Legal Communication & Rhetoric: JALWD

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General Guidelines

Submission of articles and essays

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

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

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

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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.

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

Microsoft Word (native) and explanation

Because we use a professional designer who requires it, all manuscripts must be prepared and submitted as native Microsoft Word documents.[1] Most of us will be reading the submissions onscreen,

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).

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

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Legal Communication & Rhetoric: JALWD follows standard legal citation form, contained in both the *ALWD Guide to Legal Citation* (6th ed.) and in *The Bluebook* (20th ed.). Please note that all accepted authors will be asked to provide copies of source materials that are unavailable through normal legal-research methods (including title and copyright pages). We prefer scanned materials shared via Dropbox.

Submission and process

Submissions should be sent electronically to the following email address, directly or through the *ALWD* website: jalwd@alwd.org or online via Express-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, contact our Book Review Editor, Nantiya Ruan, nruan@law.du.edu.

Questions

If you have questions, please contact either of our co-Editors-in-Chief, Ruth Anne Robbins, ruthanne@camden.rutgers.edu, or Joan Ames Magat, magat@law.duke.edu.

Table of Contents

Preface / **vii**

ARTICLES & ESSAYS

The Potemkin Temptation or, The Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey
Derek H. Kiernan-Johnson / **1**

Rhetorical Evil and the Prison Litigation Reform Act
Terri LeClercq / **47**

Wait, What?
Harnessing the Power of Distraction or Redirection in Persuasion
Melissa H. Weresh / **81**

Telling Tales: The Transactional Lawyer as Storyteller
Susan M. Chesler & Karen J. Sneddon / **119**

Applying *Daubert* to Flaubert:
Standards for Admissibility of Testimony of Writing Experts
Heidi K. Brown / **145**

Standing (Near)by Things Decided:
The Rhetorical and Cultural Identifications of Law
Lindsay Head / **189**

Four-Finger Exercises: Practicing The Violin For Legal Writers
Ian Gallacher / **209**

What Lawyers Can Learn from Edgar Allan Poe
Julie A. Oseid / **233**

The Rule of Three
Patrick Barry / **247**

The Elephant in the Room: Responding to Racially Charged Words
Suzanne Rowe / **263**

BOOK REVIEWS

This Book Is Just My Type
Typography for Lawyers
Matthew Butterick
Jennifer Babcock, reviewer / **275**

Making and Breaking Connections: Valuable Perspectives on Persuasion
Legal Persuasion: A Rhetorical Approach to the Science
Linda L. Berger & Kathryn M. Stanchi
Mary N. Bowman, reviewer / **279**

Legal Writing Lessons from American Presidents
Communicators-in-Chief:
Lessons in Persuasion from Five Eloquent American Presidents
Julie Oseid
Megan E. Boyd, reviewer / **287**

My Enemy's Enemy and the Case for Rhetoric
Race, Nation, and Refuge:
The Rhetoric of Race in Asian American Citizenship Cases
Doug Coulson
Leslie P. Culver, reviewer / **293**

Judicial Opinions Reimagined: Engendering a Language of Justice
Feminist Judgments:
Rewritten Opinions of the United States Supreme Court
Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, eds.
Andrea McArdle, reviewer / **299**

A Wound, A Chasm, or Both?
The Doctrine-Skills Divide:
Legal Education's Self-Inflicted Wound
Linda H. Edwards
David Thomson, reviewer / **305**

Legislative History is Dead; Long Live Legislative History
Misreading Law, Misreading Democracy
Victoria Nourse
Genevieve B. Tung, reviewer / **311**

PREFACE

What is rhetoric? Read this issue and you'll see many of its facets, each of which, like those of a jewel, draws the viewer. In our case, each facet speaks, as well; it persuades. This can be persuasion through blarney, such as the outlaw lore to which the labels on some American whiskeys allude in the expectation of luring the imaginations, and dollars, of whiskey drinkers. Such is the tasty tale of Derek Kiernan-Johnson's "The Potemkin Temptation or, The Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey." You'll learn more than the sparkle of rhetoric from this article, including how American whiskeys are made, and aged, and how they differ from the "whisky" made in Scotland. On the whole, this article is more fun to read than read about. You'll find it delectable.

Persuasive tale-telling—narrativity—makes for great marketing, of course, but it's also the strategy of advocates, who know that a story well told can sway the reader's judgment. Such is the lesson of Terri LeClercq's "Rhetorical Evil and the Prison-Litigation-Reform Act." The story resulting in this Act's interceding and interfering with the federal-court system, though, was one about rhetoric without ethical ballast: its supporters sold its bill of goods to Congress by means of logical fallacies—misleading labels and statistics, lopsided narratives, hyperbole, and scaremongering. Such political storytelling is storytelling without ethos—rhetoric's backbone of good morals, good character. LeClercq urges us—the lawyers who wield the tools of the law—to be watchful that our own narratives and those of our representative first reflect the moral and professional standards we have sworn to uphold.

Such deliberate misdirection of the audience from a narrative's honest arc is something we are alas familiar with in the current political climate, and none doubt that it can and often does break ethical bounds. But Melissa Weresh asks in "Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion" whether the rhetorical use of distraction—or, more palatably put, redirection—familiar in fiction as a narrative device, might be adapted, ethically, to advocacy. Weresh reacquaints us with the formal and substantive qualities that make narrative persuasive, then introduces us to psychologists' use of distraction to manipulate the

subject's engagement or compliance, thus enhancing her receptivity to the message. Can such techniques be used in advocacy? Yes, says Weresh—they already are, by defense attorneys, for example, who know how to frame a story to their clients' advantage ("redirecting" jurors' attention from unfriendly facts, from their own feelings to those of the client, from their own sense of security to a sense of threat from whatever wrong injured the client). Even mediators mis- or redirect participants in a game the latter have chosen to play. The tool is useful, and it is used. The part it plays in an advocate's strategy, though, must be appropriate and it must be ethical. Each of the articles thus far says as much.

The ethical use of rhetoric goes without saying for transactional lawyers. In Susan Chesler and Karen Sneddon's "Telling Tales: The Transactional Lawyer as Storyteller," fairness to both sides is a given (though in some contracts, it is a myth, as in an employment contract in which, true to a stock story, one party is Goliath, the other, David). The authors counsel that incorporating the lessons of storytelling can make transactional documents more effective. Such drafting does not mean replacing form agreements, which have been tested by repeated use and even judicial construction; it does mean using the best form (for there are many possibilities, whatever the transaction) as a starting point, a base for the parties' particular narrative. The authors offer a handful of ways the drafter can shape the story told by the agreement, from substituting party names for their roles in a transaction (Buyer, Seller; Insurer, Insured), to remembering that a contract envisions a plot—a series of events, the order or expression of which the drafter can modulate.

We are all familiar with the wide range of topics on which expert witnesses are called to testify, from "hard science" expertise in blood-spatter analysis to "soft science" expertise in art provenance or gang tattoos. Writing experts, including those in legal writing, occupy the witness box, too, testifying on written expression customary in one trade or another, or comparing the written documents' content or style, or construing many kinds of documents with legal effect. In "Applying *Daubert* to Flaubert: Standards for Admissibility of Testimony of Writing Experts," Heidi Brown examines the criteria for admissibility of expert testimony, explores the range of writings in which such experts in legal writing have in fact testified, and offers guidance as to how a scholar or practitioner of legal writing might establish her qualifications as an expert and develop her testimony. What does all of this have to do with Flaubert? Well, as to this last criterion, his inspiration, for one thing—to exercise assiduous care in the task, as he did in his writing: "Whatever the thing you wish to say, there is but one word to express it, but one verb to give it

movement, but one adjective to qualify it; you must seek until you find this noun, this verb, this adjective."[1]

The next article addresses the potential disjuncture of cultures in their varied responses to notions whose meaning we take for granted. Lindsay Head takes the right of privacy as an example of a notion in flux by reason of "social, political, and technological change."[2] Yet the legal community craves law that is "finite, stable, unmoving,"[3] not to mention morally "right." There's a disjuncture here, between reality and ideal, between rhetoric and formalism, between a horizontal identification with the rhetorical culture in which it thrives—and changes—and vertical identification with history and precedent. Because we lawyers inhabit both axes, Head notes, it falls upon us to make the two work together, to find a "rhetorical place to stand, between reason and power."[4]

In the last article in this issue, Ian Gallacher offers practical advice: In "Four-Finger Exercises: Practicing the Violin for Legal Writers," Gallacher suggests that legal writers, like musicians, would benefit by exercises, including writing daily, for short periods, in different formats, with different instruments, at different times of day—shaking ourselves out of numbing, normal conditions and so nudging our creativity. And he advises sharing the products of such labors with others. Gallacher offers many more suggestions, all of which promise to strengthen the skill and the ultimate performance.

The essays in this volume begin with more practical advice for improving the most important skill in our trade, our own writing. Julie Oseid ("What We Can Learn from Edgar Allen Poe") offers lessons that might apply to brief writing, drawn from qualities noted by Poe, a storyteller of indisputable renown, who lauded unity, brevity, focus, and "novelty in tone."[5]

How do you get to Carnegie Hall? Practice, practice, practice. Patrick Barry explores the rhetorical device known as a tricolon (often given a boost by alliteration) in "The Rule of Three," a pattern ubiquitous in our verbal culture. Its appeal is its rhythm, perhaps because, as one of Barry's sources suggests, we can remember three; any more, and we start to

1 Attributed to Gustav Flaubert. *See* https://www.goodreads.com/quotes/129938-one-day-i-shall-explode-like-an-artillery-shell-and.

2 Head, *infra* at 207.

3 *Id.*

4 Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 1, 4 (2010), *quoted in id.* at 207.

5 GREAT AMERICAN SHORT STORIES: FROM HAWTHORNE TO HEMINGWAY 527 (Corrine Demas ed., 2004).

6 *See* CARMINE GALLO, TALK LIKE TED: THE 9 PUBLIC-SPEAKING SECRETS OF THE WORLD'S TOP MINDS 191 (2014), quoted in Barry, infra p. 248, n. 4.

forget.[6] The parallelism snags us all, whether it's a thrice-repeated word or phrase ("Oyez, oyez, oyez!") or three parts of an appealing notion ("Wings. Beer. Sports."[7]). Barry observes that the broken promise of three beats can be even more effective if the third is shaken up at the third step, "same, same, kind of different,"[8] either notionally ("Fresh. Fast. Tasty."[9]) or rhythmically ("Nobody bothered me. Nobody vibed me. It was the opposite of my life at school.")[10] It's rhetoric. It exerts a pull; it persuades.

Suzanne Rowe approaches rhetoric of a different sort: situational rhetoric—in this case rhetoric that repels. She advises what one might do when the office or classroom is electrified by a racially charged comment or joke. Confronting the offense directly is without question awkward, but Rowe offers a couple of strategies to do so, which will enlighten, alleviate, and ameliorate what's left behind by the elephant.

Are you in mind to do some professional reading? This issue's seven book reviews offer a wide range of pleasureable options: Jennifer Babcock's "This Book Is Just My Type," a review of Matthew Butterick's second edition of *Typography for Lawyers* (2015); Mary Bowman's "Making and Breaking Connections: Valuable Perspectives," reviewing *Legal Persuasion: A Rhetorical Approach to the Science* (2018), by Linda Berger and Kathryn Stanchi; Megan Boyd's review, "Legal Writing Lessons from American Presidents," of Julie Oseid's *Communicators-in-Chief: Lessons in Persuasion from Five Eloquent American Presidents* (2017); Leslie Culver's "My Enemy's Enemy and the Case for Rhetoric," reviewing *Race, Nation, and Refuge: The Rhetoric of Race in Asian American Citizenship Cases* (2017), by Doug Coulson; Andrea McArdle's "Judicial Opinions Reimagined: Engendering a Language of Justice," a review of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016), edited by Kathryn Stanchi, Linda Berger, and Bridget J. Crawford; "A Wound, a Chasm, or Both?," David Thompson's review of Linda Edwards' *The Doctrine–Skills Divide: Legal Education's Self-Inflicted Wound* (2017); and Genevieve Tung's "Legislative History is Dead; Long Live Legislative History," a review of Victoria Nourse's *Misreading Law, Misreading Democracy* (2016). Each one is discerning, insightful, and delightfully readable.

This volume sees the end of terms for two of our excellent associate editors. We are saying farewell to Andrew Carter and Anne Ralph. Both of

7 Buffalo Wings ad, *quoted in* Barry at, *infra* p. 251, n. 22.

8 *See* Barry, *infra* pp. 252–53.

9 Jimmy Johns slogan, *quoted in* Barry, *infra* at p. 253.

10 WILLIAM FINNEGAN, BARBARIAN DAYS: A SURFING LIFE 8 (2015), *quoted in* Barry *infra* at p. 254.

these editors have published important scholarship in their own right. In Volume 11 of this journal, Andrew wrote *The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers* applying cognitive psychology to written advocacy. Anne published her first article in Volume 26 of the *Yale Journal of Law & Humanities*, writing about narrative theory as it pertains to the plausibility standard in federal pleadings. Combined, these two professors offered the journal impressive insights about the selection and editing of articles. Authors have praised each of them for their work on articles. We say goodbye with great respect and fondness, wishing them much success in their teaching and scholarly work.

One of our original editors, Ian Gallacher, also leaves our editorial board, having served terms as a coeditor in chief as well as a lead editor. Ian is one of the Journal's most stalwart and enthusiastic supporters. When authors submit pieces for consideration, Ian has always been the first to read the submissions—and he has always read them deeply. His powers of concentration astound and delight. When Ian offers suggestions, they are always on point. His editing touch is a gentle but thorough magic. Ian has also been a friend to each and all of the editors. When we have needed an extra pair of hands, he has always volunteered—during times of health issues, loss, and other crisis, he was there as a port in the storm. It is almost impossible to think of the Journal's operating without him.

And finally, it is with heavy hearts that we also mark the conclusion of an era with Joan Magat at the helm. Since Volume 8, the team has been Joan and Ruth Anne, a dynamic and complementary duo. Joan has taught us all how to be better editors. Her lyrical, sometimes whimsical, voice in bubble comments offered teaching as well as razor-precise suggestions on word choices, idea-sharpening, and small-but-significant technical edits. Thanks to her, a legion of lawyers are better people for knowing how to use hyphens and en-dashes, how to analyze a book review, and how to think about scholarship based in rhetoric. Joan's mind is keen, and her manner is enchanting. All of the editors who have worked with her adore her character and her style. Luckily, we will continue to have her carry on as a lead article editor. We give thanks and remain thankful she will be here to teach our new generation of editors and Journal leadership, even as she steps back from a top role.

—Joan Magat and Ruth Anne Robbins, Summer, 2018

ARTICLE

The Potemkin Temptation

or, The Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey

Derek H. Kiernan-Johnson*

On the heels of the 1990s microbrewing revolution, and as part of the larger eat-local movement, "craft" whiskey distilleries have sprouted across America. Many, however, aren't "distilleries" at all: They neither distill nor age whiskey, but rather purchase it premade from giant industrial plants.

These "Potemkin" craft distilleries then bottle that whiskey themselves, describing their products, on federally approved bottle labels, as "hand-bottled in [local place X]." Some Potemkins, before bottling, dilute the generic whiskey they've purchased with local water (often just filtered tap), giving them the legal leeway to celebrate that literal tie to place, too. Arresting visuals on the front of the bottle labels and narrative scripts on their backs allow Potemkins to further wrap their products in a myth of authenticity, craftsmanship, and place, thereby overwhelming the potential effect that the federally mandated disclosures on their labels might have.

This is more than standard marketing puffery and creative lawyering. The Potemkin phenomenon causes serious harms. It harms whiskey drinkers, who seek out and then pay a premium to support what they thought was a handcrafted, artisanal product. It harms "bona fide" craft distillers, who aspire to create from scratch authentic local whiskey that truly speaks of place, but who struggle to compete with corner-cutting Potemkins. Although they are less sympathetic than either consumers or

*Legal Writing Professor, University of Colorado. Deepest thanks to LC&R editors Joan Ames Magat, Ruth Anne Robbins, Mel Weresh, and JoAnne Sweeny for their insights, encouragement, and patience. Gratitude to my children, Ronan and Kelsey, for tolerating it when my mind wandered to this topic when it should have stayed focused on them, and to my spouse, Eileen, for agreeing to tour a craft-whiskey distillery as part of our 15th anniversary celebrations.

This article is dedicated to author Michael J. Jackson (1942–2007), whose writing on whiskey in the mid-1990s first sparked my lifelong love of the drink, inspiring me to take careful notes of tastings and even write an article on single malt scotch for my college newspaper.

bona fide producers, the phenomenon also harms Potemkin craft distillers themselves—both those "intentional" Potemkins who cynically set out to abuse the ethos of authenticity, and those "accidental" Potemkins (and their lawyers) who start off with the best of intentions but, faced with the particular challenges of craft distilling, and intoxicated by the special power of narrative and rhetoric in American craft whiskey, turn to find that they've fallen short of their ideals.

Legal responses to the Potemkin phenomenon have been inadequate. And they will continue to be, unless legal reformers take seriously, and specifically account for, the ways rhetoric and narrativity operate in the craft-whiskey industry.

This article sets the scene with a story—that of Templeton: the town, the whiskey, and the controversy. After that aperitif comes an overview of how American whiskey is made, with a focus on the steps in that process that (1) mirror and thus set up a false analogy to microbrewing, (2) make whiskey-making much harder than brewing, and then (3) tempt aspiring distillers to become Potemkins. The next course is a tasting of whiskey in American history, aimed at showing both the nostalgia today's Potemkins draw from and the ways previous legal reformers have tried to cabin earlier shenanigans. Next up is a close look at the ways both intentional and accidental Potemkins, and their lawyers, can respectively manipulate and fall prey to the special power of rhetoric and narrativity in American craft whiskey, and possible ways for legal reformers to manage rhetoric and narrativity's power.

I. Templeton: A Town and Its Whiskey

The story of Templeton illustrates how rhetoric and narrativity foster the Potemkin phenomenon. Templeton, Iowa, is saturated in whiskey references:

- The town logo is a sepia-toned image of figures in newsboy caps passing a whiskey barrel;
- The town slogan is "A Strong Community Spirit" (puns intended);
- Drive into town, and you'll pass a welcome sign featuring an old-fashioned stoneware whiskey jug;
- If you're hungry, turn off of "Rye [Whiskey] Avenue" and stop at "The Still Grill."[1]

1 CITY OF TEMPLETON, IOWA, http://www.templetoniowa.com/ (town slogan); http://www.felixandfingers.com/wp-content/uploads/2014/10/templeton-iowa.jpg (town sign); Josh Noel, *Tracking down Iowa Whiskey in Templeton*, CHI. TRIB. (Apr. 24, 2010), http://www.chicagotribune.com/lifestyles/travel/ct-trav-0425-templeton-iowa-20100422-31-story.html (Rye Avenue, Still Grill).

The town traces its whiskey roots back to the Great Depression and Prohibition. According to "local lore,"

> [f]alling crop prices knocked Templeton…back on its heels and, industrious Germans the townsfolk were, they turned to bootlegging. It turned out that Templeton was particularly good at both making whiskey and staying ahead of the law. Locals would erect a still, brew a batch, move the still—and repeat. By the time the economic cloud shifted, whiskey was too deeply in the local fabric to give up.[2]

This bootlegging tradition continued after Prohibition ended, with home distillers quietly passing the recipe down the generations. Over time, the legend of Templeton whiskey's importance also grew: not only had it "saved this town from the Depression," but it "was Al Capone's favorite [whiskey]."[3] Today, even though home whiskey distilling, unlike home beer brewing, remains a felony,[4] if you ask the right Templeton local, you might just get a sip of authentic, homemade Templeton rye whiskey.[5]

It was therefore only natural that, as the "craft distiller" emerged in the 2000s,[6] an entrepreneur would bring the town's storied underground recipe into the light. And so, in 2006, Templeton-area native Scott Bush opened, in tiny Templeton itself, *Templeton Rye Spirits, LLC*.[7] Bush claims to have gotten the recipe from a Templeton old-timer, who had gotten it from his father—a convicted bootlegger.[8] A grandson attested that the

2 Noel, *supra* note 1; *History,* CITY OF TEMPLETON (2014), http://www.templetoniowa.com/about_templeton/history.asp.

3 Noel, *supra* note 1; Jason Walker, *Templeton Rye of Templeton, Iowa*, THE HEAVY TABLE (July 7, 2009), http://heavytable.com/templeton-rye-of-templeton-iowa/.

4 *See* 26 U.S.C. § 5601(a)(1), (a)(8) (Westlaw through P.L. 115-90).

5 Noel, *supra* note 1.

6 MICHAEL R. VEACH, KENTUCKY BOURBON WHISKEY: AN AMERICAN HERITAGE 123 (2013).

7 Noel, *supra* note 1; Iowa Secretary of State's Business Entity Summary for Templeton Rye Spirits, LLC, Apr. 4, 2005, https://sos.iowa.gov/search/business/(S(qylzuz45kclzrxjqdaf3mn55))/summary.aspx?c=rd_dipmYeMLLvvP1OllHw-qmQZy9g8zpQuNF35GT7gQ1.

