogy and research. In fact, as Mollick shares, for the last five years, he and a team of collaborators have been developing "elaborate digital experiences" to simulate the business world and teach relevant skills like negotiation.[4] But according to Mollick, in a matter of minutes, ChatGPT "did 80 percent of what took our team months to do."[5] The bot's response to Mollick's prompt was imperfect, but quite good.

After establishing himself as someone who also stands to gain and lose something with AI's advances, Mollick invites readers "on a tour of AI as a new thing in the world, a co-intelligence, with all the ambiguity that the term implies."[6]

A Nebulous Term

Chapter 1 explains that "AI" is a nebulous term that has meant different things to different people at different times. For readers who might have a narrow definition in mind, this opening note is clarifying. This framing may also be strategic as it gives Mollick some leeway in

3 Mollick, *supra* note 1, at xx.

4 *Id.* at xiv.

5 *Id.* at xiv–xv.

6 *Id.* at xix.

deciding how to tell the story of AI's development. The first plot point on his timeline turns out *not* to be 1956, when John McCarthy of MIT coined the term, but rather, 1770, when the first mechanical chess computer was invented and began touring the world. This is a surprising starting point because, as Mollick reveals, the machine was eventually exposed as a fiction—a human chess master hid inside the gears, controlling its moves in every game! But by including this vignette on his timeline, Mollick hopefully assures the reader that he intends to offer a balanced view of AI in the pages to come. In fact, throughout the book, Mollick pauses to acknowledge relevant ethical lapses and other problematic moments in AI's development.

Mollick doesn't spend too much time discussing old technologies, though. Instead, he provides a helpful gloss on the "boom-and-bust cycles" of AI development, explaining how, like other technologies, AI research and development rises and falls with the excitement of investors.[7] Along the way, he introduces key terms and concepts that readers might have heard in discussions about AI like "artificial neural networks," "machine learning," "supervised learning," and "algorithmic decision-making."[8] Techy readers will fly through these ten pages, but for those of us just boarding the proverbial AI train, this information provides a necessary orientation.

Without bogging readers down in minutiae, Mollick's brief history of recent technological advances in AI gives readers a sense of how we got to the present day where something called a Large Language Model ("LLM") can power a bot that emulates human writing and thinking. With the reader focused on the relevant technology for today's AI, Mollick then explains how these LLMs operate, who created them, and how those creators built these systems. Specifically, he walks through the iterative "pretraining" and "fine-tuning" processes that LLMs go through, including a discussion of "tokens," "weights," and "Reinforcement Learning from Human Feedback." This discussion lays a strong foundation for the rest of the book and Mollick's overarching argument.

The Jagged Frontier

Mollick's mission in *Co-Intelligence* is to convince readers to use AI in their daily lives. This is because he needs their help mapping "the Jagged Frontier of AI."[9] Given that the universe of AI's potential capabilities is

7 *Id.* at 5.

8 *Id.* at 5–10.

9 *Id.* at 47.

so vast, Mollick wants people from a diversity of fields to test the technology and share any discovered strengths, weaknesses, possibilities, or limitations. Armed with the revelations from this kind of crowdsourcing, Mollick believes that AI researchers and developers can continue to improve AI, which in turn will lead to more innovation and, hopefully, societal benefits worldwide.

This grand vision is unsurprising, coming from a professor of innovation and entrepreneurship. But readers don't need to share Mollick's worldview to benefit from his book. Mollick gives readers a more straightforward charge: "try inviting AI to help you in everything you do, barring legal or ethical barriers."[10] Doing so, Mollick notes, could lead readers to enjoy the productivity gains, increased job satisfaction, and other career benefits that recent studies have seen with workers who use AI.[11]

And for readers who might still refuse to engage for fear of job security, Mollick also has a response. He concedes that no one can predict the effects of AI on the workforce and economy, and he acknowledges recent research that suggests that most jobs will overlap with AI's capabilities. But he reassures readers that, although this overlap will likely cause most jobs to change, it will not necessarily mean that AI will replace most jobs. Mollick thinks about jobs as "composed of bundles of tasks."[12] He predicts that AI will take over some tasks for every job, but he quips that workers may welcome offloading some of those tasks. And he believes that this reallocation of tasks will free workers up for more meaningful or important tasks.

Because the learning curve for working with AI can be frustratingly steep, Mollick doles out practical advice for using the new technology beginning in Chapter 3 and continuing throughout the rest of the book. A simple example is his recommendation that readers always plan to review and edit the AI's output before relying on or using it. But there are more detailed directives, too, such as his framework for determining whether and how to delegate a given task to AI.[13]

10 *Id.*

11 Mollick cites early AI research that showed that "[p]eople who use AI to do tasks enjoy work more and feel they are better able to use their talents and abilities." *Id.* at 153. And he cites recent studies involving participants writing documents they would typically prepare as part of their own jobs: "Participants who used ChatGPT saw a dramatic reduction in their time on tasks, slashing it by a whopping 37 percent. Not only did they save time, but the quality of their work also increased as judged by other humans." *Id.* at 111; *see also id.* at 126–27 (discussing similar studies Mollick is involved in with Boston Consulting Group).

12 *Id.* at 124–25.

13 *Id.* at 130–37.

A Pipeline of Humans in the Loop

Building on the foundation he laid in Chapter 1's discussion of how LLMs operate, in later chapters, Mollick emphasizes the potential dangers of an unchecked AI in the present day and the near future.[14] This isn't fearmongering to no end. He includes these warnings to lay the responsibility at the readers' feet. He urges them to become fluent with AI so that they can "learn to be the human in the loop."[15] By this he means that readers need to have enough working knowledge of AI to be able oversee it effectively, offering their own critical thinking skills, ethical considerations, and subject-matter expertise.

As Mollick points out in Chapter 8, most professional workers receive significant on-the-job training long after their formal education ends. He argues that AI puts this "hidden system of apprenticeship" in jeopardy.[16] As he sees it, working with humans can be emotional and inefficient. So, his argument continues, if AI now allows the boss to do certain tasks efficiently on their own, the boss is less likely to invest the energy and time in working with an in-training human. And since the boss holds some expertise in the profession, the boss's decision not to train the apprentice amounts to a decision to not share expertise. Over time and at scale, this creates a training gap that ultimately leads to fewer experts in society. And such a state of affairs would be deeply problematic because it would eliminate the very experts who should be the humans in the loop overseeing AI going forward.

AI in Legal Practice and Education

Thinking about which humans would remain in the loop in legal practice and education led to my own three sleepless nights. Legal practice is typically thought of as having a rich tradition of apprenticeship. But it's also a profession that places a premium on efficiency (though not at the expense of accuracy). That focus on efficiency makes law practice particularly vulnerable to an AI-caused training gap. Current experts from the bench and bar should pay close attention to Mollick's coverage of AI in business in Chapters 5, 6, and 8, and consider how they can best fortify their mentorship efforts to ensure that the next crop of lawyers and judges are properly trained.

14 Chapter 9 explores this topic further in imagining four scenarios for the future: "As Good as It Gets," "Slow Growth," "Exponential Growth," and "The Machine God." *Id.* at 193–210.

15 *Id.* at 52.

16 *Id.* at 178.

Mollick identifies a related AI threat in education. Effective on-the-job training depends on apprentices entering the workforce with some baseline education and requisite professional competencies. Mollick explains that AI's current capabilities and accessibility lead many students to believe that they no longer need to learn basic facts or amass basic skills in school. Mollick calls this the "paradox of knowledge acquisition in the age of AI."[17] He argues that acquiring foundational knowledge is more important than ever with the rise of AI because society needs a steady pipeline of expert humans who can oversee AI. Unless and until humans can acquire such expertise without traditional learning techniques of memorization, purposeful practice, and the like, educators have an important role to play.

Mollick's musings on teaching in the age of AI in Chapter 7 have a lot to offer legal educators. For starters, he doesn't put much stock in teaching prompt engineering.[18] Because current versions of AI can already figure out a user's intent, he predicts that in the very near term, that capability will be sufficiently improved to obviate the need for users to be good at prompting.

He also discourages educators from investing their time in designing low- or no-tech assignments and policies like in-class, handwritten assignments that prevent students from accessing AI. He views those as short-lived workarounds.

Instead, Molllick advocates for educators to focus on sharpening their evidenced-based teaching practices to ensure that AI does not prevent students from continuing to meet the educator's learning objectives for a given course or lesson. The recommendations in this part of the book will be familiar to many readers of this journal: Mollick emphasizes the utility of active learning in knowledge acquisition. And he sees flipped classrooms as a key feature of education's future. Delivering content to students (and their bots) as part of homework frees up precious class time to give students the opportunities for critical thinking, deliberate practice, collaborative problem-solving, and feedback.

He envisions educators crafting different categories of assignments and assessments depending on their goal—some will require AI use and others will forbid AI use, much like the variation seen in math classes with the use of calculators. In turn, educators will need to be transparent about their pedagogical choices for requiring or forbidding AI use. And

17 *Id.* at 181.

18 Mollick does mention basic tips for effective prompting throughout the book, though. These include providing context and constraints, using a chain-of-thought approach, and providing step-by-step instructions. *Id.* at 58, 170–71.

educators will need to have clear policies about etiquette and academic integrity surrounding AI.

Crowdsourcing

There's so much more to say about the contents of this book. It includes screenshots of interesting prompts to and responses from bots. It features a very accessible Notes chapter with citations to established scholarship in innovation and pedagogy as well as emerging (and not yet peer-reviewed) scholarship in AI. And it tees up but doesn't fully address many of the most heated debates in AI like the legality of LLMs' source text including copyrighted material, what it would mean for AIs to pretrain on their own content, whether we can assess sentience, how to regulate these technologies nationally and internationally, whether artificial superintelligence is possible, and much more.

Ultimately, the book leaves the reader wanting more. More information about AI. And more people to think through the future with. So, like Mollick, I find myself making an appeal for crowdsourcing. I am interested in having as many different people as possible from the bench, the bar, and the academy read Mollick's book so that together we can think about what this new co-intelligence means for legal practice, legal education, and (now I really sound like Mollick), *the world*.[19]

19 Mollick ends Part II of the book on a similar note:

> The thing about a widely applicable technology is that decisions about how it is used are not limited to a small group of people. Many people in organizations will play a role in shaping what AI means for their team, their customers, their students, their environment. But to make those choices matter, serious discussions need to start in many places, and soon. We can't wait for decisions to be made for us, and the world is advancing too fast to remain passive. We need to aim for eucatastrophe, less our inaction makes catastrophe inevitable.

Id. at 210.

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BOOK REVIEW

Inspiration & Frustration

Lady Justice: Women, the Law, and the Battle to Save America
Dahlia Lithwick (Penguin Press 2022), 368 pages

Rachel H. Smith, rev'r*

Since I was in law school, I have considered anything Dahlia Lithwick writes to be a must read. For more than 20 years, her pieces in Slate have analyzed and explained the work of the Supreme Court with far more concision and wit than any Con Law professor I ever had. The opening to her Supreme Court Dispatch describing the 2014 pregnancy discrimination case *Young v. UPS*[1] is a great example: "Sometimes being a Supreme Court justice looks like the most glamorous job in the world. Robes! World travel! Life tenure! Adoring clerks! But other times, it all comes down to parsing the semicolons."[2] In her pieces, the cases come alive as dramatic and funny and real. And her writing always foregrounds the human impact of any legal issue.

So I am glad to have read Lithwick's new book, *Lady Justice: Women, the Law, and the Battle to Save America*,[3] even if I feel frustrated by its limitations. Lithwick's project in writing *Lady Justice* is certainly an important one. The book serves to highlight the work women lawyers have done and are doing to protect our democracy, particularly since the election of Donald Trump in 2016. It is thus a catalog and chronology of many of the major legal battles of the Trump years, including the Muslim ban, the Unite the Right March, the family separation policy, the Kavanaugh confirmation, the census citizenship question, the undermining of the Voting Rights Act, and the reversal of *Roe v. Wade*. Lithwick is deeply concerned about the state of our democratic institutions, but she

* Mary C. Daly Professor of Legal Writing, St. John's University School of Law.

1 Young v. UPS, 575 U.S. 206 (2015).

2 Dahlia Lithwick, *Supreme Court Dispatches: Heavy Lifting*, Slate (Dec. 3, 2014, 6:45 PM), https://slate.com/news-and-politics/2014/12/young-v-ups-pregnancy-discrimination-arguments-supreme-court-justices-argue-over-a-semicolon.html.

3 Dahlia Lithwick, Lady Justice: Women, the Law, and the Battle to Save America (2022).

aims to do more than catastrophize. The book is meant to offer glimpses of hope and promise through the stories it tells of women lawyers who fought back and who show a way forward. In this way, the book is a corrective to the way we often talk and think about changes in the law. Actual lawyers are often left out of the story of the law's evolutions. A law student could easily go through three years of legal education without ever learning about—or even learning the names of—the lawyers who strategized, organized, and litigated the cases in her coursebooks.