8 Noel, *supra* note 1; TEMPLETON RYE, http://www.templetonrye.com/history/.

commercial Templeton Rye was "almost the same stuff his grandfather [had] made."[9]

The company played up their product's small-town, hand-crafted qualities: Templeton Rye wasn't merely hand-bottled. Instead, the bottling was done by a "staff of gray-haired locals…recruited from the church bulletin," who then hand-marked the labels.[10]

The federally approved bottle label, which consumers would see in the aisles of a liquor store or on a shelf at a bar, reinforced these themes.

Original Templeton Rye front label[11]

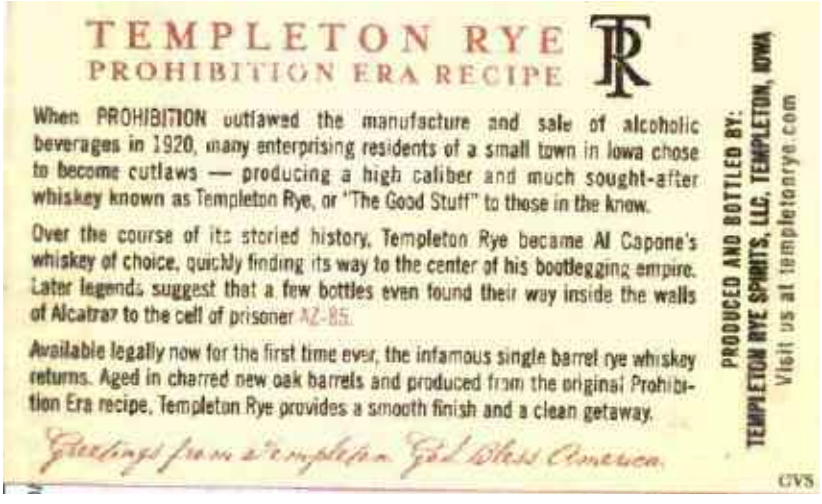
This is the label on the front of Templeton bottles. The faded, sepia photo is the first thing that catches the eye; the curve of the drinkers' arms and dark bands of their fedoras encourage the eye to circle the image clockwise. Then the eye moves outward to take in the text's distressed, old-timey lettering, reinforcing the mood of the image and "Prohibition Era Recipe" message in the banner.

9 Noel, *supra* note 1.

10 *Id.*

11 *See* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *Certification/Exemption of Label/Bottle Approvals (COLA)*, [hereinafter "*COLA Registry*"] TTB ID 06286000000097, https://www.ttbonline.gov/colasonline/publicViewImage.do?id=06286000000097.

Take that bottle down, hold it in your hands, and turn it around to this:



Original Templeton Rye back label[12]

In three short paragraphs, the back label communicates (1) an origin story set in a particular time and place—the town of Templeton in the 1920s, (2) the "infamous" whiskey's ties to the notorious Al Capone, and (3) the historically shady story's transition to a redemptive one—the underground recipe brought to light by craft commerce. Together, the visual rhetoric of the front label and the narrative power of the back conspire to send a clear, memorable message.

And the whiskey in that bottle was delicious, earning favorable reviews from critics and winning awards from 2008 through 2010.[13] This success spurred interest in the town of Templeton and its history—increasing tourism, improving finances, and leading to a book and documentary film.[14]

12 *Id.*

13 Reviews included Geoff Kleinman, *Templeton Rye Whiskey Review*, DRINKSPIRITS.COM (Jan. 26, 2011), http://www.drinkspirits.com/whiskey/templeton-rye-whiskey-review/ (rating Templeton Rye 4.5 stars; "Very Highly Recommended") and Steve Ury, *Whiskey Wednesday: Templeton Rye*, SKU'S RECENT EATS, (Apr. 27, 2010), https://recenteats.blogspot.com/2010/04/whiskey-wednesday-templeton-rye.html (describing the whiskey's nose as "beautiful; full of rye spice with pickling herbs). The list of awards Templeton received in spirits competitions are listed at *Templeton Rye*, INFINIUM SPRITS, http://infiniumspirits.com/brands/templeton-rye/#1977.

14 Ken Behrens, *Templeton Rye lawsuit is misguided*, Letter to the Editor, DES MOINES REGISTER (Oct. 8, 2014, 11:17 PM CT), http://www.desmoinesregister.com/story/opinion/readers/2014/10/09/templeton-rye-lawsuit-misguided/16949981/ (noting positive economic impact of the company on the town); BRYCE T. BAUER, GENTLEMAN BOOTLEGGERS: THE TRUE STORY OF TEMPLETON RYE, PROHIBITION, AND A SMALL TOWN IN CAHOOTS (2014); CAPONE'S WHISKEY: THE STORY OF TEMPLETON RYE (Modern American Cinema 2011).

There was just one problem: Templeton Rye's claims to history, to locality, to authenticity, everything—turned out to be outright false or, in whiskey writer and critic Chuck Cowdery's words, "misleading as hell."[15] Templeton Rye wasn't distilled in Templeton, Iowa. Nor was it made from a Prohibition-era recipe. Distillation took place two states over, in Indiana, by Midwest Grain Products Ingredients, Incorporated (MGP), a "food conglomerate" housed in a "massive brick complex that cranks out mega-industrial quantities of beverage-grade alcohol," and "food grade industrial alcohol" for use in things such as solvents, antiseptics, and fungicides.[16] This factory whiskey was "trucked [from Indiana] to Templeton, offloaded at the plant, and bottled there."[17]

The recipe for the whiskey made at that huge industrial plant wasn't quietly passed down within Templeton families from Prohibition days, but a "stock recipe"[18] that MGP had inherited from a company it had acquired, which recipe the company hadn't intended for making stand-alone whiskey but rather for use as "an ingredient in blends."[19]

The truth about Templeton Rye came to light slowly, with whiskey geeks raising questions in 2008 and confirming MGP as its source in 2010.[20] Then, in 2014, the secret broke into the open when Templeton was one of a handful of products featured in a *Daily Beast* exposé entitled "Your 'Craft' Rye Whiskey is Probably from a Factory Distillery in Indiana."[21]

15 Chuck Cowdery, *Templeton Rye Is Still Lying*, THE CHUCK COWDERY BLOG (July 27, 2015), http://chuckcowdery.blogspot.com/2015/07/templeton-rye-is-still-lying.html [hereinafter, Cowdery, *Still Lying*].

16 David Haskell and Colin Spoelman, *The Family Tree of Bourbon Whiskey*, GQ (Nov. 11, 2013), http://www.gq.com/story/bourbon-whiskey-family-tree (details on MGP); Eric Felten, *Your "Craft" Whiskey Is Probably from a Factory Distillery in Indiana*, THE DAILY BEAST (July 28, 2014 5:45 AM ET), http://www.thedailybeast.com/articles/ 2014/07/28/your-craft-whiskey-is-probably-from-a-factory-distillery-in-indiana.html (same); *Beverage Alcohol*, MGP (2017); http://www.mgpingredients.com/alcohol/beverage/ (beverage-grade alcohol); *Food Grade Industrial Alcohol*, MGP (2017), http://www.mgpingredients.com/alcohol/food-grade-industrial/ (food-grade industrial alcohol). At the time the Templeton story initially broke, its whiskey wasn't made by MGP but by its predecessor, Lawrenceburg Distillers Indiana (LDI), which MGP acquired in late 2011. Chuck Cowdery, *MGP Acquires LDI Distillery*, THE CHUCK COWDERY BLOG (Oct. 21, 2011), https://chuckcowdery.blogspot.com/2011/10/mgp-acquires-ldi-distillery.html.

17 Noel, *supra* note 1.

18 Josh Hafner, *Templeton Rye to Change Labels, Clarifies how Much Made in Iowa*, THE DES MOINES REGISTER (Aug. 29, 2014 8:33 AM CT), http://www.desmoinesregister.com/story/news/2014/08/28/templeton-rye-change-labels-clarifies-much-made-iowa/14770045/.

19 Chuck Cowdery, *George Dickel Gives a Different Taste to LDI Rye*, THE CHUCK COWDERY BLOG (Oct. 26, 2012), https://chuckcowdery.blogspot.com/2012/10/george-dickel-gives-different-taste-to.html [hereinafter, Cowdery, *Different Taste*].

20 *E.g.*, Chuck Cowdery, *Templeton Rye. Hoist On Its Own Petard?*, THE CHUCK COWDERY BLOG (Nov. 18, 2009), https://chuckcowdery.blogspot.com/2009/11/templeton-rye-hoist-on-its-own-petard.html (noting that barrels of aging Templeton Rye appearing on the company's own website featured distilling dates several years earlier than the company's founding); Noel, *supra* note 1.

21 Felten, *supra* note 16.

This national attention spurred three class-action lawsuits that ended in a global settlement.[22] Templeton Rye changed its bottle labels and set aside $2.5 million to pay consumers who had bought their whiskey based on the local, craft appeal.[23]

But some whiskey critics still weren't satisfied. Soon after the settlement, Cowdery published an article titled *Templeton Rye Is Still Lying*.[24] Debates about Templeton's other shady-but-technically-legal practices not covered by the settlement, such as their use of flavoring additives, continued.[25]

Reflecting on the lawsuits and settlement, Templeton Rye's chairman suggested that where the whiskey was made, and the stock recipe used to make it, were "not the most important thing."[26] Instead, what mattered was the idea of the "whiskey as a tribute to and celebration of the town of Templeton and its legendary bootlegging past."[27]

Cowdery noted the irony in Templeton's story: "[T]he tragedy here is that they have a delicious product and even the story is kind of sweet. The whole thing might have worked just as well if they had not tried so hard to make people believe it was literally true."[28] Not "tragic," surely, but understandable: the company's founders may well have been swept up in the "idea" of Templeton and surprised by the outcry. Inclined, as we all are, to seeking narrative coherence,[29] they may have overlooked inconvenient details in their story and fallen prey to the "seductiveness of narrative momentum."[30]

However, unlike other recent examples of the seductiveness phenomena in fields such as journalism (Brian Williams), nonfiction (Jonah Lehrer), memoir (James Frey), or sports writing (the Manti Te'o

22 Hafner, *supra* note 18; Matthew Patane, *Templeton Rye Agrees to Pay up to $36 per Claim in Settlement*, DES MOINES REGISTER (July 22, 2015 11:23 AM CT), http://www.desmoinesregister.com/story/money/business/2015/07/20/templeton-rye-settlement/30420745/.

23 Patane, *supra* note 22.

24 Cowdery, *Still Lying*, *supra* note 15.

25 *E.g., id.*; Chuck Cowdery, *Flavoring Is Legal in American Whiskey. Yes, You Read That Correctly*, THE CHUCK COWDERY BLOG (Sept. 16, 2014), http://chuckcowdery.blogspot.com/2014/09/flavoring-is-legal-in-american-whiskey.html [hereinafter, Cowdery, *Flavoring Is Legal*].

26 Hafner, *supra* note 18.

27 *Id.*

28 Cowdery, *Still Lying*, *supra* note 15.

29 *See* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 63–68 (2008) (exploring the theory of "narrative coherence" in Applied Legal Storytelling).

30 This term "The Seductiveness of Narrative Momentum" was coined and the concept explored in the context of Applied Legal Storytelling in a presentation by Derek H. Kiernan-Johnson at the 2013 Applied Legal Storytelling Conference, City Law School, City University London (July 24, 2013). A pdf of the program for that conference is located at https://www.city.ac.uk/__data/assets/pdf_file/0006/185163/Applied-Story-Telling-Conference-Programme-18-July-2013.pdf.

hoax),[31] the Templeton tragedy wasn't a one-off anomaly. For although Templeton was one of the first "craft" whiskey companies to buy pre-made whiskey from MGP and then gloss over that fact in its marketing,[32] it was not the only one to do so. MGP is a "one-stop shop for marketers who want to bottle their own brands of spirits without having to distill the product themselves."[33] The company manufactures "about half of the rye brands on liquor shelves today."[34] And not just rye whiskey, but also wheat whiskey, malt whiskey, corn whiskey, and bourbon whiskey.[35] The total number of whiskeys sourced from MGP is hard to pin down, but was recently estimated to be around 128.[36] And MGP isn't the only company offering this service to "craft" distillers.[37]

The technical name for whiskey companies, such as Templeton, that have others distill and age their whiskey is "non-distiller producers," or "NDPs."[38] As whiskey author Steve Ury notes, "There's nothing inherently wrong with buying whiskey from another company and selling it at all. What's wrong is doing it and pretending you made it yourself . . . ."[39]

Some American NDP whiskeys are transparent about their status. An extreme example is Blaum Brothers Distilling's *Knotter Bourbon*, which celebrates its NDP status not only in its advertising ("[W]e didn't distill

31 For a summary of these three examples, see Erik Wemple, *NBC News's Brian Williams Recants Story about Taking Incoming Fire During Iraq War Coverage*, WASH. POST (Feb. 4, 2015 7:20 PM), https://www.washingtonpost.com/ blogs/erikwemple/wp/2015/02/04/nbc-newss-brian-williams-recants-story-about-taking-incoming-fire-during-iraq-war-coverage/; Alexandra Alter, *A Fraud? Jonah Lehrer Says his Remorse is Real*, N.Y. TIMES, July 11, 2016, https://www.nytimes.com/2016/07/12/books/a-fraud-jonah-lehrer-says-his-remorse-is-real.html; Evgenia Peretz, *James Frey's Morning After*, VANITY FAIR, (June 2008), https://www.vanityfair.com/culture/2008/06/ frey200806; and Michael Rosenberg, *Te'o Girlfriend Hoax Filled with More Questions than Answers*, SPORTS ILLUSTRATED (Jan. 16, 2103), https://www.si.com/college-football/2013/01/16/teo-column.

32 Tony Sachs, *The Delicious Secret Behind Your Favorite Whiskey: The Best Spirits from MGP*, SERIOUS EATS, https://www.seriouseats.com/2015/09/best-whiskey-spirits-from-mpg.html.

33 Felten, *supra* note 16.

34 Haskell & Spoelman, *supra* note 16.

35 Jake Emen, *Sourcing, Labeling & Lawsuits: Why American Whiskey Should Improve Its Labels*, EATER (July 7, 2015, 1:17 PM EDT), http://www.eater.com/drinks/2015/7/7/8903167/sourcing-labeling-lawsuits-why-american-whiskey-should-improve-its. Rye whiskey features prominently because rye is especially hard for craft distillers to work with. Haskell & Spoelman, *supra* note 16.

36 Steve Ury, *The Complete List of American Whiskey Distilleries & Brands*, SKU'S RECENT EATS, http://recenteats.blogspot.com/p/the-complete-list-of-american-whiskey.html (last updated May 6, 2017) [hereinafter, Ury, *Complete List*].

37 For instance, a factory distillery in Canada is the source for Vermont's Whistle Pig Rye. NPR Staff, *Why Your "Small-Batch" Whiskey Might Taste a Lot Like the Others*, ALL THINGS CONSIDERED (July 30, 2014, 6:33 PM ET), https://www.npr.org/sections/thesalt/2014/07/30/336584438/why-your-small-batch-whiskey-might-taste-a-lot-like-the-others); Lew Bryson, *Your "Local" Craft Whiskey May Really Be from Canada*, DAILY BEAST (June 28, 2016, 1:00 AM ET) http://www.thedailybeast.com/articles/2016/06/28/your-local-craft-whiskey-may-really-be-from-canada; Felton, *supra* note 16; Emen, *supra* note 35.

38 Emen, *supra* note 35; Chuck Cowdery, *The Rational Way to Regard NDP Whiskeys*, THE CHUCK COWDERY BLOG (May 26, 2013) http://chuckcowdery.blogspot.com/2013/05/the-rational-way-to-regard-ndp-whiskeys.html.

39 Janet Patton, *The Spirit of Kentucky: Bourbon is More of a Commodity than Many Realize*, LEXINGTON HERALD LEADER, (Nov. 12, 2015, 3:04 PM), http://www.kentucky.com/news/business/bourbon-industry/article44457627.html.

this bourbon. Nope, not a drop."), but even in the product's name ("Knotter" bourbon = "not our" bourbon).[40] In Scotland there's a long tradition of "Independent bottlers,"[41] the loose equivalent of American NDPs, whose successful approach is seen as a possible model for the United States.[42]

Open, transparent NDPs aren't the problem. The problem is the NDPs who lie about or obscure their products' origin, a subcategory that Cowdery has dubbed "Potemkin Craft Distilleries."[43] In discussing High West, a Utah-based whiskey company that got in hot water around the same time as Templeton for deceptively using stock MGP whiskey, Cowdery explained his inspiration for the moniker:

> The original term refers to Grigori Aleksandrovich Potemkin, who allegedly had elaborate fake villages constructed for Catherine the Great's tours of the Ukraine and Crimea, in an effort to show his colonization efforts there were successful. It came into common usage during the Cold War, to refer to similar Soviet efforts to portray living conditions in the USSR as better than they actually were.
>
> I call High West a Potemkin Craft Distillery because the company's most highly touted products, its Rendezvous and Rocky Mountain Ryes, are whiskeys High West did not make but, rather, merely bought and bottled.[44]

It's this lack of transparency, this lack of honesty, that is harmful.

It harms whiskey drinkers, such as the plaintiffs in the class-action lawsuits against Templeton. The harms to drinkers, however, are not merely economic harms to them in their capacity as "consumers." Nor are the harms to bona-fide craft-whiskey distillers limited to the severe competitive disadvantage Potemkins put them in. There's plenty of collateral damage to go around, and the harms extend even to American whiskey itself.

To understand how the Potemkin phenomenon arose and continues to fester, to appreciate why existing legal remedies are largely ineffectual, and to see the narrative and rhetorical opportunities for Potemkins to

40 *Knotter Bourbon*, BLAUM BROTHERS DISTILLING COMPANY, http://www.blaumbros.com/knotter-bourbon.

41 *E.g., The History of the Independent Bottlers*, WHISKY.COM, https://www.whisky.com/information/knowledge/production/independent-bottlers/the-history-of-the-independent-bottlers.html.

42 Patton, *supra* note 39; Chuck Cowdery, *Who Made That Whiskey?*, THE CHUCK COWDERY BLOG (Dec. 19, 2008), https://chuckcowdery.blogspot.com/2008/02/who-made-that-whiskey.html ("Independent bottlers should identify themselves as such and be proud enough of their products to tell the truth about them.").

43 Chuck Cowdery, *Potemkin Craft Distilleries*, THE CHUCK COWDERY BLOG (Feb. 11, 2010), http://chuckcowdery.blogspot.com/2010/02/potemkin-craft-distilleries.html [hereinafter, Cowdery, *Potemkin Craft Distilleries*]; *see also* Felten, *supra* note 16.

44 Cowdery, *Potemkin Craft Distilleries*, *supra* note 43.

flourish, it's first necessary to bone up on a few things: First, what whiskey is and how it's made—in particular how the process is different from craft beer brewing, which is likewise associated with authenticity and place, and how it's regulated. The second is how key moments in American whiskey history create narrative and rhetorical opportunities for Potemkins to flourish and help explain today's broader craft moment.

II. Whiskey Basics

Whiskey[45] is made from grain, "much as bread is, but in liquid, concentrated form."[46] Dried and ground to a flourlike consistency, that grain is then steeped in hot water, like coffee or tea. It's then fermented with yeast, like beer or wine. Next, it is distilled, like vodka or gin. Finally, it is aged in wood, like brandy or aged rum.

Aficionados have defined it rhapsodically,[47] but more pertinent here is its legal definition. Under U.S. law, "whisky" (sic),[48] as defined in the Code of Federal Regulations, is

> an alcoholic distillate from a fermented mash of grain produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, stored in oak containers (except that corn whisky need not be so stored), and bottled at not less than 80° proof, and also includes mixtures of such distillates for which no specific standards of identity are prescribed.[49]

That's a lot to unpack and some parts don't make sense.[50] But what matters here are the definition's subcategories, the two most important being "bourbon" and "rye." Templeton Rye is, you guessed it, a rye whiskey, while the NDP whiskey Knotter ("not-our") bourbon is a bourbon. As a legal matter, the difference between these two subcategories hinges on the

45 An aside about spelling: Typically, the word is spelled "whiskey" for products made in former British colonies that rebelled against the Empire—such as the United States and Ireland—but "whisky" for products made in places that remained loyal to the crown—such as Canada and Scotland. VEACH, *supra* note 6, at 13. This article follows that convention. Additionally, as an article about American whiskey written by an American author, it will use, as a category term covering all species in the genus, the American spelling: "whiskey."

46 LEW BRYSON, TASTING WHISKEY: AN INSIDER'S GUIDE TO THE UNIQUE PLEASURES OF THE WORLD'S FINEST SPIRITS 23 (2014) [hereinafter, BRYSON, TASTING WHISKEY].

47 *Id.* at 10.

48 See discussion at *supra* note 45.

49 27 C.F.R. § 5.22(b) (Westlaw through Jan. 11, 2018; 83 FR 1310).