Most of the chapters in *Lady Justice* are built around profiles of women lawyers who did vital work as litigators, community organizers, and politicians during the years of the Trump administration, including Sally Yates, Becca Heller, Robbi Kaplan, Brigitte Amiri, Vanita Gupta, and Stacey Abrams. These chapters are inspiring. The women Lithwick profiles are all smart, pragmatic, and indefatigable. They are funny and self-aware. They are clear-eyed and frank. And all of them believe that the law—despite its many flaws—can be used for good in the hands of committed and clever lawyers. They believe in law and legal institutions. Even if the book at times makes you question why. For example, in the chapter called "The Airport Revolution," Lithwick profiles Becca Heller, the co-founder of the International Refugee Assistance Project, who was at the center of the spontaneous airport resistance to the Muslim ban. Heller explains her view of the law to Lithwick:

> I didn't go to law school because I had a deep respect for the courts and the rule of law. I think a lot of the law is completely ridiculous. The law says a lot of really horrible things, and historically has said a lot of really horrible things, and it has been used in a lot of really horrible ways. But, I think, sometimes you can use it to achieve good things. I mean, to me, getting a law degree is just about using the master's tools to destroy the master's house.[4]

Aside from these profiles, there are two chapters focused on #MeToo that are both the most painful and compelling in the book. The first describes the accusations of sexual harassment and misconduct against Alex Kozinski, former Chief Judge of the Ninth Circuit.[5] Lithwick was personally harassed by Kozinski when she clerked at the Ninth Circuit and after two other women, Heidi Bond and Emily Murphy, came forward, Lithwick published an account in Slate of what Kozinski had said and done

4 *Id.* at 63.

5 *Id.* at 159–87.

to her.[6] For Lithwick, #MeToo is literal—she is one of the many women who have faced unwanted sexual advances at work from a powerful man. And her description of the emotional toll of these experiences as well as the costs of choosing if and when to discuss them publicly is heart-rending, especially for readers who know Lithwick best for her playful and irreverent voice.

But Lithwick is a lawyer. The description of her personal experience soon becomes a critique of the systemic and procedural failures that allow judges like Kozinski to escape consequences for their actions while their accusers are put through the ringer. To do this, Lithwick weaves into these chapters the stories of Anita Hill and Christine Blasey Ford in coming forward during the confirmation hearings of Clarence Thomas and Brett Kavanaugh. The similarities in their experiences (including the lack of careful process, the absence of meaningful investigation, the forced isolation of giving scrutinized public testimony, the sense that the conclusion is predetermined by politics) are dispiriting, given the decades that separate them. But Lithwick finds hope here too. She sees the work of women lawyers as a way for them to express the frustration and rage that so many women feel and as a way to make things better. She writes,

> For Anita Hill, and for so many of the women lawyers who have grave doubts about the justice system and the current Supreme Court, the real work to achieve enduring justice for women requires a recalibration of both the machinery of justice itself and a culture that can accept the outrageousness of women's voices. And maybe, above all, what drew so many women to the law was the possibility of being outrageous together. For all the flaws of the legal system, of the court system, and even of the #MeToo movement, it helped us find our way to one another, and on the very worst days that was enough.[7]

But as much as *Lady Justice* offers hope and sisterhood, the book's blind spots are as obvious as its bright pink cover.

First among them is that the book is focused so intently on women that it is stuck in a gender binary that feels deeply behind the times. The book begins with the story of Pauli Murray, who Lithwick describes as "the most important woman lawyer few people know about"[8] and also a "queer, gender-nonconforming attorney so far ahead of the curve of

6 Dahlia Lithwick, *He Made Us All Victims and Accomplices*, Slate (Dec. 13, 2017, 3:11 PM), https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html?pay=1712413115083&support_journalism=please.

7 Lithwick, *supra* note 3, at 215.

8 *Id.* at 3.

modern constitutional history that it all but forgot she had been one of its principal designers."[9] But aside from Murray, who died in 1985, nonbinary and transgender people are otherwise barely mentioned in the book, even though the ban on transgender military service was another of the Trump era's defining legal horrors. A story about women lawyers that excludes the work of lawyers who exist outside a cisgender binary is woefully incomplete. This failure to acknowledge the book's cabined view of gender allows the book to rely on descriptions of women and womanhood that veer into a kind of sloppy "girl power" vibe, including "women plus law equals magic; we prove that every day."[10]

In a similar way, the book fails to meaningfully contend with the deep racism that surfaced during the Trump era, especially when the murders of George Floyd and Breonna Taylor (who isn't even mentioned) raised urgent questions about systemic racism, racially motivated police violence, and the complicity of white lawyers, judges, and institutions, including most damningly for Lithwick's project, white feminists. Acknowledging the work of women lawyers, even when those lawyers are as racially diverse as Lithwick's subjects are, misses the law's ongoing failures when it comes to racial justice and equality. Black people are still starkly underrepresented as lawyers,[11] law firm partners,[12] law professors,[13] and law students.[14] Celebrating women, without accounting for this ongoing failure, makes the book's hopefulness seem willfully blinkered.

Indeed, if anything, the legal battles of the Trump era demonstrate that everything is intersectional. The work done by the women lawyers in the book demonstrates that the attacks on bodily autonomy, migrant families, Muslims, the voting rights of Back and Latino communities, democratic norms, and the rule of law, all require intersectional solutions and awareness. So the narrow focus in *Lady Justice* on gender alone is entirely the wrong way to think about and write about the important work of the women it profiles. And yet, it is wonderful to spend time with the women Lithwick profiles and with Lithwick's intimate and charming voice. And it is a relief to find hope in this book, despite its frustrating flaws.

9 *Id.* at 4.

10 *Id.* at 284.

11 *ABA Profile of the Legal Profession 2023: Demographics*, ABA, https://www.abalegalprofile.com/demographics.html#:~:text=Meanwhile%2C%20the%20number%20of%20Black,the%20U.S.%20population%20(13.6%25) (last visited May 12, 2024).

12 *2023 Report on Diversity in U.S. Law Firms* 5 (Jan. 2024), NALP, https://www.nalp.org/uploads/Research/2023NALPReportonDiversityFinal.pdf.

13 *See, e.g.*, *Law Professor Demographics and Statistics in the US*, Zippia, https://www.zippia.com/law-professor-jobs/demographics/#race-statistics (last visited May 12, 2024).

14 Susan L. Krinsky, *The Incoming Class of 2021 — The Most Diverse Law School Class in History*, LSAC Law: Fully (Dec. 15, 2021), https://www.lsac.org/blog/incoming-class-2021-most-diverse-law-school-class-history.