50 For example, the definition requires whiskey to, first, be distilled "in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky," and then be "stored in oak containers." 27 C.F.R. § 5.22(b). This makes no sense, because it is this second step—aging in oak—that gives whiskey its flavors, aromas, and colors. BRYSON, TASTING WHISKEY, *supra* note 46, at 137–38.

percentage of rye or corn, respectively, used to make each. "Rye" whiskey is made from at least 51% rye; whiskey made from at least 51% corn is called not "corn" whiskey, but "bourbon."[51]

Significantly, the legal definition of bourbon says nothing about Kentucky. Although it is a popular myth that bourbon can be made only in that state,[52] bourbon can be made, and, with the rise nationwide of local craft distilleries, Potemkin or otherwise, increasingly *is* made, anywhere within the United States.[53] Even Tennessee.[54]

Another popular myth is that the name "bourbon" refers to Bourbon County, Kentucky, or to New Orleans's Bourbon Street.[55] Those appear to be mere coincidences. Instead, as with other nineteenth century products who used the "bourbon" moniker, such as bourbon coffee, bourbon sugar, and bourbon cotton, bourbon whiskey was probably so named in (unapproved) efforts to evoke the prestige of the Bourbon royal family.[56] Potemkin palming-off has a rich lineage.

A. The Steps that Mirror Brewing

The initial steps in making whiskey are similar to those for making beer. Entrepreneurs with backgrounds in homebrewing or microbrewing might therefore be tempted to suppose that craft distilling is just as easy to do. This is often the first step on the path to becoming Potemkins.

As with beer-brewing, the first step in whiskey-making is harvesting and preparing cereal grains.[57] Which grains are used, and in what ratio, affects a whiskey's aroma, flavor, and texture.[58] The grains most commonly used in American whiskey are corn, rye, wheat, and barley.[59] Once the

51 27 C.F.R. § 5.22(b)(1). The term "corn" whiskey is reserved for unaged whiskey made from at least 80% corn. *Id.* Other grains that can be used to make whiskey include wheat, barley, and, less commonly, oats, buckwheat, triticale, millet, spelt, and quinoa. DAVE BROOM, WHISKY: THE MANUAL 46 (2014).

52 *E.g.,* BRYSON, TASTING WHISKEY, *supra* note 46, at 139.

53 27 C.F.R. § 5.22(b)(2), (l)(1). ("Whisky [*sic*] distilled from bourbon . . . is whisky produced in the United States . . . the word 'bourbon' shall not be used to describe any whisky [*sic*] . . . not produced in the United States.").

54 Although most Tennessee whiskey producers such as Jack Daniel's and George Dickel choose to market their products as "Tennessee whiskey," and have recently garnered support within the state of Tennessee for that designation (*see* Tenn. Code Ann. § 57-2-106 (Westlaw through end of the 2017 First Regular Session of the 110th Tennessee General Assembly)), from a federal perspective they are bourbons. 27 C.F.R. § 5.22(b)(2) (defining Bourbon whiskey as whiskey produced in the United States at less than 160° proof from fermented mash of not less than 51% corn and stored at not more than 125° proof in charred new-oak containers).

55 *E.g.,* FRED MINNICK, BOURBON: THE RISE, FALL, AND REBIRTH OF AN AMERICAN WHISKEY 27 (2016) [hereinafter MINNICK, BOURBON]; VEACH, *supra* note 6, at 24–29.

56 MINNICK, BOURBON, *supra* note 55, at 27.

57 BRYSON, TASTING WHISKEY, *supra* note 46, at 23; BROOM, *supra* note 51, at 43.

58 BROOM, *supra* note 51, at 43.

59 BRYSON, TASTING WHISKEY, *supra* note 46, at 22.

grains are harvested, they are dried and milled, to about the consistency of flour,[60] unless the brewer chooses to first malt or smoke the grains.

Malting, common to beer-brewing, is a process by which harvested grains are made to sprout, but then dried before they can further mature.[61] Grains that are malted before being milled reflect that in their name. The standard MGP recipe used to make Templeton Rye (and to make many other MGP-sourced Potemkin craft whiskeys) calls for 95% (unmalted) rye and 5% malted barley.[62] A whiskey made entirely from malted grains may reflect that in its name, such as "single malt Scotch." In the U.S., most grains used in whiskey-making are unmalted.[63] Smoking the grains, a hallmark of certain kinds of Scotch whisky, is uncommon in the U.S.[64]

As with beer-brewing, the next step in whiskey-making is to steep the milled grains in hot water,[65] releasing rich, complex flavors. For whiskey, the quality and mineral content of that water is significant[66] and one reason the limestone slab beneath central Kentucky makes that area a good home for whiskey.[67] The water is kept hot to convert the starches from the grains into sugars,[68] which is important for the next step.

The third step, and the last that parallels beer-brewing, is fermentation. To the now-cooled "mash," a whiskey maker adds yeast. The choice of yeast is important, as it can significantly affect the "vast range of different flavors" produced during fermentation.[69]

Reusing yeast from a previous batch of whiskey is called "sour mashing" (as opposed to "sweet mashing").[70] For reasons of quality-

60 *Id.* at 30.

61 *Id.* at 24.

62 Cowdery, *Still Lying*, *supra* note 15; Chuck Cowdery, *Secret Mash Bills Are Stupid*, THE CHUCK COWDERY BLOG (May 14, 2014), http://chuckcowdery.blogspot.com/2014/05/secret-mash-bills-are-stupid.html. Rye whiskeys must have a mash bill of 51% rye, malted or unmalted, and most top out at around 70%, with corn, rather than malted barley, filling out the remainder. Haskell & Spoelman, *supra* note 16; 27 C.F.R. § 5.22(b)(1).

63 When used in American whiskey, malted barley is usually only around 5%–14% of the total grains. Bernie Lubbers, *There's Only 3 General Bourbon Mash Bill's Y'all – THREE*, WHISKEY PROFESSOR (July 12, 2011), http://www.whiskeyprof.com/theres-only-3-general-bourbon-recipes-yall/. Malted rye is more unusual, and expensive. *E.g.,* Cowdery, *Different Taste*, *supra* note 19.

64 This step is most common in Scotland, where peat moss is used to dry and smoke malted grains. *E.g.,* BRYSON, TASTING WHISKEY, *supra* note 46, at 26–27; BROOM, *supra* note 51, at 46–48.

65 BRYSON, TASTING WHISKEY, *supra* note 46, at 25.

66 Calcium, for example, is good to have in the water, as it helps the yeast ferment, while iron is bad, as it can "ruin whiskey, making it turn black and foul." BRYSON, TASTING WHISKEY, *supra* note 46, at 30.

67 Central Kentucky's limestone strata provide iron-free, calcium-rich water, which is "so good for whiskey making" that certain distilleries near but not on that limestone slab are believed to have failed for that reason. *Id.*

68 BROOM, *supra* note 51, at 44.

69 BROOM, *supra* note 51, at 49; *see also* Chuck Cowdery, *You Call Yourself "Craft?" Make you Own Yeast*, THE CHUCK COWDERY BLOG (Feb. 6, 2011), https://chuckcowdery.blogspot.com/2011/02/you-call-yourself-craft-make-your-own.html ("Most of the old timers who are still around will tell you that handling yeast is one of a distiller's most important skills, the first thing you are taught, because if you can't master that you shouldn't bother with the rest.").

70 *See* VEACH, *supra* note 6, at 7.

control and batch-to-batch consistency, most American whiskeys are made using a sour-mash process.[71] However, some whiskey distillers—Jack Daniel's, most famously—make a marketing point out of their sour-mash process, implying (without outright asserting) that the sour-mash process is special (rather than ubiquitous) and that it affects the flavor in an artisanal way (rather than a means of industrial control and consistency).[72]

Whether via sour mash or sweet mash, the yeast then eats up sugars extracted from steeping the grains, while expelling carbon dioxide and alcohol.[73] Once the "alcohol by volume" (ABV) in the mixture settles between 8% and 18%, it's ready for distillation.[74]

B. The Steps that Make Whiskey Different

It is here, during the next two stages—distillation, then wood maturation—that whiskey-making departs from the process for making a beverage that is merely fermented, such as wine, cider, or beer, and where the challenges in the process become most stark. Distillation is the fulcrum in the fight over Potemkin craft distilleries' failure to make explicit that their products, while perhaps "hand-bottled" on site, are actually "distilled" somewhere else, such as at MGP in Indiana.

"Distill," derived from the Latin verb "destillare," meaning "to drip down,"[75] involves boiling a liquid, collecting the vapor coming off the boil, then letting that vapor cool and condense back into a liquid so it can "drip down" away from the original, boiling liquid.[76] The main piece of equipment used in distilling is called a "still," made of copper.[77] The shape of every component of a still can have a tremendous, and not entirely understood, effect on the whiskey's taste.[78] Whatever the equipment's contours, the basic process is the same: because alcohol boils at a temperature lower than water does, as the mash is heated, alcohol evap-

71 Sour-mashing makes the mash more acidic, which helps prevent bacterial infection, and makes it more likely that the particular yeast strain used in the last batch will populate the new batch. *See* VEACH, *supra* note 6, at 7; BRYSON, TASTING WHISKEY, *supra* note 46, at 31.

72 BRYSON, TASTING WHISKEY, *supra* note 46, at 31.

73 *Id.* at 23.

74 *Id.* at 31–32.

75 F. PAUL PACULT, KINDRED SPIRITS 2, 8 (2008).

76 *Id.*

77 The use of copper is important: without it, the whiskey may acquire a repulsive, "pungently sulfury, meaty, almost a cabbagey smell." BRYSON, TASTING WHISKEY, *supra* note 46, at 34.

78 *Id.* at 34.

orates first.[79] It is this alcohol, along with various subtle aromas and flavors, that condenses and drips down into a second container.[80]

It is not, however, simply a matter of letting the still boil away and then collecting all of the runoff. Instead, at least when using a "pot" still, a distiller must pay careful attention to the "cut,"[81] to capture only the middle part of the run, the "heart cut."[82] The tricky art of picking out a heart cut is where whiskey makers "earn their keep."[83] It's also a step that allows for few mistakes, and one that can't (legally, at least) be learned at home, like aspects of beer- and wine-making can be.

In beer-making, the stakes are low: a mistake in the process might spoil the batch, making it unpleasant to consume. In whiskey distillation, however, rookie mistakes can be fatal, both for those making the whiskey and for those drinking it. For drinkers, the risk isn't just a bad-tasting batch, but the presence of ethanol in early runs, threatening blindness or death. [84] The risk to distillers is that of an explosive fire from the high levels of evaporation alcohol involved in distillation, a risk that even in today's sophisticated, regulated distilleries run by experienced professionals, remains deadly.[85] Heaven Hill Distilleries, for instance, was honored with the Governor of Kentucky's "Safety and Health Award" in June of 2017.[86] Its achievement? Going without any accidents since October of 2015.[87]

Perhaps because of these risks, unlicensed distilling, or making "moonshine," is a felony.[88] Merely possessing unlicensed distilling equipment is a felony.[89] In sum, distilling can be illegal, and is dangerous and hard to do well.

Compounding these difficulties, the next step in whiskey making—wood maturation—is also hard and dangerous, and, like a license for a still,

79 PACULT, *supra* note 75, at 8.

80 BROOM, *supra* note 51, at 49–50.

81 BRYSON, TASTING WHISKEY, *supra* note 46, at 36. The process is slightly different for whiskey made using "Coffey" or "column" stills, as well as for "hybrid" pot–column stills. *Id.* at 37–39; VEACH, *supra* note 6, at 36.

82 PACULT, *supra* note 75, at 9; BRYSON, TASTING WHISKEY, *supra* note 46, at 36.

83 BRYSON, TASTING WHISKEY, *supra* note 46, at 36.

84 This was one of the tragedies of Prohibition, as unregulated, black-market whiskey produced by criminal syndicates caused consumers to go blind and even die, with no legal recourse against their suppliers. VEACH, *supra* note 6, at 88.

85 MINNICK, BOURBON, *supra* note 55, at 50–51, 206–07.

86 Sylvia Horlander, *Heaven Hill's Safety Record Recognized by Governor at HB 100 Signing Ceremony*, NELSON COUNTY GAZETTE, June 2, 2017, http://nelsoncountygazette.com/?p=32529.

87 *Id.*

88 26 U.S.C. § 5601(a)(8).

89 *Id.* at (a)(1). The TTB's website features an eight-point summary of the various criminal penalties that home distillers may face. *Home Distilling*, TTB ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, https://www.ttb.gov/spirits/home-distilling.shtml (last updated Oct. 2, 2015).

requires many of the things that most aspiring craft distillers are unlikely to possess or be able to acquire. Aging the distillate in oak barrels is the hallmark of whiskey around the world and, with one minor exception, a legal requirement for all American whiskey.[90] Skip this step, and the clear, colorless distillate isn't really whiskey, but rather just "a sort of vodka."[91]

The "age statement" on a whiskey label, "such as "8-year-old bourbon" or "12-year-old rye," reflects the number of years that the *youngest* whiskey in the blend spent in oak barrels.[92] In other words, the blend of whiskeys in the bottle will include components that are older than the number on the label.

What happens to the spirits in the barrel all this time? Several things. First, contact with the oak inside a barrel removes "harsh elements" that would make "even the most hardened drinker wince."[93] Second, wood contact adds color, flavor, and aromas to the spirit. Which particular flavors and aromas it adds depends on things such as the strength of the spirit, what species of oak is used to make the barrels, and what size and shape the barrels are.[94] If, as required for most kinds of American whiskey,[95] the inside of the barrels are first charred, the effects on the maturing spirit will be different and more pronounced.[96]

The interaction of liquid spirit and oak barrel takes time, as it depends upon the accumulated effect of the barrels' "breathing," like lungs, as the air temperature and pressure change across a day and year.[97] How barrels breathe, and what kind of air they breathe in, depends not only on where they sit—exposed to the elements, sheltered from them, near the sea, inland, and so on—but where within a particular warehouse they are stored. Upper floors impart more spice and dryness to the whiskey, while lower floors make for more-subtle, mellow flavors. A barrel's location within a warehouse even affects whether the spirit inside it becomes more alcoholic or less.[98] For "every master distiller has a favorite floor."[99]

90 27 C.F.R. § 5.22(b).

91 BROOM, *supra* note 51, at 53.

92 27 C.F.R. § 5.40(a) (Westlaw through Jan. 11, 2018; 83 FR 1310); BRYSON, TASTING WHISKEY, *supra* note 46, at 51.

93 BROOM, *supra* note 51, at 53.

94 *Id.*; BRYSON, TASTING WHISKEY, *supra* note 46, at 48; Fred Minnick, *The Secret Science of Proof and Barrels*, WHISKY ADVOC. (Nov. 2, 2017), http://whiskyadvocate.com/secret-science-proof-and-barrels/.

95 Charred oak is not required for plain, unspecified "whiskey," or for corn whiskey, but is required for bourbon, rye, wheat, malt, and rye malt whiskey. 27 C.F.R. § 5.22(b).

96 BRYSON, TASTING WHISKEY, *supra* note 46, at 42–43 (summarizing the various effects of charring on whiskey).

97 *Id.* at 44, 150–53.

98 Alcohol by volume (ABV) increases in barrels stored on the upper floors because the heat there causes water evaporation to outpace alcohol vaporization; for barrels stored on the lower floors, the ABV decreases because alcohol vaporization caused by updrafts outpaces water evaporation. VEACH, *supra* note 6, at 68.

99 BRYSON, TASTING WHISKEY, *supra* note 46, at 49.

The "dance" between spirit and wood can't be rushed.[100] This makes it extremely challenging to learn through feedback: "Bad decisions can take years to come to light in [the whiskey] industry."[101] As one veteran whiskey maker put it, "[Y]ou only get about two chances to learn from a 15-year-old bourbon. There's your first one, and you learn from it all along the time, and you put all that into your second one. By the time the second one's done . . . you're usually about done, too."[102]

Conversely, when things go right, it can be almost impossible to meet increased demand. An "old industry joke" involves a whiskey company's marketing department calling up their production department to gush over the success of a 16-year-old whiskey they've sold out of, and to ask when they'd have more. The production department's response? "How about in 16 years?"[103]

Warehousing in large, multistory-warehouse operations and having so much flammable whiskey, floor upon floor, in one place creates a second fire hazard post-distillation, adding to the danger and cost of making whiskey.[104] In a major fire at Heaven Hill in 1996, for instance, in just four hours 90,000 barrels of Bourbon stored in seven warehouses went up in flames.[105] A few years later, a similar fire at Wild Turkey Distillery "luckily" destroyed only a single warehouse.[106]

Once a barrel is finished maturing, unless the whiskey in it is destined for a "single barrel" bottling, the next step is "marrying" different barrels, often, at large distilleries, among thousands of barrels, to complement and balance out individual barrels' diverse quirks into a coherent whole.[107]

C. The Steps that Tempt Potemkins

Barring the optional step of secondary barrel aging, the whiskey is now ready for the final stage in its creation: dilution and bottling. Both steps create legally permissible opportunities for Potemkins to state true facts about their products that nevertheless create false impressions about

100 BROOM, *supra* note 51, at 53.

101 BRYSON, TASTING WHISKEY, *supra* note 46, at 50.

102 *Id.* at 153 (quoting Ronnie Eddins of Buffalo Trace Distillery).

103 *Id.* at 53.

104 MINNICK, BOURBON, *supra* note 55, at 50–51, 206–07.

105 *See, e.g.*, Steve Coomes, *Tragic Fire at Heaven Hill in '96 Didn't Stop Nascent Bourbon Boom*, THE WHISKEY WASH (Nov. 11, 2016), https://thewhiskeywash.com/whiskey-styles/bourbon/tragic-fire-heaven-hill-96-didnt-stop-nascent-bourbon-boom/; Distillery Trail, *Vintage Aerial Coverage of 1996 Heaven Hill Distillery Fire* (Nov. 6, 2016), http://www.distillerytrail.com/blog/live-aerial-coverage-1996-heaven-hill-distillery-fire/.

106 Interview with Eddie Russell, Wild Turkey, (Aug. 19, 2014), https://www.youtube.com/watch?v=3ieShvfhDb4; *Bourbon and Smoke*, CBS News (May 9, 2000, 6:56 PM), https://www.cbsnews.com/news/bourbon-and-smoke/.

107 BRYSON, TASTING WHISKEY, *supra* note 46, at 153.

where those products came from, what they are made from, and how they were made.

The first of these steps, with one minor exception, [108] is to dilute mature, barrel-aged distillate with water. Federal law allows bourbon and rye whiskey to be diluted from an initial barrel intensity of not more than 125 proof (62.5% ABV) down to not less than 80 proof (40% ABV).[109] Adding water to whiskey to lower its proof helps reduce the unpleasant "nose burn" that high-alcohol spirits can cause, while also revealing and magnifying aromas and flavors that had been trapped in the whiskey.[110] Dilution thus "energizes whiskey," akin to the effect of a rainstorm, which can make the "hidden aromas of a dry landscape come alive."[111]

But diluting whiskey before bottling also creates an opportunity for Potemkin craft distillers to make misleading claims about their product. To save shipping costs, a stock whiskey made by a company such as MGP might be delivered to a Potemkin locale at barrel proof, where it would then be diluted for bottling using "local" (sometimes just filtered tap) water.[112] Given the importance of place to the craft ethos, and the central role that water plays in whiskey, a word with roots in the idea "water of life" or "lively water,"[113] touting the origin of the water in (added to) the whiskey is almost impossible to resist. Take Tin Cup Whiskey, an MGP Potemkin bottled in Denver, Colorado, which advertises itself as having "Bottle[d] the Mountain" by having been "cut with Rocky Mountain water."[114] As Cowdery notes, "Tin Cup is not 'made' in Colorado in any meaningful sense. It is 'made' in Indiana, and merely diluted and bottled in Colorado."[115]

108 The exception is for "cask-strength" whiskeys, which are intentionally bottled without distillation at the same proof as the barrel. *Id.* at 62. These cask-strength bottlings are often touted as superior to standard-strength bottlings. While they are sold at a higher price, they are not necessarily higher in quality.

109 27 C.F.R. § 5.22(b)(1). An aside about the term "proof": Although the modern definition is twice the ABV, the term has a less mathematical, more colorful origin: it comes from the days before ABV could be easily measured, when instead distillers would "prove" that their whiskey was the appropriate strength—not too weak, not too strong—using gunpowder. Specifically, they would "prove" the alcohol level in their whiskey by mixing a bit of whiskey with gunpowder and then setting it on fire. If this mixture "sputtered and smoked, it was determined to be 'under proof.' If it burned too quickly with a high flame, it was 'over proof.' If it burned with a steady flame, then it was '100 percent proved.'" VEACH, *supra* note 6, at 37.

110 BROOM, *supra* note 51, at 61; BRYSON, TASTING WHISKEY, *supra* note 46, at 62-63; Hannah Devlin, *Scientists Reveal Why Whisky Tastes Better with Water*, THE GUARDIAN (Aug. 17, 2017, 9:33 AM EDT), https://www.theguardian.com/science/2017/aug/17/whisky-and-water-galore-scientists-conclude-dilution-enhances-flavour.