BOOK REVIEW

A Plea for Reform

Pleading Out
Dan Canon (Basic Books 2022), 336 pages

JoAnne Sweeny, rev'r*

The criminal justice system is broken. Researchers and journalists have been reporting on the myriad of abuses perpetrated by our failing criminal justice system for decades. However, until recently, there was relatively little scholarship on the most hidden but also the most common way for people to end up in jail: plea bargaining. Largely conducted behind the scenes, often without the defendant even being a part of the negotiations, plea bargains resolve the vast majority of criminal cases every year.[1] Wrongful convictions from jury trials regularly make the news but wrongful guilty pleas almost never do and have, therefore, largely escaped public scrutiny.[2]

Pleading Out[3] changes that. The author, Dan Canon, is both a legal academic and a practicing attorney who has litigated civil rights, criminal, and post-conviction cases. His expertise comes to the fore throughout the book as he skillfully dissects the reasons behind plea bargaining's prevalence and the dangers and injustices inherent in a system that resolves criminal cases almost entirely in the shadows. Though criminal law practitioners and academics will recognize the issues Canon brings to light, this book is a valuable read for anyone who wants to know more about this part of the legal system that affects so many people.

* Professor of Law, University of Louisville Louis D. Brandeis School of Law.

1 A recent study found that approximately ninety-eight percent of federal criminal cases end with a plea bargain. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023, 5:00 AM), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice.

2 The Innocence Project has some information about "coerced pleas" on their website but their work with wrongful convictions after jury trials is much more well-known. *Coerced Pleas*, Innocence Project, https://innocenceproject.org/coerced-pleas/ (last visited May 13, 2024); Alicia Maule, *Innocence Project's Uplifting Moments from 2023*, Innocence Project (Dec. 12, 2023), https://innocenceproject.org/innocence-projects-uplifting-moments-from-2023/.

3 Dan Canon, Pleading Out (2022).

Ultimately, this book is a scathing critique not against individual cops, judges, or attorneys (though there are plenty of bad actors identified) but of the entire system of plea bargaining that most of us take for granted. But, more than that, this book offers alternatives to our broken system by looking at other countries and even experiments done in the United States.

Part I presents a history of plea bargaining and how it evolved from a practice that was wholly disfavored to relatively unheard of, to ubiquitous, to effectively swallowing the entire criminal justice system.[4] Canon shows that this evolution was ultimately about controlling the lower classes and how that control continues to this day. Indeed, the history of plea bargaining outlined in this part of the book also shows how a new class was created: the criminal class. Using a wide variety of academic works in multiple disciplines, Canon details how being labelled a criminal has profound consequences with regard to employment, housing, and overall perception by the public, whether deserved or not. The label matters and, therefore, someone who bargains away their right to a trial has given up more than they likely realize.

In Part II, Canon goes through the key players in the plea-bargaining system, how they perpetuate injustices (either knowingly or unknowingly), and why they have no incentive to change the system. This Part reveals even deeper inequities in the criminal justice system, such as the differential treatment meted out to defendants based on race and financial resources.[5] Even more so, this Part delves into the almost limitless power wielded by police and district attorneys as part of their discretion to arrest and bring charges against people.

As noted in Chapter 5, you can be arrested for a surprisingly wide variety of behaviors and activities, so your fate is largely in the hands of actors who can put you in jail for reasons ranging from a cop not liking your tone to a district attorney needing to close a high-profile case.[6] Cops, district attorneys, and even judges can also feel incentivized by the system to make more arrests and to have a high conviction rate. A plea bargain gets them both. The only defense defendants have against these incentivized actors are public defenders who are under-resourced and therefore have their own incentive to simply close cases with plea bargains so they can reduce their workload. Whether they intend to or not, every actor in the criminal justice system is working together to ensure that the maximum number of cases are resolved quickly via plea bargain. It is no

4 *Id.* at 60.

5 *Id.* at 95.

6 *Id.* at 86.

wonder that the United States has the highest rate of incarceration of any industrialized country in the world.[7]

In addition, the chapters in this Part make effective use of stories that present the theme to be explored therein. As any legal storytelling scholar will tell you, this technique is incredibly effective at conveying complex ideas in a relatable way.[8] The stories presented here are both infuriating and heartbreaking, leaving the reader wanting to do something to correct the injustices portrayed.

Part III picks up the story after the plea bargain has been entered and explores the consequences of these false convictions. Once the plea bargain has entered into open court, it is very hard to undo. Judges are skeptical of any attempts by a defendant to say that their prior admission of guilt is false. Why would anyone do that? To answer that question, Canon brings in psychological research as well as cultural studies to uncover the pressure defendants are under to agree to what is often presented by their own attorney as "a good deal."[9] As other scholars have noted, due to the high stakes of the bargain—sometimes a person's very life is at stake—coercion can never be fully separated from the plea bargaining process.[10]

The ubiquity of plea bargains has inevitably led to a large number of wrongful convictions. Researchers and, more recently, popular media, have raised public consciousness about the prevalence of wrongful convictions, which has led to the undermining of the public's confidence in the criminal justice system.[11] Surveys conducted over the past several years have shown that the American public believe that the criminal justice system needs to be reformed, particularly with regard to high incarceration rates and the justice system's treatment of Black people.[12] As Part III of *Pleading Out* shows, the public's lack of confidence has been exacerbated by the flagrant two-tiered system we see in the news every day: there is one system for the rich and privileged, and the other for the rest of us. And plea bargaining is no exception.[13]

7 Roy Walmsley, *Global Incarceration and Prison Trends*, 3 F. on Crime & Soc'y 65, 66 (2003).

8 There is a plethora of excellent scholarship on just this point. *See* Christopher J. Rideout, *Applied Legal Storytelling: An Updated Bibliography*, 18 Legal Comm. & Rhetoric 221 (2021).

9 Canon, *supra* note 3, at 163–65.

10 Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L. Q. 67, 81 (2005); John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 11, 13 (1978–79).

11 Liz Banks-Anderson, *The "Making a Murderer" Effect*, Pursuit, https://pursuit.unimelb.edu.au/articles/editing-the-making-a-murderer-effect (last visited May 13, 2024).

12 *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017, 10:15 AM), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds.

13 Canon, *supra* note 3, at 189.

Part IV, perhaps sensing that the reader is now in the grips of utter despair, does its best to give us hope. Several attempts at limiting plea bargaining have been tried in the United States over the past few decades but none have been wholly successful or consistently applied.[14] There are better results outside of our borders but those systems have never been burdened by our high rates of arrests; so while the British criminal justice system does show us that ours is not the only way to run a criminal justice system (even one based on common law), it is less clear how we can undo what we have already done.[15] Ultimately, Canon advocates for a bottom-up approach to criminal justice reform and provides many examples of successful organizing and activism by nonprofit organizations across the country.[16] The book ends with Canon's advice to would-be activists to think small—start with a small, local problem—and build a coalition through effective storytelling and leveraging institutional actors.[17]

Overall, this book is a thorough, thoughtful examination of the plea-bargaining system in the United States. Canon has a lot to cover in just one manuscript so the plot is always moving forward but as a reader, I never felt rushed.

I also appreciated the informal tone of the book and its ability to explain a complex system to a wide audience. This book is clearly aimed towards the public but with an eye to practitioners and academics; there's something for everyone. It uses case studies and social science research to prove its points but also has an overall feeling of humanity and a sense of personal frustration and anguish that can only come from a lawyer who has been in these very trenches. When the author despairs the tragedies wrought by a broken system, we despair along with him. Both in substance and in storytelling technique, this book offers its readers a lot to think about.

14 *Id.* at 221, 224.

15 *Id.* at 227.

16 *Id.* at 266–72.

17 *Id.* at 272–77.

BOOK REVIEW

Finding the Thinkable Thoughts

Index, A History of the: A Bookish Adventure from Medieval Manuscripts to the Digital Age
Dennis Duncan (W.W. Norton 2021), 352 pages

Beth Hirschfelder Wilensky*

He who knows where knowledge may be had is close to having it.[1]

When John B. West developed his legal classification system in the 1880s,[2] he likely didn't anticipate that his system of indexing the law would persist into the twenty-first century. But persist it has, and flourished, most prominently in the form of Westlaw's headnote and key number system. West's index built on several precursors,[3] but it was his version, West's *American Digest*, that established the foundations of the classification system that most modern legal researchers use today, in one form or another.

Others had earlier attempted to create classification systems that enabled lawyers practicing in the common law system to find "the law"—i.e., precedents relevant to a client's case.[4] But it is no accident that West's system, the most thorough and enduring one, arrived when it did. The second half of the nineteenth century witnessed a surge of interest among intellectuals in indexing written works generally, culminating in an 1877

* Clinical Professor, University of Michigan Law School.

1 Dennis Duncan, Index, A History of the: A Bookish Adventure from Medieval Manuscripts to the Digital Age 228–29 (2021).

2 For a detailed description of the early development of the West reporter and indexing systems, see Michael O. Eshelman, *A History of the Digests*, 110 L. Libr. J. 235, 237–49 (2018).

3 *Id.* at 241–45.

4 "Without digests, claimed Frederick C. Hicks, the law librarian at Yale, 'the whole fabric of the common law would long ago have broken down.'" Eshelman, *supra* note 2, at 239 (quoting Frederick C. Hicks, Materials and Methods of Legal Research 251 (1st ed. 1923)).

conference of librarians who gathered with the intent to create a Universal Index of knowledge.[5] West's index was a natural outgrowth of this larger movement.

This history—of the late-nineteenth-century fascination with indexing—and much more is told in charming detail in Dennis Duncan's *Index, A History of the*.[6] Anyone interested in how we classify, find, and use information is likely to be intrigued by the book's recounting of the life of this tool. The index is nearly ubiquitous in non-fiction materials today, yet we tend to take for granted what a remarkable tool it is. And that includes, of course, lawyers and other legal researchers. While the book does not address legal indexes specifically, its discussion of the history, purposes, and substance of the index calls to mind modern legal indexes like Westlaw's headnote and key number system.

The early history of the index

Index begins by walking the reader through early attempts at categorizing information in the late Middle Ages. That period saw the growth of two institutions—universities and religious orders—that each inspired a need for texts that were accessible to their users.[7] As a result, the first materials to be indexed were the Bible and similar religious tracts on the one hand, and the works of Greek philosophers on the other.

The book then turns to a lively history of the traditional index's raw ingredients: alphabetization and page numbers.[8] Most of us give hardly any thought to these two simple inventions,[9] but they are as essential to indexing as the invention of the wheel was to transportation: obvious in hindsight, but revolutionary in their time. Similarly, it is surely no accident that West developed his own index in conjunction with his National Reporter System:[10] an index only functions if the body of work it refers to

5 Duncan, *supra* note 1, at 209–12.

6 *See generally id.*

7 *Id.* at 51.

8 *Id.* at 19–47 (alphabetical order); 85–112 (page numbers). "The page number has become the universal referencing unit, the second basic ingredient—along with alphabetical order—of pretty much any book index in the last 500 years." *Id.* at 98.

9 "With barely a thought we know how to use a table where alpha order is the sole organizing system (as in the old residential phone books), or where it works in tandem with another specialized or context-specific categorization (as in the old Yellow Pages, where entries were grouped first by trade, then alphabetically within these). It's a system with which we are completely familiar, something so deeply ingrained, something we acquire so early, that it might seem self-evident." *Id.* at 25–26. With respect to the first printed page number, the book explains that it "will revolutionize the way that we use books. And in doing so it will become such a commonplace that it will almost disappear from view, hiding in plain sight at the edge of every page." *Id.* at 86.

10 Eshelman, *supra* note 2, at 247.

has standardized embedded location tools—volumes and page numbers in F. Supp. 3d, for example.

The book's discussion of different methods of indexing bears particular resonance for modern legal researchers—and especially for those of us who teach legal research to law students. The two primary methods are organizing around words (i.e., a "concordance") and organizing around subjects (i.e., a cascading index like the West key number system)—what the book describes as "matching letters versus identifying concepts."[11] That's the precise distinction between Boolean searching and digest searching. And of course, the latter—"identifying concepts"—has historically required editorial judgment from an actual person, unlike (for the most part) "matching letters."[12] Duncan comes out strongly in favor of the importance of human intervention and subject indexes. (This law professor feels similarly, as my students can attest.) Here is Duncan:

> The limitations of *unimaginative* indexing, of the simple string search, become starkly apparent if one tries to locate the parable of the prodigal son, that famous tale of mercy and forgiveness, using a Bible concordance. The parable does not contain the words *forgiveness* or *mercy*, or, for that matter, *prodigal*.[13]

The same is true of legal concepts, which are often not captured by specific and unique words. A classic example is of the multiple ways that a court opinion might refer to someone under the age of majority: "juvenile," "child," "minor," "infant," etc. A researcher who can't anticipate all of the possibilities is likely to miss key authorities. An even thornier problem for concordance searches is that some concepts are difficult to describe in a way that won't produce an unwieldy number of irrelevant "hits." For example, imagine trying to create a useful Boolean search for this question: "Can a jury verdict on one charge be voided if it is inconsistent with another charge?"

The subject index: complexity and complications

The counter to these problems is the subject index, an index that is created by a human user who classifies the material into sections, subsections, sub-sub-sections, and so on. The obvious benefit of such an

11 Duncan, *supra* note 1, at 258.

12 Before the computer age, matching letters to identify words often required editorial judgment about *which* words were worthy of indexing. The advent of computer searching has enabled the ability to index *every* word.