111 BROOM, *supra* note 51, at 61.

112 Chuck Cowdery, *After Templeton, Who's Next? How About Tin Cup?*, THE CHUCK COWDERY BLOG (Sept. 2, 2014) http://chuckcowdery.blogspot.com/2014/09/after-templeton-whos-next-how-about-tinotehtml [hereinafter, Cowdery, *After Templeton*].

113 *E.g.*, BRYSON, TASTING WISKEY, *supra* note 46, at 96–97 (summarizing the etymology of the word "whiskey").

114 *Whiskey: This is How We Bottle the Mountain*, TIN CUP, http://www.tincupwhiskey.com/whiskey/.

115 Cowdery, *After Templeton*, *supra* note 112.

Potemkin craft distillers can take yet another tempting step before bottling, although they aren't eager to tell anyone, let alone their customers, about it:[116] current federal regulations permit whiskeys other than those classified as "straight" to add "coloring, flavoring, or blending materials."[117] Templeton does this today, using that addition of a "little bit of flavoring" as the "sole basis" for their claim that their product is not stock MGP whiskey.[118] However, as Cowdery dryly notes, "to many consumers the revelation that the product is artificially flavored may be worse."[119]

After whiskey is diluted from barrel proof to bottle proof, it is put into individual bottles. This process can be highly automated, although some whiskey companies have workers—or volunteers, as part of a carefully choreographed craft-whiskey "experience"—cork the automatically filled bottles before the mechanized assembly line resumes. This human step allows such companies to imbue their not-at-all-handmade, industrially manufactured products with the evocative phrase "hand-bottled."

After the bottles are filled they are affixed with labels. The label alone, as the Templeton Rye label illustrates, is one more opportunity for Potemkin distilleries to evoke the almost magical power of rhetoric and narrativity in American craft whiskey.

III. Roots in American Whiskey History

The initial success of Templeton Rye relied on how it fooled consumers, and perhaps even its creators, into thinking it was an authentic craft product. It did so by building a visual brand and narrative that reinforced the idea of the whiskey's coming from a particular stock place and time—the Prohibition-era Midwest—associated with particular stock characters—Chicagoland gangsters and small-town bootleggers.[120] As effective as Templeton's choices were, they are not the only stock settings and characters from America's mythic past that Potemkins have drawn from. Nor was National Prohibition the only American legal reform that inflected that history and mythos.

116 Steve Ury, *The Flavoring Game*, SKU'S RECENT EATS (Oct. 12, 2015) http://recenteats.blogspot.com/2015/10/the-flavoring-game.html. Ury describes the reaction he received from distilleries when asking them about this practice as akin to "poking into a matter of national security." *Id.*

117 27 C.F.R. § 5.22(b)(1)(iii), (b)(5)(i); 27 C.F.R. § 5.23(a); Cowdery, *Flavoring Is Legal*, *supra* note 25.

118 Cowdery, *Still Lying*, *supra* note 15.

119 *Id.*

120 These themes are so resonant that they work even outside the U.S. *See, e.g.,* Alia Akkam, *'Speakeasy' Bars are Killing It in Countries that Never had Prohibition*, VINEPAIR (Oct. 23, 2017), https://vinepair.com/articles/speakeasy-bars-countries-never-prohibition/.

Potemkins have drawn from a range of stock settings and characters in American whiskey history, involving four key themes:

- *Whiskey as pastoral*: whiskey as a farm product, unregulated, made by individual farmer-distillers from seasonal regional grains.
- *Whiskey as industrial*: whiskey as a commodity, taxed and regulated, manufactured corporately and branded nationally.
- *Whiskey as reliable*: whiskey as a beverage with integrity, made honestly above a solid regulatory floor, whose claims to origin, method, quality, and purity could be trusted.
- *Whiskey as maverick*: whiskey as bad-boy accoutrement, outside the law.

Each theme has roots in different points in American history—the pastoral in the eighteenth century, the industrial and reliable in the nineteenth, and the maverick in the twentieth—but are not exclusive to those periods. Each theme has reemerged from time to time, and now converge in today's Potemkin moment.

A. The Romance of the Rebel Farmers

America's first waves of European immigrants didn't make whiskey. Instead, they made gin or rum, using stills they had brought with them from the old world.[121] After America's war of independence, those who moved westward realized that their increased distance from seaside trading in cane sugar, molasses, and spices made it cost-prohibitive to continue making gin or rum.[122] So those in the interior made whiskey, instead, using "whatever grain they had on hand—usually corn or rye but also occasionally wheat."[123] For them, whiskey was "just another farm-made product, like cheese, butter, cider, or bacon."[124] Because it preserved well, whiskey could be stored and then traded for necessities throughout the year.[125]

Whiskey making in the new territories was also a community affair. Farmers who didn't own stills would borrow time on a neighbor's, paying for privilege by giving them a portion of the finished product. And millers, who received as payment for their services a portion of the grain they had ground, distilled that surplus grain into whiskey. For these millers, whiskey not only kept better than surplus grain did, it also was easier to transport.[126]

121 VEACH, *supra* note 6, at 3.

122 *Id.*

123 *Id.* at 6.

124 BRYSON, TASTING WHISKEY, *supra* note 46, at 87.

125 *Id.*

126 *Id.*; VEACH, *supra* note 6, at 6.

Back East, however, the federal government needed money to pay war debts and fund the new bureaucracy. Treasury Secretary Alexander Hamilton found a solution: to tax whiskey.[127] Inland farmer-distillers, who viewed the tax—correctly—as favoring both coastal distillers and large, urban distilleries, were furious.[128] Opposition to the tax led to the Whiskey Rebellion, which started in western Pennsylvania, spread throughout Appalachia, and eventually forced George Washington's government to back down.[129] As a consequence, America's farm distilleries would remain "small-time business operations for many decades to come."[130]

The Whiskey Rebellion is also the source of a popular founding myth among Kentucky distilling families—that the turmoil from that rebellion caused their ancestors to flee to Kentucky, bringing their distilling know-how with them.[131] History suggests, however, that the fighting "likely had a nominal impact on the state's distilling industry."[132]

Because those early farmer-distillers made whiskey from whatever local grains were available, their whiskeys took on regional characteristics. Rye whiskey "grew up in the ridges and valleys of Pennsylvania's Appalachian and Allegheny Mountains"[133] and spread across the thirteen colonies, becoming "*the* American whiskey" for many years. Rye helped to power the Pennsylvania and Maryland legislatures, whose long debates would cause beer to go warm and flat.[134] George Washington himself built a rye distillery at Mount Vernon, and, after retiring from the presidency, he became "for a short time the nation's largest distiller of rye whiskey."[135]

South of rye country, corn (maize) was plentiful.[136] So in places like Kentucky and Tennessee, the predominant whiskey was the corn-based whiskey called bourbon.[137]

127 MINNICK, BOURBON, *supra* note 55, at 15; Steve Simon, *Alexander Hamilton and the Whiskey Tax*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Sept. 4, 2012), https://www.ttb.gov/public_info/special_feature.shtml. The text of the legislation enacting the whiskey tax can be found in the Public Statues at Large for the First Congress, Sess. III, Ch. 15., Mar. 3, 1791, pages 199–214, available at https://www.loc.gov/law/help/statutes-at-large/1st-congress.php.

128 VEACH, *supra* note 6, at 12.

129 *Id*. at 13; MINNICK, BOURBON, *supra* note 55, at 15.

130 VEACH, *supra* note 6, at 15.

131 MINNICK, BOURBON, *supra* note 55, at 15.

132 *Id*.

133 BRYSON, TASTING WHISKEY, *supra* note 46, at 91–92.

134 *Id.* at 157.

135 *Id.* at 16.

136 Corn also grows further north, such as in Massachusetts, which honors that heritage in its laws. *See* Mass. Gen. Laws ch. 2, § 28 (Westlaw through Chapter 175 of the 2017 1st Annual Session) ("The corn muffin shall be the official muffin of the commonwealth.").

137 As noted earlier, as a legal matter "Tennessee Whiskey" is technically bourbon. *See infra*, Section 2, and note 54.

As distinct whiskey styles evolved, consumers' appreciation for quality rose. By the 1840s, newspaper advertisements would note bourbons' vintages and how long they had spent maturing in wood.[138] By the 1860s, ads emphasized brand identities.[139] The best whiskey brands were expensive: records from 1857 suggest that a barrel of 12-year-old Old Crow whiskey sold, in today's dollars, for over $15,000 a gallon (or $3,000 per 750ml bottle).[140] Whiskey was growing up, and moving past its pastoral roots to a more realistic understanding of its role as a manufactured, regulated, and branded commodity.

B. Commodification in the Nineteenth Century

The Industrial Revolution transformed American whiskey. The farmer-distiller ideal, preserved at the beginning of the century by the 1802 repeal of the whiskey tax,[141] would, by century's end, make way for a "fully fledged factory system."[142] This was a result not only of general technological innovations such as steam engines and railroads, but also of innovations in distilling and wood aging.[143] These innovations made whiskey-making "a big business and an expensive one at that—far beyond the reach of the typical farmer distiller, for whom distilling was only a side business."[144]

Alongside increasing mechanical sophistication came increasing marketing savvy. In 1870, for example, Old Crow's E.H. Taylor Jr. set up a taste-off in Washington, D.C., between his 21-year-old Kentucky bourbon and a 21-year-old Pennsylvania rye.[145] His bourbon, lauded as "the most mellow, rich, full yet delicately flavored and surpassing in bouquet," won.[146] This contest, and other clever stratagems, made Old Crow a national brand with a reputation for quality, thus "creating a demand for it among consumers who until that point preferred familiar, locally produced whiskey."[147]

138 MINNICK, BOURBON, *supra* note 55, at 38.

139 *Id*. at 44.

140 *Id.* at 38. Old Crow has changed hands, and the brand today is no longer a premium one. *Id.* at 43. E.H. Taylor Jr., however, is honored by a premium Bourbon brand from Buffalo Trace Distillery. *See* BUFFALO TRACE DISTILLERY, *E.H. Taylor, Jr. Collection,* https://www.buffalotracedistillery.com/brands/eh-taylor.

141 Public Statutes at Large for the Seventh Congress, Sess. II Ch. 19., Apr. 6, 1802, pp. 148–50, https://www.loc.gov/law/help/statutes-at-large/7th-congress/c7.pdf. By repealing the whiskey tax and then signing the Louisiana Purchase, which opened up new markets and trade routes for whiskey commerce, Thomas Jefferson may rightly be considered "the greatest whiskey president of all time." MINNICK, BOURBON, *supra* note 55, at 32–33.

142 VEACH, *supra* note 6, at 31–33.

143 *Id*. at 31–44.

144 *Id*. at 44.

145 *Id*. at 53–54.

146 *Id*. at 54.

147 *Id*.

The evolution of American whiskey into branded products with national, and even international, reputations meant that the companies making those well-known whiskeys now had to fight to protect the integrity of their brand identities. The main threat to whiskey's reliability were the proto-Potemkin "rectifiers."

Rectifiers were wholesale merchants who would (1) purchase cheap alcohol such as unaged neutral spirits, (2) "rectify" that alcohol with colors and flavors to suggest the look, smell, and taste of aged whiskey, and then (3) sell their Potemkin product as whiskey.[148] Rectifiers could thus "pass[] off as ten-year-old whiskey" a product they had manufactured "in a single day."[149]

Not only was rectified whiskey fast, cheap, and easy to manufacture, but it also threatened public health, or at least threatened public notions of purity.[150] The main concerns involved the industrial additives used to color and flavor rectified whiskey, which included coal tar (creosote) and crushed bugs (cochineal).[151] Some of these additives were known to be harmful; others were newly developed products of the industrial age whose long-term effects were unknown.[152]

Purity concerns over rectified whiskey dovetailed with similar concerns about the purity of products in other industries such as meat-packing, a concern made vivid through Upton Sinclair's book *The Jungle*.[153]Along with "meat . . . , milk, and medicine, whiskey was something the public wanted to be wholesome."[154]

The fight to preserve whiskey's identity and purity took place in the courts,[155] in the executive branch,[156] and in Congress, and made for strange bedfellows: the Women's Christian Temperance Union supported

148 *Id.* at 45–47.

149 *Id*. at 67.

150 *Id.* at 45, 74.

151 *Id.* at 46.

152 *Id.* at 74.

153 BRYSON, TASTING WHISKEY, *supra* note 46, at 94–95.

154 *Id*. at 95.

155 One of the more colorful cases was one brought by the government of Japan to prevent rectified whiskey (explained in the next section) imported into their country from being advertised as straight whiskey. The judge in that case was Alphonso Taft, father of President and Chief Justice William Howard Taft. VEACH, *supra* note 6, at 73.

156 President William Taft held hearings, then ruled on a labeling controversy in 1909. MINNICK, BOURBON, *supra* note 55, at 71–72; *see also, e.g., Taft Decides Whiskey Must be Classified,* L.A. HERALD, (Dec. 27, 1909), available at http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=LAH19091227.2.5. President Taft's decision, which allowed the words "rye" or "bourbon" to accompany the words "straight whiskey," recently secured his place in the Kentucky Bourbon Hall of Fame. *Kentucky Bourbon Hall of Fame: 2009 Recipients*, KY. DISTILLERS ASS'N, http://kybourbon.com/heritage/kentucky_bourbon_hall_of_fame/; *President Taft Inducted to the Kentucky Bourbon Hall of Fame*, THE FILSON HISTORICAL SOCIETY (Dec. 22, 2009), http://filsonhistorical.org/president-taft-inducted-to-the-kentucky-bourbon-hall-of-fame/ (noting that Taft was inducted into the hall of fame "to pay homage to the centennial of his famous 'Taft Decision on Whiskey'").

distillers in their legislative fights against rectifiers, arguing that "whiskey was at least an all-natural product, and, thus, the lesser and safer of two evils."[157] For our purposes, the most significant legislative enactment was the "Bottled in Bond" Act of 1897.[158] The Act created a regulatory scheme, still in effect today, that permits the phrase "bottled in bond" to appear on labels and advertising of whiskey that is

- made by the same distillery at the same distillery in a single season,
- aged for at least four years,
- at least 100 proof, and
- contains no additives (other than water needed to reduce barrel proof to bottling proof).[159]

The Act also imposed invasive oversight requirements on distillers seeking that classification, such as the requirement that the whiskey be aged in government "bonded" warehouses, and criminal penalties for those who used the term without authorization.[160] This "landmark consumer protection legislation offered guarantees people did not have before: namely, a means to identify when and where the whiskey was produced."[161]

Given today's whiskey consumers' similar interest in seeking explicit assurances of purity and origin, the "Bottled in Bond" category has undergone a renaissance.[162] Buffalo Trace's "E.H. Taylor, Jr. Collection," for instance, is Bottled in Bond.[163] But the phrase is helpful only to those who already know what it means. For everyone else, it may just be alluring rhetoric—an unfamiliar, old-fashioned-sounding whiskey word, like "sour mash," that suggests more than it means.

157 VEACH, *supra* note 6, at 75.

158 Officially, "An Act to allow the bottling of distilled spirits in bond," Public Statutes at Large for the Fifty-Fourth Congress, Sess. II Ch. 379, Mar. 3, 1897, pp. 626–28, https://www.loc.gov/law/help/statutes-at-large/54th-congress/session-2/c54s2ch379.pdf.

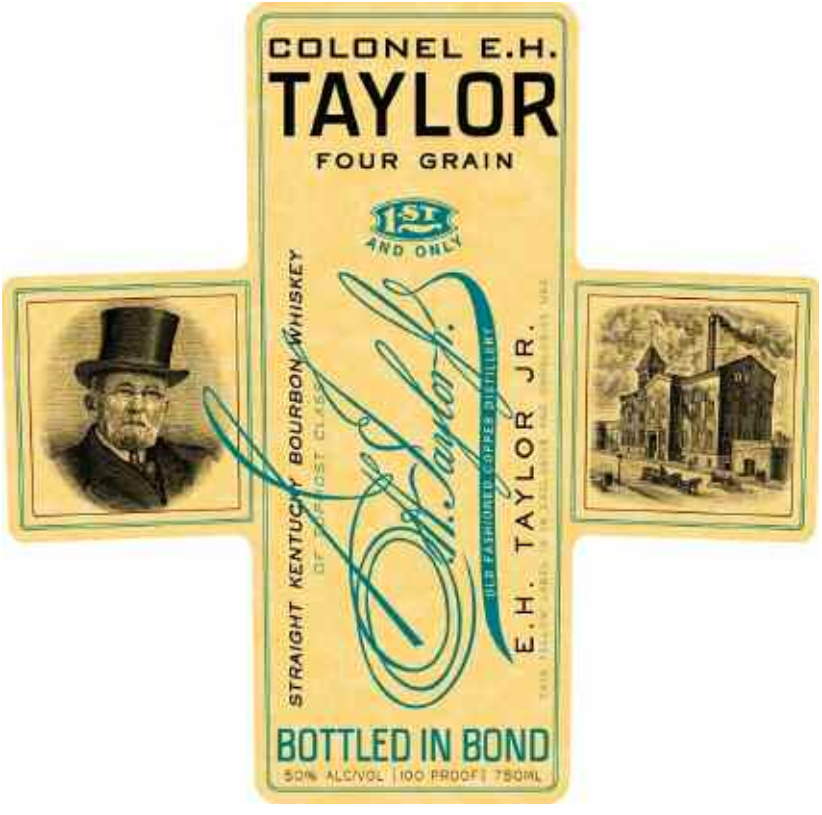
159 27 C.F.R. §§ 5.42(b)(3), 5.65(a)(7) (Westlaw through Jan. 11, 2018; 83 FR 1310).

160 Public Statutes at Large for the Fifty-Fourth Congress, secs. 1 & 7, Sess. II Ch. 379, Mar. 3, 1897, pp. 626–28, https://www.loc.gov/law/help/statutes-at-large/54th-congress/session-2/c54s2ch379.pdf.

161 MINNICK, BOURBON, *supra* note 55, at 59; *see also* Wallace Bennett, *Forty Years of Bottled in Bond*, AM. WINE LIQUOR J. 45 (Mar. 1937) (recognizing, on the Act's 40th anniversary in 1937, how it had "insured 'character' for straight unblended whiskeys" and expressing the hope that this would "prevail through the years to come.").

162 *E.g.*, Fred Minnick, *Why You Should Try Bottled-in-Bond Whiskey*, WHISKY ADVOC. (June 1, 2106), http://whiskyadvocate.com/why-you-should-try-bottled-in-bond-whiskey/; Jonah Flicker, *Everything You Need to Know about Bottled in Bond Bourbon*, PASTE (Sept. 24, 2015 12:29 PM), https://www.pastemagazine.com/articles/2015/09/everything-you-need-to-know-about-bottled-in-bond.html.

163 *See Colonel E.H. Taylor Small Batch Bottled in Bond Bourbon*, DISTILLER, https://distiller.com/spirits/colonel-e-h-taylor-small-batch.



Front label of one of Buffalo Trace's revival E.H. Taylor Bottled in Bond whiskeys[164]

The Bottled in Bond Act and other legislative reforms were largely successful, and the whiskey industry grew, becoming "the most regulated industry in the United States."[165] Whiskey was now an industrial commodity, whose corporate manufacturers had the lobbying clout to protect its integrity legally, and which the federal government taxed without fear of inciting rebellion. And tax it they did: until the introduction of a federal income tax in 1913, whiskey taxes were the largest source of federal tax revenue.[166]

Whiskey's power and prestige, however, would soon change.

164 *See COLA Registry*, TTB ID 16117001000016, https://www.ttbonline.gov/colasonline/publicViewImage.do?id=06286000000097; *see* also *E.H. Taylor, Jr. Collection*, *supra* note 140.

165 VEACH, *supra* note 6, at 63.

166 38 Stat. 114 (1913), available at http://legisworks.org/sal/38/stats/STATUTE-38-Pg114.pdf at 136-37 (legislation taxing whiskey); VEACH, *supra* note 6, at 63 (noting whiskey's role as a revenue source).

C. The Turbulent Twentieth Century

Ever since Colonial days, while many Americans had been enjoying alcohol consumption, others had been fighting it.[167] This second group gained the upper hand in the beginning of the twentieth century, leading to the Eighteenth Amendment in 1919 and implementing legislation the next year.[168] Prohibition had begun.

America was, however, still thirsty, and Prohibition spawned a huge black market in booze. This black market attracted not only small-time bootleggers, such as those in the town of Templeton, but also large criminal syndicates, like that led by Al Capone, celebrated on Templeton Rye's back label.

Most criminal gangs made terrible whiskey. It not only tasted awful but was so poorly made that just drinking it could kill.[169] These gangs were also violent, although that violence tended to be restricted to rival gang members,[170] rather than bystanders, and thus did not deter the public from purchasing alcohol illegally.[171] Instead, the public viewed the criminal distributors as "modern-day Robin Hoods."[172]

But once the Great Depression hit, the lost federal tax revenue and increased crime that accompanied Prohibition became unsustainable.[173] Thus, with the passage of the Twenty-First Amendment in 1933, Prohibition ended.[174]

Although the American whiskey industry celebrated its end, Prohibition's thirteen long years had cast a long shadow. Most distilleries "were in ruins," and many of those who used to run those distilleries had either died, or, if still alive, "were too old to have any interest in starting up" again.[175] Consumers' tastes had changed, too, in favor of two main competitors to American whiskey: (1) non–wood-aged spirits such as gin and rum, which had the added advantage of not needing to be aged and thus could ramp up manufacturing quickly, and (2) imported whiskey, whose manufacturers had been unaffected by the Prohibition experiment.[176]

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167 MINNICK, BOURBON, *supra* note 55, at 92 (citing examples from the 1600s).

168 U.S. CONST. amend. XVIII (*repealed* by 41 Stat. 305 (1919)). The variety of factors that contributed to that moment are outlined in VEACH, *supra* note 6, at 77–90.

169 VEACH, *supra* note 6, at 88.

170 MINNICK, BOURBON, *supra* note 55, at 109.

171 VEACH, *supra* note 6, at 88.

172 *Id.*

173 MINNICK, BOURBON, *supra* note 55, at 116.

174 *Id.*; *see also* U.S. CONST. amend. XXI.

175 VEACH, *supra* note 6, at 91.

176 *Id.*

These pressures caused many American distilleries to embrace whiskey-as-commodity principles antithetical to today's artisanal, craft ethos: overt industrial optimization and capital growth. Whiskey companies boasted of their "powerful workforce and size of operation," or of the "big names associated with their brands," and often became publicly traded.[177] This approach succeeded: just four years after Prohibition ended, "more than 530 Kentucky bourbon brands . . . [competed] for shelf space in packaged liquor stores and in taverns."[178]

Just as American whiskey regained its footing, though, the United States entered World War II. The U.S. military needed high-proof, industrial alcohol, and a lot of it.[179] America's distilleries were conscripted to its manufacture,[180] but the costs of refashioning their facilities forced some distilleries out of business.[181]

After the war, though, American whiskey revived, extending its reach as both a product and an idea internationally: aided by the cold-war expansion of American military bases, whiskey brands such as Jim Beam "followed the U.S. military to its bases in South Korea, Japan, Germany, and Italy," where "American soldiers become its unpaid salesmen."[182] Stateside, the popularity of American whiskey, especially Jack Daniel's, among "Rat Pack" entertainers such as Frank Sinatra and Dean Martin, gave a new twist to whiskey's identity: the edginess of bad-boy cache.[183] This new identity developed further when whiskey later came to be associated with other mavericks, such as "the hard rock crowd and motorcycle clubs."[184]

At the same time that American whiskey was projecting these narratives outward into international markets and popular culture, it was also looking inward and reflecting on its history. The Bourbon Institute, founded in 1958, sought to "solidify bourbon's heritage."[185] One way it did so was to popularize the legend that bourbon was created on the same day

177 MINNICK, BOURBON, *supra* note 55, at 121.

178 *Id.* at 122.

179 About 1.7 billion gallons. VEACH, *supra* note 6, at 101. Some of the wartime uses for industrial alcohol included making smokeless gunpowder, synthetic rubber, lacquer, octane booster, and antifreeze. *Id.*

180 MINNICK, BOURBON, *supra* note 55, at 138; *accord* VEACH, *supra* note 6, at 101.

181 VEACH, *supra* note 6, at 103; MINNICK, BOURBON, *supra* note 55, at 139–40.

182 VEACH, *supra* note 6, at 106-07.

183 *Id.* at 107, 111.

184 *Id.* at 111. This bad-boy cache was gendered in whiskey's marketing, effectively marginalizing women's role as some of the country's first distillers and half the whiskey-production workforce at the time. MINNICK, BOURBON, *supra* note 55, at 163–64 (noting women's role in early whiskey production). Today, women are the fastest-growing market segment of whiskey consumers. *Id.* at 164. Readers interested in an entertaining deep-dive into the role of women in whiskey, both in America and abroad, should seek out another book by Fred Minnick: WHISKEY WOMEN (2013).

185 MINNICK, BOURBON, *supra* note 55, at 166

that George Washington was inaugurated, celebrating that day (April 30) as "the birthday of bourbon whiskey."[186] Lobbying efforts culminated in 1964, when Congress christened bourbon "a distinctive product of the United States," putting it on par with Scotch whiskey, Canadian whiskey, and French cognac.[187]

After this high mark, the tide once again changed. Whiskey's goodwill with postwar America didn't pass to their Baby Boomer children, who "rejected everything their parents stood for, including their alcoholic beverage choices."[188] Vodka was ascendant; whiskey wasn't cool, and distilleries were once again closing.

One whiskey weathered these storms in ways that inform today's craft-whiskey movement: Maker's Mark bourbon. Rather than emphasize its whiskey's popularity, ubiquity, and value, the maverick Maker's Mark focused on its operation's small-scale, its product's limited availability, and its high cost (three times that of other whiskeys).[189] Its branding reflected this proto-craft ethos and a contrasting narrative.

> Why can't I find Maker's Mark when I travel? I always see Jack Daniel's. The only way to truly solve the problem would be to go into mass production and we're not about to do that. Handcrafting is what makes Maker's Mark special. If we made much more than we do, well, it wouldn't be your Maker's Mark. Most of our production is taken up by our customers right here at home. There's precious little left for elsewhere. So if, in your travels you have to search for a bottle of Maker's Mark—after seeing row after row of Jack Daniel's—we apologize . . . .[190]

When a glowing story about Maker's Mark appeared on the front page of the *Wall Street Journal*, sending demand through the roof, Maker's responded by publishing two different ads: one in the *Wall Street Journal*, thanking it for the attention but explaining that it couldn't meet this new demand, and another in regional newspapers in Kentucky and Tennessee, assuring "longtime customers that it would not forget their loyalty."[191] Maker's counterintuitive approach worked: it thrived throughout the Vodka Age and in 1980 became a National Historic Landmark.[192]

186 *Id.* at 169.

187 VEACH, *supra* note 6, at 110; MINNICK, BOURBON, *supra* note 55, at 170–71.

188 VEACH, *supra* note 6, at 110.

189 *Id.* at 111.

190 MINNICK, BOURBON, *supra* note 55, at 190.

191 *Id.* at 189–90.

192 National Historic Landmarks Survey, 74000893, *Burks' Distillery (Maker's Mark Distillery)*, Jan. 16, 1980.

But Maker's focus on quality and customer loyalty also restricted their ability to adapt. When Maker's recently lowered their bottle proof from 90 down to 84—in effect, diluting each 750ml bottle with more than 50ml of water[193]—customers noticed and were outraged. The company quickly switched back to 90 proof.[194]

As for the rest of the whiskey industry, it went from uncool to nothing at all, other than a prop in an old-timey movie, drunk fast, as a shot, without concern for quality. It was bad-boy cachet reduced to flavorless trope.

Ironically, signs of hope for American whiskey came from Scotch whisky, whose distillers took the hint from wine tastings popular in the '70s and began promoting single-malt tastings.[195] American whiskey followed suit. The early 1990s saw the emergence of premium collections of contrasting "small-batch" whiskeys,[196] each with a "very different flavor profile."[197] Whiskey shifted its focus (back to) rare, expensive, extra-aged whiskeys.[198] Like rare wines, these whiskeys were sold for outlandish prices on the secondary market.[199]

D. Whiskey Tourism and Commentary

Whiskey's returned focus on quality and prestige at the end of the twentieth century inspired a unique passion among its fans that other distilled beverages, such as vodka, could never command.[200] Unlike vodka and other distillates, but much like wine, American whiskey inspired a cottage industry—not only of tasting notes and reviews, but books, magazines, and movies.[201] Much of this whiskey commentary focused on authenticity, origin, and community. A natural outgrowth of such

193 750ml x (90/84) - 1 = 53.57ml.

194 MINNICK, BOURBON, *supra* note 55, at 223.

195 VEACH, *supra* note 6, at 113.

196 *Id.* at 116; MINNICK, BOURBON, *supra* note 55, at 193, 201.

197 The most famous of these, Jim Beam's small-batch collection, featured (1) Booker's, a fierce, barrel-proof, unfiltered bourbon; (2) Basil Hayden, an 80-proof bourbon with a light flavor meant to woo Canadian whisky fans; (3) the "heavy-bodied" Baker's; and (4) the extra-aged, 9-year-old Knob Creek. VEACH, *supra* note 6, at 116–18.

198 *Id.* at 118. Older whiskey had not always been viewed as superior: in the 1920s, young whiskey was preferred, so much so that older whiskey was often unwanted and sold for medicinal purposes. MINNICK, BOURBON, *supra* note 55, at 101.

199 A bottle of *Pappy Van Winkle's Family Reserve* 23-year-old wheated bourbon, for instance, has a manufacturer's suggested retail price of almost $300 but actually sells at an average price approaching $3,000. *Pappy Van Winkle's Family Reserve 23 Yr, 95.6 Proof*, OLD RIP VAN WINKLE DISTILLERY, http://www.oldripvanwinkle.com/whiskey/family-reserve-23-year/ (MSRP price), *Old Rip Van Winkle 'Pappy Van Winkle's Family Reserve' 23 Year Old Kentucky Straight Bourbon Whiskey, USA*, WINE-SEARCHER MARKET DATA, https://www.wine-searcher.com/find/old+rip+van+winkel+pappy+fmly+rsrv+23+straight+bourbon+whisky+kentucky+usa/1/-/-/u, (average market price).

200 BRYSON, TASTING WHISKEY, *supra* note 46, at 13.

201 MINNICK, BOURBON, *supra* note 55, at 200. The field of whiskey commentary has continued to blossom, with the present day being compared to a "golden age" in the genre. *See* Robert Simonson, *A Golden Age for American Whiskey Writers*, N.Y. TIMES, Dec. 30, 2016, https://www.nytimes.com/2016/12/30/dining/bourbon-writers-american-whiskey-rye.html.

discussions, and one really co-constitutive with them, was whiskey tourism.

The first major coordinated tourist effort was the Kentucky Distillers' Association's (KDA's) "Kentucky Bourbon Trail."[202] Tourists to whiskey country could travel from (KDA member) distillery to distillery with a map, getting their "passports" stamped at each stop. Get a passport with a stamp from every distillery on the trail and you could get a free t-shirt![203] The program's success bred imitators. Louisville, Kentucky, created an "Urban Bourbon Trail" of approved whiskey bars in the city. [204] Even Tennessee got in on the act.[205]

Whiskey lovers gathered at conventions, such as the annual Kentucky Bourbon Festival, founded in 1992, and WhiskyFest, founded in 1998 and now meeting four times a year in four cities.[206] This growth has even led Kentucky's Midway University to offer an MBA degree focused on whiskey "tourism and event management."[207]

E. Enter the Craft Whiskeys

Building off of this culture of whiskey tourism and commentary, the first decade of the 2000s saw the emergence of "an exciting idea—that of the 'craft distiller' who, working with a small still, would make his own spirits for sale in the market."[208] The concept of craft distilling was an offshoot of the broader "eat local" (and drink local) trend emergent in American culture.[209] It was also tied to the appeal of craft beer brewing.

202 VEACH, *supra* note 6, at 120.

203 *Id.* at 120. The program is still in effect. S*ee Kentucky Bourbon Trail Passport*, KY. BOURBON TRAIL, http://kybourbontrail.com/map/kentucky-bourbon-trail-passport/. The map of the current tour is available as both a clean, cartographic pdf and as an interactive google-maps layer. *See Kentucky Bourbon Trail*, http://10vsslmt3js29lu005tjzl1e.wpengine.netdna-cdnotecom/wp-content/uploads/2013/01/KBT-2016-Map-web.pdf and *Map*, KY. BOURBON TRAIL, http://kybourbontrail.com/map/. There's also an iPhone app. *Id.*

204 VEACH, *supra* note 6, at 122.

205 *Watch Out Kentucky, Here Comes the Tennessee Whiskey Trail*, FRED MINNICK, (June 19, 2017), https://www.fredminnick.com/2017/06/19/watch-kentucky-comes-tennessee-whiskey-trail/.

206 Veach, writing in 2013, lists three events in three cities each year, but WhiskyFest expanded, in 2016, to four: Chicago, New York, San Francisco, and Washington, D.C. VEACH, *supra* note 6, at 121; *2018 WhiskyFest Tickets Are Now On Sale!*, WHISKEY ADVOC., http://www.whiskyfest.com/?_ga=2.104627392.1194702641.1518800416-1319136562.1518800416.

207 *MBA–Concentration in Tourism and Event Management*, MIDWAY UNIV., https://www.midway.edu/majors-programs/graduate-programs/mba-tourism-and-event-management/.

208 VEACH, *supra* note 6, at 123. "Craft" is one of several overlapping terms used to refer to this new phenomenon in whiskey. Others include "artisanal" and "micro." Bryson predicts that, just as the vocabulary in the 1990s beer-brewing revolution has settled on "craft" as the most common descriptor, so too will whiskey. For "'Artisanal' is too long, and a bit pretentious; 'micro' becomes a problem when you get successful. 'Craft' is likely where it's going to wind up.'" BRYSON, TASTING WHISKEY, *supra* note 46, at 178.

209 MINNICK, BOURBON, *supra* note 55, at 227. For more on the locavore movement and its ties to ideas of "craft," see also Lynne Curry, *The Food Movement has Only Just Begun*, L.A. TIMES (Feb. 7, 2015 5:00 AM) http://www.latimes.com/opinion/op-ed/la-oe-curry-locavore-movement-20150208-story.html and RICHARD E. OCEJO, MASTERS OF CRAFT: OLD JOBS IN THE NEW URBAN ECONOMY (2016). Thanks to Ted Becker of the University of Michigan for suggesting Ocejo's book to me last summer.

Microbreweries have led to the highest-quality, most flavorful beer being made not by the big companies but by the little guys.[210] Yet the analogy of craft brewing to craft distilling is a false one, not only because the image of the small, local, "craft" brewer is not necessarily true, but because, as a practical matter, making whiskey is so much harder, and, as the history of American whiskey-making reveals, riskier.

Unlike those in previous generations, many craft distillers did not grow up in whiskey families. Some, like the founders of Tuthilltown Spirits, didn't even really drink, but saw in distilling as an entrepreneurial opportunity to "make a unique material product from raw ingredients with their hands."[211]

A 2015 *New York Post* article on the craft phenomenon in New York State noted that "[t]here are now about 70 New York 'farm distilleries' . . . up from less than a dozen a few years ago. Some of these distilleries even grow the grains and botanicals for their liquors to control everything that goes into the bottle, and many offer tours and charming tasting experiences."[212]

Interest in local whiskey wasn't limited to locals, but tied into the earlier trend toward wine-style whiskey tourism. For "local roots are authentic, even when it's not your locale."[213] And it's a powerful experience. "A Craft distiller can take you to the spring, show you the field, and let you hold the green malt and lay your hand on a barrel filled with aging whiskey—that's a story, and a link."[214]

And stories sell whiskey. Even whiskey writers have been entranced by the craft narrative, giving "craft whiskeys a pass" even though "craft whiskeys are mostly too young, too expensive and too crappy."[215] For, unlike big beer brewers, the "big macrodistilleries put out some amazing quality whiskeys" whose diversity and innovative styles "give the whiskey lover plenty to choose from."[216]

210 *Id.* Many microbreweries have since been bought out by the big-beverage conglomerates; others were big-bev projects from the start. Matt Allyn, *Is That Really Craft Beer? 29 Surprising Corporate Brewers*, MEN'S J., http:mensjournal.com/food-drink/drinks/is-that-really-craft-beer-21-surprising-corporate-brewers-20150923.

211 OCEJO, *supra* note 209, at 60, 63.

212 Halley Eber, *5 Great Hudson Valley Distilleries to Get Your Drink On*, NY. POST (Apr. 10, 2015 11:50 PM), http://nypost.com/2015/04/10/5-great-hudson-valley-distilleries-to-get-your-drink-on/; *see also* N.Y. Alc. Bev. Cont. Law § 61 (McKinney, Westlaw through L.2017, chapters 1 to 505) (state-law requirements for farm distilleries).

213 BRYSON, TASTING WHISKEY, *supra* note 46, at 185.

214 *Id*. at 186.

215 Steve Ury, *Most Craft Whiskeys Suck!,* SKU'S RECENT EATS (July 27, 2010), https://recenteats.blogspot.com/2010/07/whiskey-wednesday-most-craft-whiskeys.html.

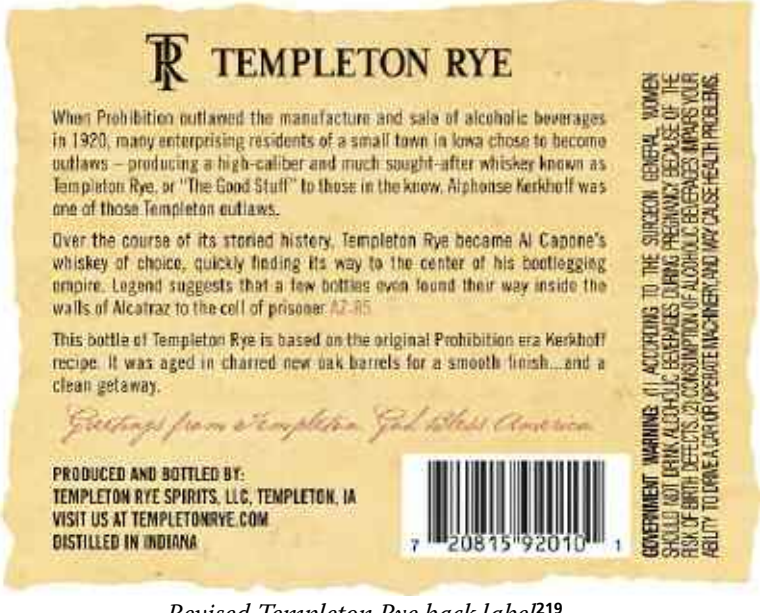
216 *Id.*

Yet the Potemkin phenomenon steams on. Curbing it through legal reform will require attending not only to American whiskey's production process and history, but also to the ways narrativity and rhetoric create and sustain the Potemkin Temptation.

IV. The Law and the Label

Which brings us back to Templeton Rye. After the lawsuits settled, did Templeton close up shop? Nope. Did it become a transparent NDP like Blaum Bros., maker of "Knotter" Bourbon?[217] Not a chance. Instead, Templeton continued to purchase sourced whiskey from Midwest Grain Products (MGP).

The only real changes Templeton did make were subtle ones to their bottle label. The front of the revised label omits the "Prohibition Era Recipe" language from the original but visually is otherwise the same.[218] The back label also drops the "Prohibition Era Recipe" claim, but retains almost verbatim the same narrative text, including the impossible-to-resist references to legendary Al Capone:


TEMPLETON RYE

When Prohibition outlawed the manufacture and sale of alcoholic beverages in 1920, many enterprising residents of a small town in Iowa chose to become outlaws – producing a high-caliber and much sought-after whiskey known as Templeton Rye, or "The Good Stuff" to those in the know. Alphonse Kerkhoff was one of those Templeton outlaws.

Over the course of its storied history, Templeton Rye became Al Capone's whiskey of choice, quickly finding its way to the center of his bootlegging empire. Legend suggests that a few bottles even found their way inside the walls of Alcatraz to the cell of prisoner A2-85.

This bottle of Templeton Rye is based on the original Prohibition era Kerkhoff recipe. It was aged in charred new oak barrels for a smooth finish...and a clean getaway.

Greetings from Templeton, God's Own America

PRODUCED AND BOTTLED BY:
TEMPLETON RYE SPIRITS, LLC, TEMPLETON, IA
VISIT US AT TEMPLETONRYE.COM
DISTILLED IN INDIANA

7 20815 92010 1

GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY CAUSE HEALTH PROBLEMS.

Revised Templeton Rye back label[219]

217 *See Knotter Bourbon*, *supra* note 40.

218 *See COLA Registry*, TTB ID 15014001000338, https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid=15014001000338.

219 *Id.*

There is, however, one key difference on the revised back label. Outside the "box" of the three-paragraph narrative text there are three bits of marginalia in sanitized, all-caps typeface: the standard government warning about the dangers of drinking; the product's UPC bar code; and (after language noting, accurately if misleadingly, that the whiskey is "Produced and bottled by" Templeton Rye Sprits in Templeton, Iowa), a three-word disclaimer: "Distilled in Indiana."

That disclaimer is all the law formally requires of Potemkins.[220] Given the effect that the bottle design as a whole has on consumers, the likelihood that this kind of disclaimer would be noticed, let alone understood, by anyone not already looking for it is slim.

And so Templeton continues to sell their flagship whiskey. They've even expanded their offerings, adding several exclusive (i.e., expensive) age-declared expressions to their line—a 4-year-old, 6-year-old, and 10-year-old rye—each of which features images and text on its label that builds and reinforces the "idea" of Templeton, despite the typographically inconspicuous "distilled in Indiana" disclaimer.[221] Although whiskey critics howled,[222] Templeton marched on.