13 Duncan, *supra* note 1, at 260.

index is to render findable such information that a word search might otherwise bury. But—as skilled users of legal indexes and their close cousin, the Table of Contents, know—a good subject index has power beyond that. A subject index tells a detailed story about the relationship between complex ideas. The wise researcher uses it not just to locate a specific concept, but to understand that concept in the context of related concepts. Thus, this quote from the index of an early sixteenth-century historical work: "Read, dear reader, the following table, / And soon under its guidance you will hold the entire work in your mind."[14] Similarly, in the legal realm, even the *name* of West's paper-bound index, "West's Analysis of American Law,"[15] conveys that it is much more than a finding tool for cases; the organization system itself *constitutes analysis*. At 2,116 pages in its current edition,[16] it probably is not one that a legal researcher could read and thus "hold the entire work in [their] mind." But skilled lawyers know that sitting down to browse through the index to a section will open up areas of inquiry and suggest connections between concepts that they would not otherwise have discovered or thought of on their own.

At their best, then, subject indexes suggest to readers new ways of finding and thinking about the source material. But there are drawbacks. Duncan describes the key concern in his description of an early attempt at a universal index created by the thirteenth-century poet Robert Grosseteste:

> His grand *Tabula* is . . . what we now call a subject index, an index of ideas, and as such it is alive to the play of synonyms, able to identify a concept even where the text does not explicitly name it. It is also, then, a *subjective* index, the work of a particular reader, thinking and parsing their reading a certain way. Concepts are slippery things. We make a choice when we say that a text is *about* something; that, say the, story of Noah's Ark is about forgiveness, or anger, or rain.[17]

Thus, if a subject index rests on choices, those choices can be biased, designed with only some users in mind, inattentive to the ways the source material might be understood in future years, or inadequate in any number of other ways. Here is Duncan again: "Indexes are the work of individuals, they are linguistic and therefore human exercises, steeped

14 *Id.* at 118.

15 West's Analysis of American Law (2023).

16 *Id.*

17 Duncan, *supra* note 1, at 51–52.

in the same paradox, redundancy and subjectivity as all language uses."[18] Legal indexes are hardly immune to these same concerns.

Indexing in the computer age

Index travels from early hand-written concordance and subject indexes across the span of centuries, ending in the computer age. In yet another theme that parallels the development of legal research tools, the book discusses the ways in which computing has changed indexing, and the ways indexing is still very much the same. When it comes to creating a simple concordance, computers have the upper hand; they can quickly scan a large volume of text and identify instances of any words the end user choses. And yet, the end user must still know what words to choose; the computer can't replace the researcher's own thinking.[19]

When it comes to creating a subject index, human involvement is essential: "It is a job of deep reading, of working to understand a text in order to make the most judicious selection of its key elements."[20] Reading that line brought to my mind the difference between Lexis's headnote system and Westlaw's headnote system: Lexis's system primarily pulls language directly from court opinions, relying heavily on technology to automate the sorting of snippets into topics.[21] Westlaw, on the other hand, uses attorneys to summarize key points of law from court opinions, which enables it to sort cases into its index "even where those cases may use atypical language."[22] That is one reason I have generally found Westlaw's headnote system to be more effective.[23]

Even so, when humans get involved in creating an index, we can muck things up. Susan Artandi, an early developer of a computer-assisted indexing project explained that "the terms must be known to be indexed."[24] That, in turn, creates new problems: "Terms which appear for the first time in primary sources are missed . . . because they are not yet included in the dictionary."[25] This observation anticipates the way

18 *Id.* at 181.

19 At least not yet.

20 *Id.* at 250.

21 *See generally* UF Law, *Headnotes in Lexis Advance*, Lawton Chiles Legal Info. Ctr., https://guides.law.ufl.edu/legal-research/lexisheadnotes (last visited May 13, 2024).

22 *See* Maggie Keefe, *Free vs. Westlaw: Why you need the West Key Number System*, Thomson Reuters, https://legal.thomsonreuters.com/en/insights/articles/using-the-west-key-numbers-system (last visited May 13, 2024).

23 *Index* itself contains an example of the benefits of human indexing over computer indexing: As the author explains, the book has *two* indexes, one produced by a human and (a partial) one produced by a computer. Duncan, *supra* note 1, at 254. The human-created index is plainly better.

24 *Id.* at 246.

25 *Id.*

that indexing can ossify ideas, including legal ideas. Legal indexes exert a hegemony that impedes the development, recognition, and acceptance of new ideas or ways of thinking about the law. As one pair of scholars has observed, legal indexes "function like DNA; they enable the current system to replicate itself endlessly, easily, and painlessly."[26] As a result, "Their categories mirror precedent and existing law; they both facilitate traditional legal thought and constrain novel approaches to the law."[27]

And of course, because computer indexes still rely on human intellectual effort, they have not eliminated human biases and related problems described above. In fact, as *Index* points out, modern concerns about biases built into (for example) "the black of Google's algorithm"[28] mirror the concerns of "the eighteenth-century pamphleteer who discovered [an indexer] serving up anti-Tory propaganda in the back pages of [a volume of] Tory history."[29] At least back then, a careful reader would recognize that a human was to blame. The computer age has made it all too easy to assume that a technology-produced index is bias-free.

The index endures

And the age of technology has changed things not just for the indexer, but also for its audience, i.e., the end user. This brings us to a final recurring theme of *Index*: How much can a good index do? In particular, should we worry about what aspects of thinking, reading, and research it replaces? And again, this isn't a concern that magically sprang up in the computer era. *Index* describes how, almost as soon as indexes became commonplace, some writers started complaining that indexes would make for lazy readers, who would read just individual pieces and not the whole thing: "The printed index was only just coming into its own, and already alarums were being sounded that indexes were *taking the place of* books, that people didn't read *properly* any more. . . . "[30] That concern echoes the admonishment of law professors to students everywhere: the headnote is an extremely useful tool, but not a replacement for reading the underlying opinion.

But *Index* also shares a more optimistic take, one that might give us reason not to despair. The book quotes a sixteenth-century indexer who

26 Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 Stan. L. Rev. 207, 208 (1989).

27 *Id.* at 208.

28 Duncan, *supra* note 1, at 232–33.

29 *Id.* at 233.

30 *Id.* at 118.

insists that, while some careless users might rely on the index in place of reading the complete text, "the quality of those books is in no way being impaired, because the excellence and practicality of things will by no means be diminished or blamed because they have been misused by ignorant or dishonest men."[31] Similarly, when an "ignorant and dishonest" attorney relies on just the headnotes, it is the attorney, and not the headnote system, that is to blame for the poor legal analysis that is likely to result. The rest of us—the knowledgeable and honest—will continue to benefit from what a remarkable tool the index is, one that is indispensable in making the law findable.

31 *Id.* at 112 (quoting Hans H. Wellisch, *How to Make an Index – 16th Century Style: Conrad Gessner on Indexes and Catalogs*, Int'l Classification 8 (1981).

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BOOK REVIEW

Process, Not Product

Why They Can't *Write: Killing the Five-Paragraph Essay and Other Necessities*
John Warner (Johns Hopkins University Press 2018), 271 pages

Jayne T. Woods, rev'r*

My students are in law school; why can't they write?!