Although Templeton might be hit by a second round of class-action lawsuits for deceptive trade practices, that's unlikely. They are no longer making explicit, falsifiable claims about their products. They're not even using suggestive, arguably deceptive words like "handmade" or "handcrafted," the use of which on bottle labels were the focus of several theories of liability in recent lawsuits against Jim Beam and Maker's Mark, each of which was dismissed.[223]

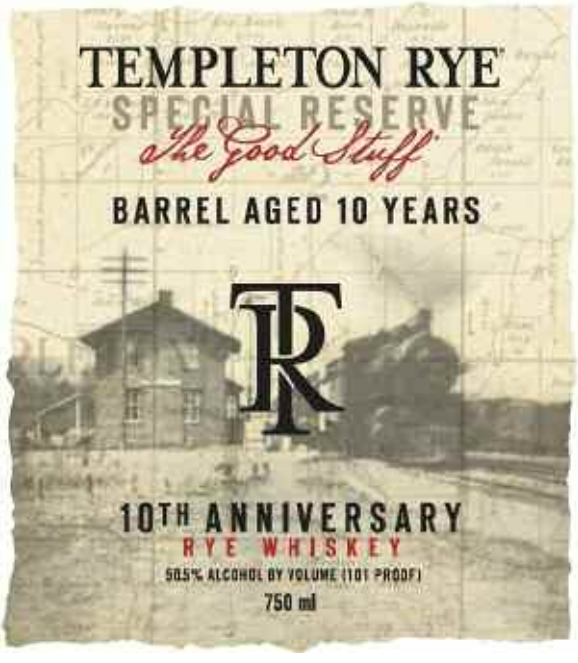
220 27 C.F.R. § 5.36(d) (Westlaw through Jan. 25, 2018) (requiring, when a whiskey "is not distilled in the State given in the address on the brand label," that the "State of distillation" be "shown on the label").

221 *See COLA Registry*, TTB ID 15184001000198, https://www.ttbonline.gov/colasonline/ viewColaDetails.do?action=publicFormDisplay&ttbid=15184001000198 (4 year); TTB ID 17071001000120, https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid=17071001000120 (6 year); TTB ID 16138001000243, https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicFormDisplay&ttbid= 17071001000120 (10 year).

222 *See, e.g.,* Josh Peters, *Templeton Rye 6 Years–A Press Release without Integrity*, THE WHISKEY JUG (June 15, 2016), http://thewhiskeyjug.com/press-release/templeton-rye-6-years-press-release/ ("Templeton Rye 6 Years is Bullshit. Well, the actual age of the whiskey probably isn't, but the press release for the Templeton Rye 6 Years definitely is. It's as if asshats at Templeton didn't learn anything from their $2,500,000 lawsuit because they're once again telling the same old made-up story."); Cowdery, *Still Lying*, *supra note* 15.

223 *See* Welk v. Beam Suntory Import Co., 124 F. Supp. 3d 1039 (S.D. Cal. 2015) (dismissing consumer class-action suit against distiller because the word "handcrafted" on a bourbon bottle is "mere puffery" which no reasonable consumer would understand to mean that the whiskey in a bottle making that claim had been "created by a hand process rather than by a machine"); Salters v. Beam Suntory, Inc., No. 4:14cv6592015, 2015 WL 2124939, *2 (N.D. Fla. 2015) (dismissing state deceptive and unfair-trade-practices claims against distiller for the use of the term "handmade" on their bottle labels because "[o]ne can knit a sweater by hand, but one cannot make bourbon by hand. Or at least, one cannot make bourbon by hand at the volume required for a nationally marketed brand like Maker's Mark. No reasonable consumer could believe otherwise."); Nowrouzi v. Maker's Mark Distillery, Inc., No. 14CV2885 JAH (NHS), 2015 WL 4523551, *2 (S.D. Cal. 2015) (dismissing false advertising and unfair competition claims against distiller because the term "handmade" "cannot reasonably be interpreted as meaning literally by hand nor that a reasonable consumer would understand the term to mean no equipment or automated process was used to manufacture the whisky").

Instead, Templeton is now merely implying things. Take the front label of Templeton's 10-year-old rye:



Templeton 10-Year Rye, front label[224]

"10 years" appears twice: above the old-timey image and below it. The text above the image notes that the rye whiskey in the bottle has been "barrel aged 10 years." That is probably true; MGP has plenty of 10-year-old stock it can sell to Templeton and others. The text below the image notes this is Templeton's "10th Anniversary" bottling. It is also true that when this label was approved in 2016, the company was 10 years old. The label doesn't *explicitly claim* that the *company has been aging that whiskey itself for the last ten years*, but because the whiskey in the bottle is the same age as the company, that's implied. It therefore sets up an "enthymeme" for readers to complete, and in so doing "participate in [their] own persuasion."[225]

That's not enough to overcome a motion to dismiss, especially when Templeton can now simply point to the "distilled in Indiana" disclosure in

224 *Supra* note 221.

225 An enthymeme is a syllogism reduced to two steps: the first assumes that the reader accepts the major premise (Because the company's 10 years old) and draws a conclusion based upon that premise (its whiskey is 10 years old). *See* Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 SO. CAL. INTERDISC. L. J. 237, 273–74 (2009) (quoting Anthony Blair, *The Rhetoric of Visual Arguments* in DEFINING VISUAL RHETORICS 41 (Charles A. Hill & Marguerite Helmers eds., 2004)).

the corner of the back of its label, which label had been reviewed and approved by the relevant federal agency. As ineffective as it may be for all whiskey consumers other than those who know to look for it, that disclosure means Templeton is actually complying more than some Potemkins: at least 29 have failed to make that disclosure yet still had their bottle labels approved.[226]

One reason noncompliant bottle labels such as Templeton's pre-settlement labels have gotten past federal regulators has to do with the agency doing the regulating. As its name implies, the federal agency charged with approving bottle labels—the Alcohol and Tobacco Tax and Trade Bureau (a/k/a "Tax and Trade Bureau" or "TTB")—does not have consumer protection as its primary focus. Instead, this arm of the Treasury Department's mission is, in its own words "simpl[y] . . . to collect alcohol . . . taxes."[227] Given the history of whiskey and taxation in the U.S., from the Whiskey Rebellion to the repeal of Prohibition, this is not surprising. Also unsurprisingly, the agency's focus on tax means their focus on label approvals is secondary, at most.

Accountability at the agency level for claims whiskey companies put on proposed labels is "largely run on the honor system."[228] Significantly, Cowdery notes, because, before the current craft era, "virtually all" producers of American whiskey were "big companies, with lots of lawyers," this honor system worked well enough.[229] Now, however, many Potemkin whiskey startups fail, either innocently or intentionally, to comply with requirements such as the state-of-distillation disclosure.[230]

Notwithstanding calls for the TTB to be staffed sufficiently to fully enforce its regulations,[231] even if every non-distiller producer was made to comply with the disclosure rule, it wouldn't do much. Templeton's disclosure is too subtle and is overwhelmed by the overall impact of a well-designed bottle label and by craft consumers' and purveyors' own desires

226 Chuck Cowdery, *TTB May Crack down on Section 5.36(d) Violations*, THE CHUCK COWDERY BLOG (May 13, 2014), https://chuckcowdery.blogspot.com/2014/05/ttb-may-crack-down-on-section-536d.html [hereinafter Cowdery, *TTB May Crack down*] (citing the password-protected forum http://www.straightbourbon.com/forums/showthread.php?22157-whiskies-that-fail-to-list-State-of-Distillation&p=415903&viewfull=1#post415903); *see also* Steve Ury, *Why isn't the TTB Enforcing the State of Distillation Disclosure Rule?* SKU'S RECENT EATS, (Sept. 4, 2012) https://recenteats.blogspot.com/2012/09/why-isnt-ttb-enforcing-state-of.html [hereinafter, Ury, *TTB Enforcing*].

227 *The TTB Story*, TTB: ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Sept. 8, 2017), https://www.ttb.gov/about/history.shtml.

228 Chuck Cowdery, *TTB Fails Are Becoming All Too Frequent*, THE CHUCK COWDERY BLOG (Apr. 22, 2014), http://chuckcowdery.blogspot.com/2014/04/ttb-fails-are-becoming-all-too-frequent.html [hereinafter, Cowdery, *TBB Fails*].

229 *Id.*

230 Even large distillers don't always follow TTB's labeling rules. *See, e.g.*, Steve Ury, *Why Doesn't Four Roses Follow the Labeling Rules?*, SKU'S RECENT EATS (Mar. 6, 2017) https://recenteats.blogspot.com/2017/03/why-doesnt-four-roses-follow-labeling.html.

231 Cowdery, *TTB May Crack Down*, *supra* note 226; Ury, *TTB Enforcing*, *supra* note 226.

for (at least the experience of) authenticity.

Rhetoric and narrativity operate so powerfully in American craft whiskey that a Potemkin can (1) comply with all explicit legal requirements, such as noting the state of distillation on their bottles, while (2) never outright lying on their bottle labels or marketing materials about the source of their whiskey or method of production, yet (3) convince most consumers (and maybe even themselves) that what is in the bottle is a bona-fide craft product.

I call Potemkin craft distillers that purposefully harness the powers of narrativity and rhetoric (whether aware of those terms or not) to create an illusion of authenticity "intentional Potemkins." Other craft distillers, however, create start-up craft whiskey companies with the best of intentions, but themselves become seduced by the power of rhetoric and narrativity. I call them "accidental Potemkins." Both types of Potemkins harm whiskey drinkers and bona-fide craft distillers, and not just economically: they also both represent a threat to American craft whiskey itself. The best way to see how this is so might be through stories.

A. The Dark Arts of the Intentional Potemkins

Imagine that a group of cynical entrepreneurs in the current craft-whiskey moment see a business opportunity. They create a Potemkin craft distillery, build up the brand, then sell it and move on to another venture. Advised by a like-minded Applied Legal Storytelling (AppLS) scholar, well versed in the tools of persuasion, marketing, narrativity, and regulatory compliance, they take the following approach:

First, their company will need stock characters and settings that resonate with their target audience. To identify one, they look to whiskey history. If the Potemkin will operate out of New England, they'll focus on Colonial-era farmer-distillers. A Chesapeake Bay–area Potemkin might allude to George Washington's having distilled rye at Mount Vernon. If, instead, the company will be in Greater Appalachia, they'll just shift the focus slightly, toward the Whiskey Rebellion and distiller farmers. The Midwest? Prohibition, bootleggers, and gangsters. West coast? Rat-pack crooners. Mountain West? Mountain vistas or spaghetti-western deserts and saloon cowboys. Even locations with no clear relationship to American whiskey history can be effective: if the company will be in a town along the Mississippi River, go with riverboat gamblers. Pacific Northwest? Lumberjacks or fur trappers.[232]

232 For those wondering if these stock characters and settings are merely hypothetical, browse the whiskey section of a large liquor store. You'll find them there.

Once a theme is chosen, the company should flesh it out with specifics. Rather than alluding to the Whiskey Rebellion generally, say, their AppLS consultant might suggest playing up connections to a local whiskey rebel or battle. Historical societies and amateur genealogists can help them identify characters, plots, and settings.

Besides looking backward for resonant historical associations, the company should also look forward to identify ways to put itself in the continuing historical stream. Given whiskey's boom-bust cycle in American history, wherever the company is located should be a story that puts the company at a momentum point in a plot arc. Frame it as a hero returning to that locale, its own traditions of craft distilling facing off against the bland, industrial, corporate Big Whiskey.

Although local historical emphasis is important, it works best when connected with the land itself by evoking the ethos of terroir. An easy starting point is water, which the company must use, anyway, to dilute their sourced whiskey down to bottle proof. Even if the water used is simply filtered municipal tap, the company could state that their whiskey is made with "local" water. Even better, if the area is proud of a nearby source of water, emphasize that, as does Denver-based MGP Potemkin Tin Cup Whiskey by advertising itself as having been "cut with Rocky Mountain water."[233]

If possible, the company should also make allusions to local grains. Is the site in the "heart of winter wheat country" or the "birthplace of [variety X] barley?" Then "celebrate" that "heritage" by ordering, from the stock distiller, a recipe that includes at least a handful of wheat or barley. While specific local agricultural connections are ideal, they're unnecessary. It's enough to make vague allusions to place.

Though these ideas should permeate all of the company's advertising and communication, it will be especially important to feature them on the bottle labels. Because the front label will be the first thing liquor-store shoppers or bar patrons will see, its design will be especially important. For maximum rhetorical impact, the front label should, like Templeton's, be dominated not by text but by image, which not only evokes emotion but also is "hard to see as argument[]: [images] persuade without overt appeals to rhetoric."[234] As their AppLS advisor might note, "images are well-suited to leaving intended meanings unspoken, as would-be

233 *Whisky: This is How We Bottle the Mountain*, *supra* note 114.

234 Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 283, 692 (2012); *see also* Charles A. Hill, *The Psychology of Rhetorical Images, in* DEFINING VISUAL RHETORICS 36 (Charles A. Hill & Marguerite Helmers eds., 2009) (Images allow a company to appropriate emotions and values without having to explicitly argue for their relevance.).

persuaders may prefer, especially when [label regulations] forbid making a given claim explicitly."[235]

This is especially true with photographs, which operate as "index" signs, whose "very existence" implies strongly the existence of the thing they depict.[236] Even if a photograph isn't available, a well-designed graphic can still take advantage of the ways images persuade through "presence," "vividness," and "affect transfer."[237] A New England Potemkin, for instance, might feature a black-and-white, scrimshaw-like image of an old farmhouse, while a Southwestern Potemkin might instead feature the sunset silhouette of a desert cowpoke.

The front label's typography should reinforce ideas from the label image. Font choice will be the paramount, but not only, typographic concern.[238]

As Templeton does in its three-paragraph stories, the company should take advantage of the space on the back label to reinforce the narrative theme and assumptions created by the front label. Several paragraphs of text, in a mood-reinforcing typeface, will allow the company not only to tell a fairly detailed story about its product, but also to help expend readers' attention and keep their eyes from the disclaimer at the bottom, "Distilled in [another state]."

Text on that back label should take advantage of legally undefined but evocative buzzwords, such as "small batch" and the powerful "hand bottled," which evokes a completely handcrafted process even though it's just volunteers placing a cork in the bottle neck.[239] Given big distillers' success at swatting away lawsuits over their use of terms like "handmade" and "handcrafted,"[240] the company could even get away with using those terms. (Or, as the AppLS advisor might advise, the company need not take that chance, given the cumulative effect of the implications they can make without any legal risk).

235 Richard Sherwin, *Visual Literacy in Action, in* VISUAL LITERACY 185 (Jim Elkins ed., 2008); Jewel, *supra* note 225, at 274. For a deep dive into the operation and ethics of visual rhetoric in legal persuasion, see the work of Michael D. Murray, *e.g.*, *The Ethics of Visual Legal Rhetoric*, 13 LEGAL COMM. & RHETORIC: JALWD 107 (2016); *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 LEGAL WRITING 185 (2016); *The Sharpest Tool in the Toolbox: Visual Legal Rhetoric and Narrativity* (January 22, 2018); https://ssrn.com/abstract=3040952 or http://dx.doi.org/ 10.2139/ssrn.3040952.

236 Charles A. Hill, *The Psychology of Rhetorical Images, in* DEFINING VISUAL RHETORICS 29 (Charles A. Hill & Marguerite Helmers eds., 2009).

237 *Id.* at 27–38.

238 *See* Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 LEGAL COMM. & RHETORIC: JALWD 87 (2010) (exploring the persuasive impact of typography and document design in legal briefing).

239 *See, e.g.*, TEMPLETON RYE WHISKEY, *Keith Kerkhoff's Message to Customers* (2014), https://www.youtube.com/watch?v=p_d56otHSVw& (presumably revealing unintentionally just such a process).

240 *See* cases at *supra* note 223.

Another nice touch is to have the label design leave space to handwrite a batch and bottle number, even if those numbers mean nothing. And space for the bottler's scribbled initials, adding to the aura of authenticity without giving the consumer any useful information.

All this labeling work can be done in full compliance with the letter of the law, as guided by their advisor, allowing our entrepreneurs to sign the blanket attestation of regulatory compliance on their federal label-approval form (the truthfulness of which, as noted, is self-policed on an "honor" system anyway).[241]

The company should also build a good website that reinforces all of these ideas. The advisor might suggest that, deep in that site, at least two clicks in, the company could mention, in passing, that the whiskey is sourced. While doing so, the company should make a vague promise to use only source whiskey during their start-up phase—just until they get off the ground—and to distill and age everything on site.

Our entrepreneurs should look for opportunities to use narrativity and rhetoric to build excitement and brand recognition. Brand recognition, after all, is about ethos, and ethos is not only culture, but credibility. Just like the church ladies at Templeton who helped out with the hand-bottling, so too volunteers (including visitors who just finished taking the slick tour) can spend an hour helping with the bottling.

Then, after reaping profits from selling what are essentially generic goods at premium prices, our entrepreneurs can move on, perhaps as many do, by selling their proven-profitable company to an international beverage conglomerate.[242] They could then repeat the pattern in a new locale or leave whiskey behind for whatever the next new thing is in craft culture. In their wake they leave the whiskey drinkers who had supported them, paying more than they should have for "a story and a fancy bottle, and maybe not even that."[243]

The harm to whiskey drinkers from this business venture is more than just economic. There are also related moral and constitutive harms. Those who support local enterprises—whether by shopping at farmers' markets, patronizing local-artists' co-ops, or eating at farm-to-table restaurants—often see their behavior in moral terms. They see shopping this way as a good deed or charitable act: rather than "purchasing" a local commodity,

241 *See* Cowdery, *TBB Fails*, *supra* notes 228; *see also* 27 C.F.R. 5.32 (outlining mandatory label information); *Application for and Certification/Exemption of Label/Bottle Approval*, Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, OMB 1513-0020, https://www.ttb.gov/forms/f510031.pdf (application from with blanket attestation); Emen, *supra* note 35 (quoting Don Poffenroth, cofounder of Spokane, Washington's, bona-fide craft distillery Dry Fly, for the lack of staffing and resources at the Alcohol and Tobacco Tax and Trade Bureau).

242 *See, e.g.,* Tripp Mickle, *Constellation Brands Acquires High West Distillery for $160 Million*, WALL ST. J. (Oct. 4, 2016, 8:34 PM ET), https://www.wsj.com/articles/constellation-brands-acquires-high-west-distillery-for-160-million-1475625536.

they're "supporting" a local business. Learning that they've been duped can be disillusioning and even humiliating.

Related to but distinct from this moral harm is a constitutive one. For choosing a whiskey, and drinking it, is a meaning-making activity, no less than, in James Boyd White's classic example, the act of fishing:

> Imagine a bear fishing for salmon in a river of the great Northwest. What is it doing? "Fishing," we say. Now imagine a man fishing in the same river for the same fish. What is he doing? "Fishing," we say; but this time the answer has a different meaning and a new dimension, for it is now a question, as it was not before, what the fishing means to the actor himself.[244]

And thus the whiskey drinker who pours a dram of what they believe to be an artisanal product from a particular place—perhaps their hometown, favorite vacation spot, or wished-for locale visited only in their imagination—is creating and reinforcing an idea of themselves. Learning, after years of doing so, that their favorite craft whiskey was fake can be devastating.

Duped whiskey drinkers, however, aren't the only ones Potemkins harm. There's also the "bona-fide" craft distillers, those committed local artisans actually trying to make whiskey. Like drinkers, they suffer economically. Those who have started a bona-fide craft-whiskey distillery face profound business challenges those starting a Potemkin don't have to worry about. Unlike their Potemkin competitors, they have to "buy a still and learn how to use it; then buy all the ingredients and actually ferment and distill them; buy barrels and build or lease warehouses in which to put them; and then sit on the investment for years."[245] Todd Leopold, one of the two founding brothers of bona-fide craft distillery Leopold Bros.,[246] speaks with "disdain" of the easier road traveled by Potemkins: "All that they have to do is hire salespeople, make up a BS story, and boom, they look like a distillery."[247]

Bona-fide craft distillers also suffer an associational harm as knowledge of Potemkin practices spreads and more drinkers approach all craft brands with suspicion. This can be frustrating for bona-fide distillers:

243 Patton, *supra* note 39.

244 James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHIC. L. REV. 684, 693 (1985).

245 Felten, *supra* note 16.

246 *Story*, LEOPOLD BROS.: SMALL BATCH DISTILLERS OF FINE SPIRITS, http://www.leopoldbros.com/our-story.

247 Felten, *supra* note 16. Other legitimate craft distillers include Finger Lakes, Dry Fly, and Garrison Brothers. Cowdery, *Potemkin Craft Distilleries*, *supra* note 43.

"The smoke and mirrors used in this industry make it extremely difficult. . . when one company talks about their heritage recipe that was a favorite of a gangster, even though it is just the stock MGP recipe, we all suffer. . . ."[248]

Furthermore, the Potemkin phenomenon also risks harming American craft whiskey itself. As craft American whiskey's reputation suffers from Potemkin controversies and fatigue, its availability and prestige in the crowded beverage market may suffer as well. Whiskey drinkers have choices. If, as a category, American craft whiskey is suspect, drinkers can stick with the big brands. They can also switch to whiskey made in other countries, such as Scotland, where the Potemkin phenomenon isn't a problem. Or, as history has shown, American drinkers can choose vodka.

Although the analogy to the microbrewing movement of the 1990s is misguided in many ways, in terms of potential historical trajectory, the analogy might be promising. Like the evolution of beer tastes from the few and narrow—Budweiser or Miller, regular or lite—to tasty craft beers, "the hope is that these craft distillers can do for the distilling industry what the microbreweries did for the American brewing industry and renew interest in fine whiskeys with robust tastes."[249] But when "half of the rye brands on liquor shelves today"[250] are identical, or near-identical variations sourced from MGP, then consumers mistake that apparent diversity for a categorical "family resemblance" clustered around a phantom core prototype, and "come to expect whiskey with a particular flavor—that is, the taste of MGP rye."[251] This alters and then limits what creative distillers can do with rye, and what consumers will recognize as rye whiskey, impoverishing both. Thus even as Potemkins flourish, whiskey suffers.

B. The Sad Story of the Accidental Potemkins

Exacerbating these harms, some who become Potemkin craft distillers don't intend to end up that way. Instead, they're themselves seduced and carried away by the intensity of the rhetoric and narrativity in craft whiskey. Then—like countless prosecutors in high-profile cases whose stories outpace their evidence, often forcing them into public dismissal of

248 Felten, *supra* note 16.

249 VEACH, *supra* note 6, at 124.

250 Haskell & Spoelman, *supra* note 16.

251 Felten, *supra* note 16; *see also* Jerry O. Dalton, *Heisenberg's Spirits: Tasting is More Uncertain than it Seems*, in WHISKEY & PHILOSOPHY: A SMALL BATCH OF SPIRITED IDEAS 195–207 (Fritz Allhoff & Marcus P. Adams eds., 2010) (outlining the inherent subjectivity and importance of consumer expectations in whiskey perception); Linda Edwards, *The Trouble with Categories*, J. LEGAL ED. 181, 205–10 (2014) (discussing prototype in the context of legal education).

charges—they're forced to confront, publically and personally, how they got there. Although these accidental Potemkins may not be the most sympathetic characters in our drama, their disillusion is real, and public shaming can be a bitter tonic.[252] Furthermore, unlike lawyers for the intentional Potemkins, those for potential accidental Potemkins—especially those who are savvy about how rhetoric and narrativity can lead us all astray—might see trouble coming and help their clients steer clear of it.

For this story, assume, again, that a group of entrepreneurs wish to create a craft-whiskey company. This time, however, they're not cynical about craft whiskey, but naïve. They come to the idea of craft distilling not through, say, a family history in the industry but through their participation in locavore culture. They decide to switch from merely supporting local artisans. They imagine, like the founders of Tuthilltown Spirits, that making whiskey will be easy.[253]

They soon learn, however, not only that distillation is difficult, but that wood maturation takes years. They have neither the patience nor the capital to (1) experiment with different recipes and techniques; (2) watch, over time, how their initial attempts fare; (3) adjust accordingly, try again; (4) and then, years from now, finally open their doors.[254] Though they could sell unaged spirits, like vodka, to sustain the business for a few years while they work on their whiskey, given vodka's role as the villain in American whiskey history, they have no interest in doing so.

But they've already committed to the project. They've left their jobs, and shared their dreams of making craft whiskey with friends, both in person and across social media. Their aspirational identity as whiskey makers is too engrained to easily walk back now.

Perhaps, like High West founder David Perkins, they turn to a master distiller for help.[255] Like Mr. Perkins, they might be advised to buy whiskey from MGP.[256] They might even learn of Mr. Perkins' story—how High West enjoyed annual double-digit sales growth and was then sold for $160 million.[257] So, like the 128 or so non-distiller producers (NDPs) before

252 *See* JON RONSON, SO YOU'VE BEEN PUBLICLY SHAMED (2015).

253 OCEJO, *supra* note 209, at 61 ("There are guys with no teeth and a kindergarten education back in the mountain and they're making whiskey. We're an engineer and a producer and developer and businessmen having worked at the highest levels of the industries we were in. We figured [we] were smart enough to do this.").

254 As whiskey author Ian Wisniewski has noted, "getting a new distillery off the ground takes years—if not decades—of planning and preparation, trial and error." Ian Wisniewski, *Torabhaigh: Countdown to a Distillery Opening*, SCOTCHWHISKEY.COM (Mar. 15, 2017), https://scotchwhisky.com/magazine/features/13128/torabhaig-countdown-to-distillery-opening/.

255 Mickle, *supra* note 242.

256 *Id.*

257 *Id.*

them,[258] they contact MGP, choose a stock recipe, and schedule their first delivery.

Meanwhile, they work on other aspects of the business. They connect with other local artisans in their community and develop an increasing sense of connection to their town's culture and history. Like Templeton Rye's founders, they come to believe that where their whiskey is actually made, and the stock recipe used to make it, is "not the most important thing," but rather what matters is the idea of that "whiskey as a tribute to and celebration of the town" and its past.[259] They look to rhetoric, seeking a myth that will distinguish, and enhance, their product.

They find an independent graphic artist who offers to design their bottle labels for free (or maybe in exchange for a bottle or two of that new whiskey). This local artist hasn't designed a whiskey bottle before and doesn't know about the need for the requisite "distilled in [state X]" disclaimer. Nor do the company's founders. None is a lawyer, and the regional lawyer they use for the business isn't a whiskey specialist and doesn't know, either, so she thus doesn't think to probe into this new client's claims to artisan authenticity. Nothing in the regulations governing bottle labels stands out to the lawyer, so, after relying on her client's (presumed) technical expertise about whiskey-making and attaching the image files sent over from the graphic designer, she signs the boilerplate blanket attestation at the bottom of the TTB's one-page application form.[260] TTB approves the label and the company begins using them.

In their excitement to share their new product, the company's founders make exaggerated, or at least simplified, craft claims. The NDP model, they tell themselves, is just too complicated to explain to their new patrons or to other local craft businesspersons they're now connecting with. Even if they could explain it, how could the farm-to-table restaurant down the street possibly capture that idea on their all-local-ingredients cocktail menu? It's easier to simplify and romanticize the story, even analogizing their enterprise to microbrewing.

258 *See* Ury, *Complete List*, *supra* note 36.

259 Hafner, *supra* note 18 ("Though Templeton Rye is not distilled according to the Prohibition recipe, Bush and Underwood on Wednesday framed their whiskey as a tribute to and celebration of the town of Templeton and its legendary bootlegging past, not a product from it.").

260 That attestation reads, "Under the penalties of perjury, I declare: that all statements appearing on this application are true and correct to the best of my knowledge and belief; and, that the representations on the labels attached to this form, including supplemental documents, truly and correctly represent the content of the containers to which these labels will be applied. I also certify that I have read, understood, and complied with the conditions and instructions which are attached to an original TTB F 5100.31, Certificate/Exemption of Label/Bottle Approval. I consent to the return of processed applications in the manner indicated on this application and set forth in the applicable instructions." TTB Form 5100-31–Application for and Certification/Exemption of Label/Bottle Approval (10/17/2016), https://www.ttb.gov/forms/f510031.pdf [hereinafter TTB Form 5100-31].

Eventually, however the inconvenient details of their MGP sourcing catches up with them; they're exposed in the press or even sued. They're now forced into the uncomfortable position of explaining to their supporters, and themselves, how their artisanal aspirations led them so far astray.

C. Modest Suggestions for Reform

What can be done to curb the Potemkin phenomenon? The battle is being fought on multiple fronts, from class-action lawsuits, to calls to better staff and fund the TTB so it can enforce existing regulations, to proposed regulatory amendments, to efforts at better industry self-policing.[261] But lawsuits haven't always succeeded,[262] and even when they have, they're a piecemeal, "whack-a-mole" approach to the Potemkin Pandemic. Industry self-policing efforts have inherent limitations and have been criticized.[263]

While a fully staffed and funded TTB might spot every Potemkin and get them to include the existing "Distilled in [state X]" disclaimer, that would make the label legal, but it would help only those consumers who already know what that language means. For most, though, the disclaimer would do little to overcome the rhetorical impact of Potemkin bottles' overall design, or consumers' own desires to believe the myth the label is selling.

Proposed changes to the regulations themselves have also been met with skepticism,[264] a skepticism sharpened once one accounts for the strong pull of rhetoric and narrativity. But this article's arc wouldn't be

261 *See, e.g.*, Letter from a coalition of beverage associations to the Senate urging full funding for the TTB (Sept. 5, 2014), https://www.nbwa.org/sites/default/files/Beverage_Industry_Coalition_TTB_Funding_Letter_to_Senate.pdf (arguing for full funding for the TTB); *Craft Certification*, AMERICAN DISTILLING INSTITUTE, http://distilling.com/resources/craft-certification/ (industry self-policing proposal); Emen, *supra* note 35 (noting proposed regulatory changes); Chuck Cowdery, *The Movement to Enforce 5.36(d) Is Growing*, THE CHUCK COWDERY BLOG (July 15, 2014), http://chuckcowdery.blogspot.com/2014/07/the-movement-to-enforce-536d-is-growing.html (calling for better enforcement of existing regulations); *Association Proposes Ethics Code for Craft Spirits Producers*, THE CHUCK COWDERY BLOG (Sept. 4, 2014); http://chuckcowdery.blogspot.com/2014/09/association-proposes-ethics-code-for.html (describing and critiquing proposed ethics code).

262 *See supra* note 223 and sec. IV discussion of Templeton's post-settlement revised label and 10-year-old rye bottle design.

263 For example, the American Distilling Institute created a "craft certification program" and sought federal registration for a "craft certification mark" but abandoned that latter effort. *Craft Certification*, AMERICAN DISTILLING INSTITUTE, http://distilling.com/resources/craft-certification/ (program); U.S. Trademark Application Serial No. 85856253 (filed Feb. 21, 2013, abandoned Dec. 10, 2013). As for the program itself, in Cowdery's opinion, "nobody uses" or "cares" about that craft certification, and, even if they did, as a form of "self-certification," the approval process is akin to "no certification at all." Email from Chuck Cowdery to Derek Kiernan-Johnson (Nov. 30, 2017) (copy on file with author). Additionally, certification marks are also tricky to design and place in a way that reaches consumers. *See* Kyle Kastranec, *Craft Beer Enters the Upside Down—A Design Analysis*, GOOD BEER HUNTING (July 5, 2017), http://goodbeerhunting.com/blog/2017/7/5/ craft-beer-enters-the-upside-down-a-design-analysis-of-the-new-ba-indie-logo (analyzing this design problem with respect to craft beer). Furthermore, even if a stringently regulated, carefully designed, and well-placed certification mark did appear on bona-fide craft bottles, consumers would probably still not see that mark on *Potemkin* bottles unless they were looking for it. There's also the slippery, some would say useless, term "craft" itself. *E.g.*, Kinsey Gidick, *When It Comes to Cocktails, Is It Time to Kill the Word Craft?*, CHARLESTON CITY PAPER (Aug. 17, 2016), https://m.charlestoncitypaper.com/charleston/is-it-time-to-kill-the-word-craft/Content?oid=6111707.

complete without at least the hope of a happy ending. So two suggestions for cabining narrativity and rhetoric follow.

The first reform, aimed at potential accidental Potemkins (and their lawyers), would require Potemkins to better know, and truthfully describe, their product. The TTB's current application form for bottle-label approvals is a less than a page long and requires only a blanket attestation.[265] A revised form might better visually encourage deliberative responses while also drawing upon the cognitive advantages of checklisting[266] by breaking things down more explicitly. Applicants could, for instance, be required to outline and attest to the truth of the product's components and character:

- where the grains used in the whiskey came from;
- where the whiskey was distilled—not just which U.S. State but in which specific distillery, by registered DSP number;
- where the whiskey was aged—again, not just the state but specific warehouses;
- where water used to reduce the whiskey to bottling proof came from (i.e., was it just filtered municipal tap?);
- if the whiskey, like Templeton's,[267] contains flavoring additives, which ones and how much?
- where the whiskey was bottled.

The list could go on, requiring applicants to disclose and attest to details about the type of yeast used, type of wood used for aging, barrel entry proof, number of barrels used, and so on. At some point the amount of detail would be too much, creating the backfire risk, common in contracting, of the reader's seeing a waterfall of information with individual boxes to initial and deciding that, rather than read all the text, they'll just initial each line. Requiring too much detail might reveal company trade secrets worth protecting. Despite startups' possible ignorance of the information sought in such a form, for an industry as regulated as whiskey, and for tasks as dangerous as distilling and wood-aging, requiring producers to report such details is a low bar.

264 *See* Charles L. Cowdery, *Revised Rules for Whiskey Labeling? Proceed with Caution*, R STREET (Aug. 1. 2016), http://www.rstreet.org/2016/08/01/revised-rules-for-whiskey-labeling-proceed-with-caution/; Chuck Cowdery, *Rule Writing Is Not a Job for Amateurs*, THE CHUCK COWDERY BLOG (Aug. 3, 2016), https://chuckcowdery.blogspot.com/2016/08/rule-writing-is-not-job-for-amateurs.html.

265 TTB Form 5100-31, *supra* note 260.

266 *See* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2010); Shankar Vedantam, *The Trick to Surviving a High-Stakes, High-Pressure Job? Try a Checklist*, HIDDENBRAIN (Oct. 30, 2017), https://www.npr.org/2017/10/30/559996276/the-trick-to-surviving-a-high-stakes-high-pressure-job-try-a-checklist. For an exploration of the benefits of checklists for legal writers and the technique's broader implications for lawyering, see Jennifer Murphy Romig, *The Legal Writer's Checklist Manifesto: Book Review*, 8 LEGAL COMM. & RHETORIC: JALWD 93 (2011).

267 Cowdery, *Flavoring is Legal*, *supra* note 25.

Admittedly, a longer, more detailed form would only compound the staffing shortage at TTB, making it even more likely that application reviews would continue to depend on the honor system. But TTB agents reviewing the application forms wouldn't be the only audience for this information and attestations. Industry watchdogs, as well as bona-fide competitors across town, could check TTB database filings and alert the agency to false reports. Concrete, false attestations on applications would also give class-action lawyers hard evidence with which to build their cases.

Besides curbing the Potemkin Temptation by improving the form's visual design, a revised form could also draw upon the power of narrative. Above the newly enumerated attestations, the form could feature a short, maybe paragraph-long, narrative about why the information requested is important and what the consequences for lying on the form might be. The page on the TTB website where the label-approval form is downloaded and submitted could also feature short stories about these matters. By revealing the existence of "Potemkin" NDPs to some industry participants—such as its lawyers who don't specialize in whiskey—such stories might "stick" just enough to spark a longer, more critical conversation about the label-application attestations. Although far from a complete cure, focus-on-the-form efforts might help reduce the number of Potemkins who slip through the system and make it easier to catch those that do.

A second reform, aimed not at the label-approval form but at the labels themselves, might also help. Rather than allow Potemkins to continue to quietly whisper "distilled in [state name]" in a quiet corner of the label behind the bar code, whiskey labels would have to feature something more comprehensive and prominent, like the "nutrition facts" boxes on packaged foods. Such a box would—in standard, readable typography and background color chosen by the TTB rather than selected strategically by each producer—reproduce key information from the revised application form, such as where the grains came from, where the whiskey was distilled, where it was aged, and where it was bottled. Thus at least some consumers who had been drawn in by the visual rhetoric of a front label and the narrativity of a back label might, upon noticing this new information box, be encouraged to check their initial impressions and engage their more critical faculties. [268]

268 In other words, they would be encouraged to "think slow," that is, to switch "to a slower, more deliberate and effortful form of thinking." *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011). For an illuminating exploration of how Kahneman's concept helps explain judicial decision making, see Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 LEGAL COMM. & RHETORIC: JALWD 7–12 (2013).

However, as with too many boxes on a TTB form, too much information on a label could risk consumers' becoming overwhelmed and glossing over the whole thing, as some perhaps do with today's detailed "nutrition information" boxes on food labels. So the list would have to be short as well as designed to catch the eye in that moment after a consumer has taken a bottle off the shelf but before they've put it in their shopping cart.

Unlike the current "distilled in state [X]" disclaimer, which appears only on Potemkin bottles, and the proposed "craft certification mark,"[269] which would appear only on bona fide bottles, this information box would appear on both, facilitating comparative shopping and making the Potemkins' more complicated disclosures stand out.

There are, of course, limits to what mandatory labelling disclosures can achieve. Junk food and cigarettes show that. And this reform would do little to change encounters with Potemkin whiskeys chosen and enjoyed in places where the bottle is nowhere in sight, such as on restaurant menus or cocktail lists.

Nevertheless, these two proposals—expanding the label-approval form and adding a pithy nutrition-facts-style box to whiskey labels—might improve the status quo. This craft moment has its dangers, but American whiskey has faced challenges before—from outright rebellion at the country's founding, to the rise of the rectifiers in the nineteenth century, to Prohibition and the Vodka Age. It will find its way through this current struggle. And if it doesn't, like the imported beer of the 1980s, the rest of the world makes great whiskey, too.[270]

269 *Craft Certification*, *supra* note 263.

270 *See, e.g.,* the archive of World Whiskies Awards (currently through 2017) at WORLD WHISKIES AWARDS, http://www.worldwhiskiesawards.com/; Stuart, *Jim Murray's Whiskey Bible 2017—The Winners,* THE WHISKY EXCHANGE (Oct. 17, 2016), https://blog.thewhiskyexchange.com/2016/10/jim-murrays-whisky-bible-2017-the-winners/.

ARTICLE

Rhetorical Evil and the Prison Litigation Reform Act

Terri LeClercq*

I. Introduction

This article exposes the misleading presumptions and rhetorical devices that allowed a bad bill to become law. How? The rhetorical performances of the four senators who proposed and passed the Prison Litigation Reform Act (PLRA) created narrative constructions that labeled, sustained, supported, and justified the need for harsh intercession into the federal-court system.[1] Discussion on the final passage from the 1995 Senate floor was dominated by four senators: Robert Dole (R, Kansas),[2] Orrin Hatch (R, Utah),[3] Spencer Abraham (R, Michigan),[4] and Jon Kyl (R, Arizona).[5] These Congressional sponsors of the Prison

* Senior Lecturer, Norman Black Professorship of Ethical Communication in Law, University of Texas School of Law (retired); 2010 Ralph Brill Chair Distinguished Visiting Professor, Chicago-Kent; 2018 recipient of the national Golden Pen Award from the Legal Writing Institute. Heartfelt thanks to Professor Ruth Anne Robbins, who convinced me that this journal was the appropriate forum for this article—she was right. JALWD Editors Jeffrey Jackson (Washburn) and Andrew Carter (ASU) spent hours, days, months! helping me revise and attribute properly. They improved every aspect of this article. Thanks also to the myriad social-justice attorneys who tried to make sense of the PLRA for me. Several law-school faculties allowed me to work through this project with both faculty and students at The University of Ottawa; Georgetown Law School; Barry University School of Law; and the University of Nevada, Las Vegas. I accepted all the faculties' and most of the students' advice and suggestions; if there's a mistake here, it's mine.

1 *See generally* A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, Pub. L. No. 104-13, 110 Stat. 1321 (Bernard D. Reams & William H. Manz eds., 1997).

2 141 CONG. REC. S7524–25 (daily ed. May 25, 1995); 141 CONG. REC. S14,413–14 (daily ed. Sept. 27, 1995). During the September 27, 1995 debate, Senator Dole is identified as speaking for himself, Mr. Hatch, Mr. Abraham, Mr. Kyl, Mr. Reid, Mr. Specter, Mrs. Hutchison, Mr. Thurmond, Mr. Santorum, Mr. Bond, Mr. D'Amato, and Mr. Gramm. Pre-enactment documents of the legislative history available at *Margo Schlanger,* UNIV. MICH. LAW SCHOOL FACULTY HOMEPAGE, http://law.michigan.edu/facultyhome/margoschlanger/Pages/PrisonLitigationReformAct (last visited Mar. 31, 2018).

3 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995); 141 CONG. REC. S18,136–37 (daily ed. Dec. 7, 1995). Of the identified speakers, only Senator Hatch remains in office today.

4 141 CONG. REC. S14,316–17 (daily ed. Sept. 26, 1995); 141 CONG. REC. S14,418–19 (daily ed. Sept. 27, 1995).

5 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995); 141 CONG. REC. S19,1113–14 (daily ed. Dec. 21, 1995).

Litigation Reform Act of 1996 abused professional rhetoric. They offered misleading statistics. They told stories that combined into a woven narrative[6] of inmate abuse of the legal system, in which inmates purportedly file frivolous grievances. They told only one side of stories, ignoring any prisoner's legitimate facts behind the court filings. They repeatedly labeled federal judges as "liberals" who were willing to grant any inmate any frivolous request. They insisted that tax dollars were thrown away on inmate filings costs. To top all that off, they insisted that their audience, the other Senators, should fear thousands of violent inmates, court-freed and roaming the streets.