In his book, *Why They* Can't *Write*, John Warner answers that very question: "They're doing exactly what we've trained them to do; that's the problem."[1]

According to Warner, "Writing is thinking,"[2] but our elementary-through-secondary education system's approach to writing has removed the thinking aspect from the process. "Instead, much of the writing students are asked to do in school is not writing so much as an *imitation* of writing, creating an artifact resembling writing which is not, in fact, the product of a robust, flexible writing process."[3]

Though he expressly targets the five-paragraph essay,[4] Warner also takes a deep dive into the educational culture of assessment and standardization as a root cause of writing degradation. That culture requires that we assess students to determine if schools are successfully teaching; and, to conduct such mass assessment effectively, we must standardize the material. But this approach has thrown students into a "curiosity crisis,"[5] where they are taught a method of performance (e.g., the five-paragraph

* Associate Teaching Professor, University of Missouri School of Law. Thanks to my friend and colleague, Anne Alexander, for her invaluable feedback.

1 John Warner, Why They *Can't* Write: Killing the Five-Paragraph Essay and Other Necessities 2 (2018).

2 *Id*. at 145.

3 *Id*. at 5.

4 "The five-paragraph essay format is a guide that helps writers structure an essay. It consists of one introductory paragraph, three body paragraphs for support, and one concluding paragraph." Matt Ellis, *How to Write a Five-Paragraph Essay, With Outlines and an Example*, Grammarly (last updated Apr. 14, 2023), https://www.grammarly.com/blog/five-paragraph-essay/.

5 Warner, *supra* note 1, at 36.

essay), rather than the thought-process and decisionmaking required for the task (e.g., why we use topic sentences, why some words are better in a particular context than others, etc.). Teaching students to perform, rather than think, creates a deleterious drain on student engagement. Students then view school as a "gauntlet to be run,"[6] rather than a place to explore and grow.[7] And if, as Warner suggests, writing is thinking, standardization of writing has turned our students into thoughtless drones.

Warner also examines well-meaning but ineffective attempts to solve the student engagement problem through educational fads, like emphasizing student self-control and compliance, and technological hype, like massive open online courses and adaptive software. But he astutely notes that these fads and hype favor a quick fix while tending to "ignore[] the vital role of intrinsic motivation in engendering meaningful and lasting development."[8]

Though the book was published before OpenAI's release of ChatGPT, it contains some very prescient thoughts that are even more crucial for educators in the face of generative AI.[9] If students are not engaged, they lack intrinsic motivation to learn, which makes reliance on machine-generated writing that much more appealing, especially when the technology is advanced enough to pass law school courses and even the bar exam.[10] And, due to the lack of engagement in earlier phases of education, any resulting reliance on AI-generated content will likely be made without the necessary critical analysis to evaluate its output.

While half the book is devoted to identifying why our students can't write, the other half is devoted to ways to increase student engagement and reconnect students with their intrinsic motivation to learn. And, even though Warner is not a legal writing professor, the beauty of Warner's proposed solutions is that they can be applied in any educational environment, from the legal writing classroom to training programs for new associates or law clerks.

6 *Id*. at 37.

7 Warner talks about the effect this crisis has on student mental health, especially in higher education, where rates of student depression and anxiety are soaring. *Id*. at 40.

8 *Id*. at 77. As Warner notes, "When the chief problems of education are alienation, lack of engagement, and anxiety, where is the value in making students talk to black boxes that count in 0's and 1's?" *Id*. at 102–03.

9 While this particular book was not written with generative AI in mind, Warner is working on a new book addressing reading and writing in the age of AI, which should be available in early 2025. John Warner, *Writing is Thinking*, The Biblioracle Recommends (Sept. 24, 2023), https://biblioracle.substack.com/p/writing-is-thinking. Warner is also the host of a Master Course on *Teaching Writing in an Artificial Intelligence World*. *See A Master Course from John Warner: Teaching Writing In an Artificial Intelligence World,* https://www.whytheycantwrite.com/ (last visited May 12, 2024).

10 Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan, & Daniel Schwarcz, *ChatGPT Goes to Law School*, 71 J. Legal Educ. 387 (2022).

Focusing on choice

At the outset, Warner notes that "[t]o write is to make choices, word by word, sentence by sentence, paragraph by paragraph."[11] And, unlike formulaic writing structures developed for ease of assessment, this decisionmaking process requires critical thinking on the part of the writer as well as understanding of the subject, the audience, and the purpose of the written work.[12] To accomplish the transition from writing as a formula to writing as choice, Warner offers several suggestions.

A. Choice in language

He first proposes that we shift the focus from grammar and sentence structure to the underlying ideas the writer is trying to convey.[13] He notes that, "[w]hen experienced writers struggle over sentences[,] the battle is not about 'correctness,' as we teach developing writers, but in lassoing the words that best express the idea."[14] To convey the effect of word choice, Warner presents students with different versions of a sentence and engages them in a discussion of their responses to the different language choices. Two of the sentences are:

> 1. I have smelled what suntan lotion smells like spread over 21000 pounds of hot flesh.
>
> 2. I have smelled what suntan lotion smells like spread over 21000 pounds of hot skin.[15]

In his experience, students "[u]niversally . . . agree 'skin' has less impact and 'flesh' is much grosser."[16]

In legal writing, we are concerned with not only word choice but also sentence structure and overall meaning. Warner's philosophy that requiring students to understand grammar and sentence structure before writing "gets writing backward"[17] is applicable in the legal writing classroom as well. Perhaps instead of drilling grammar rules into the students through outside-the-classroom lessons, we should be asking

11 Warner, *supra* note 1, at 5.

12 *Id.*

13 *Id.* at 144.

14 *Id.*

15 *Id.* at 208.

16 *Id.* at 209.

17 *Id.* at 144.

them to analyze in-class examples with misplaced commas or modifiers to show them how these errors change the entire meaning of sentences and, thus, motivate students to understand the rules for themselves and improve their own communication abilities. As Warner observes, when writers "have an idea worth expressing, the desire to share it provides the necessary intrinsic motivation to find the precise language to do so."[18]

B. Choice in rhetorical situation

Warner next advocates that writing professors accept the fact that "we can't teach every last thing."[19] Rather than focusing on the parameters of specific kinds of documents (e.g., essays, narratives, reviews), Warner suggests we focus on writing, generally, as a process—one where the writer asks questions about "audience, purpose, message, and genre . . . to fully understand the rhetorical situation."[20] This approach has already been adopted by many legal writing professors who have made the shift from a document-based approach to a more process-based one.[21] By teaching students to analyze a rhetorical situation, rather than simply mimic an example or template, we can ensure that students are actually writing and not simply imitating writing. And new associates and law clerks who understand the rhetorical situation will be able to produce more meaningful and effective legal briefs, memoranda, discovery documents, and draft opinions.

C. Choice in subject matter

To increase engagement, Warner suggests giving students agency over the topics of their written assignments (or at least basing assignments on a subject on which the students have existing knowledge).[22] For law students and new legal writers, this likely means assigning them work on topics with which they have at least some familiarity or interest, because one component of writing knowledge is "knowledge of the subject being written about."[23] But it also means giving them autonomy over the arguments raised and organization of the work, rather than trying to force

18 *Id*.

19 *Id*. at 158.

20 *Id*.

21 *See, e.g.*, Katie Rose Guest Pryal, *The Genre Discovery Approach: Preparing Law Students to Write Any Legal Document*, 59 Wayne L. Rev. 351, 355 (2013) ("The genre discovery approach deliberately teaches familiar legal texts as rhetorically[ ] driven genres whose conventions are dictated by an audience's needs and other rhetorical demands, rather than by abstract rules or templates.").

22 Warner, *supra* note 1, at 163–64.

23 *Id*. at 26.

them into a pre-ordained structure with canned arguments. Then, they can focus on learning and building their writing skills rather than learning the elements of a cause of action or defense they have no interest in.

D. Choice in assessment

Warner pours a lot of attention into the importance of student reflection; providing formative (how to make this better), rather than summative (what was done wrong), feedback; and teaching students *why* we do certain things (such as citation), rather than just *how* those things are done.[24] In short, Warner advocates a shift in focus to the process of writing, rather than the end product. And emerging writers should be given the freedom and opportunity to make mistakes along the way: "My role as the instructor shouldn't be to help students avoid potholes, but to help them understand what happened to put them into a pothole so they could avoid doing it again in the future."[25]

Recognizing that assessment of process is more challenging than assessment of product, Warner suggests creating a system of contract grading to increase intrinsic motivation. In a contract-grading scheme, a student's grade is assessed against the values of the course. For example, in Warner's composition courses, he provides his students multiple writing and feedback opportunities, consistent with the theory that writing improves through practice, and he then grades them based on the volume of work produced throughout the semester—in other words, "more work, better grade."[26]

He recognizes that his approach should not be imported wholesale, as "[d]ifferent courses and different student cohorts require different approaches."[27] And he gives the example that a journalism course may place a greater emphasis on quality of the final product, rather than the quantity of writing produced, because producing a "print-ready copy . . . may be vital."[28] But the end goal should be to align the grading contract requirements with the subject matter and values of the course. Thus, in legal writing, one skill we might emphasize is timely filing, as that is something expected of attorneys in practice. Therefore, we might create a contract-grading scheme that values timely submission of assignments.

24 *Id.* at 171–75.

25 *Id.* at 168.

26 *Id.* at 216–17.

27 *Id.* at 218.

28 *Id.*

Though not directed toward legal writing instruction, Warner's book is thoroughly researched with hundreds of references supporting his arguments and theories about education, especially as it affects writing instruction. It contains usable exercises for anyone teaching writing of any kind, many of which can be adapted for the legal writing curriculum. As a legal writing professor, I found it accessible, relatable, and inspiring.[29]

29 Of particular note to some legal skills professors, in the acknowledgements section, Warner provides some insightful comments on his experience with academic freedom and status within higher educational institutions.

Melissa H. Weresh receives the Berger Award for Excellence in Legal Writing Scholarship

With great delight—bells on, really—we write about the most recent recipient of the Linda Berger Lifetime Achievement Award for Excellence in Legal Writing Scholarship: Professor Melissa Weresh. Already recognized at her home institution and in the national legal communication community as a leading light in the academy, Professor Weresh's body of scholarly work deserves special recognition for its fulsome impact.

The Berger Award is the highest scholarship award presented by the Association of Legal Writing Directors (ALWD). Named for this Journal's founding editor, it recognizes the recipient's long-term dedication to scholarship in the field and a dedication to the advancement of the field of legal communication and rhetoric, *i.e.,* what we often shorthand as "legal writing." The award celebrates those scholars in the discipline, like Professor Weresh, who have made a significant impact on other scholars through their articles, books, and book chapters.

Professor Weresh's vibrant body of work includes almost thirty law review articles in addition to five textbooks and the same number of chapters in compendium books. Professor Weresh's scholarship examines the art, science, and ethics of persuasion. She has also advocated for modernization of law school teaching to integrate ethics and team-based learning inside the first-year legal writing course design. The energy she puts into her scholarship takes one's breath away. The scope of her work shows depth and tenacity: two hallmarks of a strong scholarly *ethos*. To those who know her, curiosity is her driving force. As one nominator wrote, Professor Weresh "is never satisfied and is constantly striving to pursue the next idea, to ask the new questions, and to continuously advance [the legal communication discipline] through her scholarship." Her numerous short and bar-practice pieces demonstrate her commitment to building bridges between the scholarly and practical sides of the discipline.

Legal communication/writing as a discipline faces challenges to its very existence as a valid field at all. The shadow of gender bias underscores the debate. Professor Weresh has worked tirelessly to elevate the discipline, carefully and firmly calling out the barriers built into the academy's system. Many of her articles unmask the gender-based hierarchies built into legal education, which of course influence the gender-based issues that are still replete in the practice of law. A number of articles she wrote in this vein have had measurable, positive impacts on career trajectories and career advancement opportunities for faculty around the country.

Professor Weresh served for a decade as an editor of our own Legal Communication & Rhetoric. She described her time on the editorial board as a "happy assignment," an atmosphere that she herself helped create. Her dedication shone through all that she did. She strove to provide a positive experience to the author while simultaneously nudging the piece towards the best that it could be. But for her thoughtful and insistent voice on the editorial board, several of the most stellar articles this Journal has selected and published over the years might not have been published under our banner. For her work in the field and for her work for the field, we offer enthusiastic and whole-hearted congratulations to one of our discipline's stars. A bibliography of Professor Weresh's contributions is included, organized topically.

—The Editorial Board of
Legal Communication & Rhetoric: Jalwd, May, 2024.

Professor Melissa H. Weresh: A Bibliography

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These pieces explore structural inequality, particularly with respect to gender. Several of the titles are self-explanatory. References to the American Bar Association accreditation standards 405(c) and 405(d) involve the requirement that law schools provide security of position for faculty as a method of attracting/retaining stable and qualified teachers in the academy. The standards currently permit lesser security and faculty governance rights for clinical professors (405(c)) and for legal writing

professors (405(d)). Perhaps unsurprisingly, these two lesser-status faculty both report much higher percentages of women.

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Building Bridges Across Curricular and Status Lines: Gender Inequity throughout the Legal Academy, 69 J. Legal Educ. 3 (2019) (with Kristen Tiscione).

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