A parsing of their testimony offers strong evidence that, moving forward, concerned citizens should insist that public legislative speech be guided by strong ethical standards. At their best, public speakers should employ rhetorical devices that balance honesty and an obvious statement of both sides of an argument need to be at least acknowledged—if not given a full discussion. Then listeners–readers can trust the messenger and the message. Aristotle explained this essential element in persuasive rhetoric: listeners (and readers) require a comfortable, complicit sense of the speaker's (and writer's) having moral values, of persuading through reasoning and fact. Thus, to be persuaded, the listener wants to hear reasoning that is sufficiently plausible. Ideally, the motives of the speakers should not be self-serving but rather of benefit to a larger good—here, to the court system, inmates, and the public.

Joseph Campbell explained the need for ethical speech:

> Ethics is a way of teaching you how to live as though you were one with the other [here, the speaking senators and their audience, but also America's inmates]. You don't have to have the experience because the [speaker] gives you molds of actions that imply a compassionate relationship with the other. It offers an incentive for doing this by teaching you that simply acting in your own self-interest is sin.[7]

In these public speeches, the four senators did not imagine themselves as representatives of the inmates they re-judged and condemned to limited court access. They functioned more as the ancient Greeks did: "The buccaneering chieftains in the *Iliad* did not want justice. They wanted to take whatever they chose because they were strong and they

6 *See generally* Binny Miller, *Telling Stories about Cases and Clients: The Ethics of Narrative,* 14 GEO. J. LEGAL ETHICS, 1 (2000). Professor Miller reignited my interest in ethics during a Georgetown Law School conference, after a D.C. semester where I had the opportunity to walk and discuss ethics with Father Drinan.

7 JOSEPH CAMPBELL WITH BILL MOYERS, THE POWER OF MYTH 281 (1991).

wanted a god who was on the side of the strong."[8] Senators with their bully pulpit hammered rather than taught.

I have drafted and redrafted this material for ten years. I do understand "irony": my word choice and organization are not balanced or neutral. They condemn. This article is "public discourse." Its goal is to examine the four senators' rhetoric through Aristotelian lenses, searching out thematic evil and slanted language. I assure readers that I have examined my goals, and I hope that the rhetoric I deliberately use here will benefit the larger good—the amendment or replacement of the PLRA. My second goal is to encourage readers to examine their own prose for these abused rhetorical elements and evaluate whether they, too, benefit the common good.

Speakers and writers manipulate rhetoric for many reasons, chief among them to persuade audiences to agree with a message they might otherwise ignore or disagree with. Manipulating rhetoric in public discourse can be dangerous, though. In the context of the PLRA speakers, the rhetoric endangered the liberty and property of thousands of inmates—and perhaps endangered their lives as well, by reducing court access. The purported impetus of the PLRA was to provide a practical screening mechanism to filter unwarranted inmate claims.[9] The growing prison overpopulation and overcrowding was certainly creating a tsunami of grievances, which placed an additional burden on the courts and an urgent need to reduce the federal-court docket. Thus an urgency helped push a bad policy. Scholar Linda Berger describes these special moments in time as the Kairos tipping points: essential moments when an argument seems sensible, rightful, and thus more persuasive than it would have been before, and maybe after.[10]

The senators obviously felt the need to step outside the professional standards of ethical speech, because the PLRA introduced harsh restrictions for inmate petitions. Among other requirements, it limited injunctive relief; it added an exhaustion requirement of administrative remedies (yielding access through the local requirements); it reduced or eliminated attorneys' fees; it offered state judges the ability to screen, dismiss, and waive reply pleadings; and it required filing fees even of indigent inmates.[11]

8 EDITH HAMILTON, MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES 7 (2017).

9 *See generally* Squire Servance, Jones v. Brock: *New Clarity Under the Prison Litigation Reform Act*, 3 DUKE J. CONST. L & PUB. POL'Y SIDEBAR 75, 82 (2008); Jones v. Brock, 127 S. Ct. 910, 925–26 (2007).

10 Linda Berger, *Creating Kairos at the Supreme Court:* Shelby County, Citizens United, Hobby Lobby, *and the Judicial Construction of Rights Moments*, 16 J. APP. PRAC. & PROCESS 147, 150–52 (2015).

11 110 Stat. 1321-71, as amended, 42 U.S.C. § 1997e *et seq*.

To get other senators to vote for those unusually harsh corrections to pro se filings, the sponsoring senators slipped the PLRA as a rider into an omnibus appropriations bill for farmers.[12] Thus in addition to unethical use of rhetoric, the senators resorted to a common but unethical tactic of "hiding" the bill within another, more popular one. With their minds and perhaps attention elsewhere, then, the Senate audience may not have been aware of deceitful rhetoric but instead were convinced by the rhetorical manipulation of repetition, false statistics, and hyperbole about federal courts' excessive "interference" with inmate litigation.

Abuse of rhetoric might be difficult to recognize within today's flaming Twitters and fast-moving political slogans. And yet . . . it is essential for those within the legal profession to stand back, reflect, and parse this congressional language precisely because it allowed fear and emotion to overcome logic. Beginning in 1998, thousands of citizens lost much of their ability to seek redress from cruel prison conditions.

II. Abuse of a Rhetorical Theme

A review of their congressional rhetoric allows a practical legal rhetorician to evaluate the arguments through a wide-ranging set of criteria, most handed down from Aristotle. These four speeches provide examples of an abused, embedded rhetorical theme of Chaos; ipse dixit statements of exaggeration and false–bogus language; and repetition of the theme while ignoring opposing views. Most professional rhetoric employs a theme, an underlying message that weaves into and around the discussions, facts, and conclusion. In the PLRA speeches, the common theme is Chaos: the federal courts and their prison oversight have created Chaos and discord throughout the nation's states. To make this point, the speakers break professional standards with gross distortions, simultaneously denigrating federal-court review of inmate filings. The *ethos* should reflect character, but what character? Aristotle believed that the speaker "must inspire confidence, credibility, good senses, good morals, good will."[13] Each of the four speeches was filled with false language and false anecdotes: in retrospect, we can judge that the duplicity instead produced disrespectful language and distorted values.

The four senators employed a primary characteristic of political rhetoric—a **rhetorical theme**:[14] they framed the need for political action

12 The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

13 Adina Arvatu & Andrew Aberdein, Rhetoric: The Art of Persuasion 6 (2016).

14 Rhetorical themes can be used, and can be abused, of course. We remember the speeches and writings of Churchill, Martin Luther King, Nimitz, and Lincoln, for instance, for their strong patriotic rhetorical themes.

(restricting prisoners' court access) as "Our" battle against Evil. These speakers repeated metaphors of overreaching federal courts and of frivolous filings by bored and wily inmates. A subliminal message throughout is of a rightful Throne (power over inmate litigation) usurped by Evil (liberal federal judges). The strategy reinforced the theme and worked.[15] The senators chose metaphoric verbs to connect the states' prison-litigation struggles with the struggle of Heroes attempting to Save the Nation. Reviewed through the lens of this archetypical theme of battle and retribution, the senators' rhetoric is a solid, interwoven mass of persuasion. If "liberal federal judges" and whining inmates are the Evil, then Congress is perfectly positioned to set itself as Savior, the Knight who protects the Kingdom from Chaos, Crime, Abuse of Process, and Abuse of Taxpayer Money.[16] The rhetoric of the four senators reviewed below played on that ancient myth of Hero Saving the Kingdom. And in the rushed five days of testimony, those four senators trumpeted that story[17] of the perceived crisis in America's courts of Law and Order.

It's not a bad story:

The narrators and theme: The storytellers (Defenders of Traditional Values) are the impassioned Congressmen. These Defenders created a dichotomy of exclusion and confusion: "we" are the defenders of state courts, and "they" are the overreaching federal courts.[18] The repetition of this Us–Them theme was an exaggeration of a "kind of ritualized exclusion"[19] that separated Congressional listeners from both the traditional judiciary and the prison population. Exaggerating the dichotomy between "Us" and "Them" allowed speakers to pull listeners into their privileged world and even discouraged independent thought about "The Other."

The story: Liberal federal judges have stolen the Power from the rightful owners—state judges and prison officials. To develop that theme, the senators embedded coded cultural tropes of mythic representation.

15 The Senate audience probably read *The Chronicles of Narnia* series to their children, C.S. Lewis' tale of children who have to protect the kingdom of Narnia from Evil and restore the throne to its rightful owner. They may have watched their children or grandchildren play Dungeons and Dragons, a wildly popular board game with heroic figures and wildly evil villains.

16 Anthony G. Amsterdam and Jerome Bruner provide a brilliant and extended application of a similar theme and its consequences on the race-discrimination decisions in MINDING THE LAW (2000).

17 "[T]he telling of the story is also the interpretation of a story . . . ." NEIL FORSYTH, THE OLD ENEMY: SATAN AND THE COMBAT MYTH 95 (1989).

18 Discussing a similar strategy in *Spencer v. Texas*, 385 U.S. 554 (1967), Anthony G. Amsterdam points out rhetorical "manipulation to posture the Court exactly where it wants to be between the historically established, immemorially venerated tradition of prudence and the ever-lurking, imminently menacing danger that threatens the Nation if judges stray from that tradition." Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 355, 360 (1992).

19 Richard Boyd, *Narratives of Sacrificial Expulsion in the Supreme Court's Affirmation of California's 'Three Strikes and You're Out' Law*, 11 LEGAL COMM. & RHETORIC: JALWD 83, 86 (2014).

Like a repeated metaphor, a rhetorical trope is used in a figurative sense, invoking a feeling or memory. For instance, when readers find a ticking clock in a scene, they recognize passing time.[20] The deliberate tropes in the senators' speeches concentrated on the Hero archetype. In our Western culture, a White Knight is the good guy, just as cowboys in white hats are assumed to be the Heroes on an old movie.[21] Listeners respond to these cultural tropes without realizing the source of their response.[22] The senators constantly alluded to federal judges who abused their limited positions. But the implicit message was decoded and received as senators recognized the threat and danger to the traditional world of Power. Naturally, to save our historically safe and privileged Nation, our Defenders had to pass this bill.

Professor Ruth Anne Robbins investigated the relationship between mythology and folklore heroes to lawyering decisions and their choices of rhetoric; she concluded that "people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes."[23] Whether the four speakers came to their rhetorical choices deliberately or not, they ended up using markedly similar language of insult about "them" and of power for "us." The Senate voted to implement the PLRA. The rhetoric overcame the real consequences for the country's inmates. As Professor Robbins explained, "we respond viscerally to certain story patterns unconsciously."[24] Following the consistently repeated storyline of a usurped Throne, listeners voted the PLRA into law.

A. "Us" versus "Them" with Senator Dole

Senator Dole began the series of speeches with a strong emphasis on "us" versus "them," dividing "our" individual states and prison officials from the "other," the federal judiciary.[25] Senator Dole created an archetype, the Usurped Throne, to convince Congress that their vote would Return Control of Our Country. He offered no credible, empirical foundation. Instead, he promoted the Hero archetype (we) offering guidelines to "restrain" (as in a battle) federal judges. Emphasizing the unnecessary

20 Additional tropes can be found at https://literaryterms.net/trope/ (last visited Mar. 31, 2018).

21 Songs elicit the same cultural-specific responses. For example, 1970s Western-world moviegoers recognized John Williams' music score to *Jaws* even if it were used in commercials. Danger!

22 *See* Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW & LIT. 127, 135–36 (2004).

23 Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Character and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 768 (2006).

24 *Id.* at 769.

25 *See* 141 CONG. REC. at S14,413–14.

intervention of liberal judges, Senator Dole accused them of "micromanaging," an abstract yet familiar pejorative synonym for "control." Micromanaging was bad:

> • "Tough new guidelines . . . will work to *restrain liberal Federal judges* who see violations on constitutional rights in every prisoner complaint and who have used these complaints to *micromanage State and local prison systems.*"[26]

Was a review of inmate petitions "micromanaging"? Senator Dole gained his rhetorical power with a narrative that "exists chiefly in its ability to justify its particular rendition of events and the actions that may derive from the telling of that story in that way."[27] His worry actually centered on the injunctions and judicial oversight of appalling prison conditions that were revealed by those petitions; Senator Dole lumped petitions and injunctions together. The Senate will save the nation and its criminal-justice system by taking away its proper role in prison oversight; and thus it came to pass.

Joseph Campbell anticipated this universal story:

> The usual hero adventure begins with someone from whom something has been taken, or who feels there's something lacking in the normal experiences available or permitted to the members of his society. The person takes off on a series of adventures beyond the ordinary, either to recover what has been lost or to discover some life-giving elixir. It's usually a cycle, a going and a return.[28]

B. "Chaos! Be Afraid" with Senator Hatch

Senator Hatch stepped into the Chaos story line by emphasizing fear: the nation should fear an out-of-control federal judiciary; citizens should fear inmates who might win court cases and be released to commit "vicious crimes."[29] Senator Hatch's rhetoric of fear allowed him to bang home his theme: What would happen if the Senate and the PLRA did not stop these imprisoned criminals who churn out frivolous and excessive prison litigation? The crushing burden would overcome our court system.[30] The pendulum of possible responses swings only one way: Wake up! Save the Nation!

26 *Id.* at S14,414 (emphasis added).

27 Boyd, *supra* note 19, at 87.

28 CAMPBELL WITH MOYERS, *supra* note 7, at 152.

29 *See* 141 CONG. REC. at S14,418; 141 CONG. REC. at S18,137.

30 *See* 141 Cong. Rec. at S18,136-37; ; 141 CONG. REC. at S14,418.

Senator Hatch called on Congress to stand on the side of taxpayers against criminals and federal judges—an odd duality of Evil. The PLRA would "restore balance" against federal-court orders, setting up the proper Kingdom once the federal judges' orders are limited.[31] The red herring in this logic is of course the scope of the PLRA, which has nothing to do with the laws citizens might break that land them in prison to begin with.

- "[The PLRA will] help *restore balance* . . . and will *ensure* that *Federal court orders* are *limited* to remedying actual violations of prisoners' rights, *not letting prisoners out of jail*."[32]
- "*Nearly every day* we hear of *vicious crimes committed by individuals who should have been locked up.*"[33]

Allowing inmates a chance to rejoin society would be "another kind of crime committed against law-abiding citizens."[34]

He insisted that states' "competent administrators" would look out for society's interests "as well as the legitimate needs of prisoners."[35] These would be, presumably, the same administrators who created the incident or rules that inmates were petitioning to improve. He urged Congress to keep Us safe by slamming the revolving door on the prison gate. Those of Us Outside those gates would be, ergo, safe. This language continued the implicit message that the Senate needed to restore the glorious past.

C. "We Will Eliminate Intrusive Oversight," with Senator Kyl

The third Senator who battled the Evil of excessive prison litigation shamed the courts' legitimate and mandated procedures. Senator Kyl announced that his testimony was to focus exclusively on Special Masters, those experts chosen by the courts to oversee court-ordered repairs to broken prison systems.[36] Special Masters are special investigators; as part of Federal Court Decree, Special Masters oversee the corrections of problems within a prison system. They have the power to visit prisons, interview both personnel and inmates, evaluate, and eventually make recommendations to both the prison administrators and the court.[37]

31 *See id.* at S14,418.

32 *Id.* (emphasis added).

33 *Id.* (emphasis added).

34 *Id.*

35 *Id.*

36 *Id.*

37 *See* Legal Information Institute, *Special Masters,* WEX, https://www.law.cornell.edu/wex/special_master_(last visited Mar. 31, 2018) (describing the duties and powers of a special master); Vincent Nathan, *The Use of Masters in Institutional Reform Litigation,* 10 U. TOL. L. REV. 419, 435 (1979) (describing the role of the Special Masters in the litigation that culminated in the Fifth Circuit's decision in *Newman v. State of Alabama*, 559 F.2d 283 (5th Cir. 1977)). A more recent example of using a Special Master in a criminal case: On Oct. 13, 2016, U.S. District Judge Julie Robinson named attorney David R. Cohen a Special Master as a third-party expert to examine the facts and determine if inmates' constitutional rights had been violated when the Correction Corporation of America (CCA) recorded client–attorney jail and prison meetings and turned the recordings over to prosecutors. *See generally* United States v. Black, No.16-CR-20032, 2018 Westlaw 398457 (D. Kan. Jan. 1, 2018).

Senator Kyl made use of the persuasive rhetorical device that Aristotle described as "shame":[38] he manipulated conventional reactions to the use of Special Masters and so turned traditionally sound rhetorical elements—statistics or examples—into unexpected negative attacks.[39] He shaped his audiences' reactions by switching these legitimate judicial actions into shameful ones, and assumed no one ("us") would want these shames to continue.

- "[S]pecial masters, who are *supposed to assist* judges as factfinders . . . all *too often* have been *improperly used*…."[40]

Senator Kyl set the Senate members up as external judges of Special Masters, hoping to cleanse the system. Note Senator Kyl's use of the loaded adjective "lavish" and the passive, ambiguous "was allowed" that subtly encouraged listeners to believe Special Masters needed to be curtailed or eliminated.[41] Improperly directing these federal experts to investigate inside the prison systems allowed these Special Masters to function as tools of the Enemy, micromanaging and interfering with local and states' proper authorities.

Senator Kyl also used synecdoche, where a part is made to represent the whole. He used a few examples of Special Masters to tar the whole system:

- "[Special Masters allow] maintaining *lavish law libraries* to distribut[e] **up to** 750 tons of Christmas packages each year."[42]
- "One special master was *even allowed* to hire a chauffeur, at taxpayers' expense, because he said he had a bad back."[43]
- "In Arizona, special masters have *micromanaged* the department of corrections, and have performed all manner of services *in behalf of* convicted felons."[44]

Staying within the archetype of Savior, Senator Kyl surgically separated the Special Masters from "us," from powerful senators, from reasonable state judges who know better than pesky outsiders. The PLRA

38 Aristotle defined shame as "a certain pain or agitation over bad deeds, present, past, or future that appears to bring one into disrepute." Nicholas Higgins, *Shame on You: The Virtuous Use of Shame in Aristotle's Nicomachean Ethics*, 9.2 EXPOSITIONS 1, 2 (2015) (citation omitted).

39 *See* 141 CONG. REC. at S14,418.

40 *Id.* (emphasis added).

41 *See id.*

42 *Id.* (emphasis added).

43 *Id.* (emphasis added).

44 *Id.* (emphasis added).

discussions reflect a concern throughout penal institutions that the federal takeover of the Fifth Circuit federal prisons could happen anywhere, and no prison official would want that intrusion into their domains. One of the most famous and far-reaching uses of the Special Masters is, indeed, a prison case, *Ruiz v. Estelle*. This 1980 class-action injunction by Judge William Justice sent Special Masters throughout the entire Texas prison system and took until 1999 to finally be resolved.[45] Today the word Ruiz sends shivers down the collective backs of wardens.

D. "Let's Punish this Evil, Save State Court System, Save Taxpayers," with Senator Abraham

The mythic story continued. Senator Abraham wanted retribution for the loss of power and the insult to taxpayers caused by purportedly excessive prison-condition litigation. He saw punishment as appropriate and encouraged "hard time" for inmates; he assumed hard-line punishment would make society safer.[46] His draconian rhetoric appealed to the human propensity for negativity, for expecting or assuming the worse.[47] His heroes, of course, would be the senators who vote to pass the PLRA so that state officials could properly get back to work using their discretion to review inmate petitions. Senator Abraham produced a traditional Strawman fallacy,[48] mischaracterizing the courts' actions so the Heroes could attack the federal courts, which had "control" versus "elected officials."

- "[J]udicial orders entered under the federal law have effectively *turned control* of the prison system away from *elected officials* . . . over to the courts.[49]

45 *See generally* Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982); *see also Cruel and Unusual Punishment: Ruiz*, THE TEXAS POLITICS PROJECT, https://texaspolitics.utexas.edu/archive/html/just/features/0505_01/ruiz.htm (last visited May 2, 2018). Indeed, the entire Congressional record of the PLRA debates is replete with derogatory references to the "intrusions," "takeover," and "overreach." *Ruiz*'s success resulted in bitterness and righteous anger from most state and prison officials. Prison authorities just couldn't see the need for oversight by federal observers. For instance, former Texas warden Lon Bennett Glenn blames all current prison problems on the federal judge who overhauled prison conditions and thus created, he believes, the expensive, vast network of the Prison Industrial Network. He liked the way the system ran before Judge William Justice ruled against its barbarism. *See generally* LON BENNETT GLENN, THE LARGEST HOTEL CHAIN IN TEXAS: TEXAS PRISONS (2001).

46 *See* 141 CONG. REC. S14,418–19.

47 *See* Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 NEV. L. J. 605, 613–14 (2015) ("Because the negativity bias is thought to be an evolutionary adaption, it is very deeply seated in our psyches. It probably resides in the amygdala, the portion of the brain that is closely associated with emotional processing and fear responses.").

48 *See* Elizabeth Fajans & Mary Falk, *Shooting from the Lip:* United States v. Dickerson*, Role [Im]morality and Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 18 (2000) (discussing the concept of a "strawman argument").

49 141 CONG. REC. at S14,419 (emphasis added).

He mischaracterized the attempts to correct prison conditions by stating that they were undoing the national prison system.

- "[Federal judges' interventions were] undermin[ing] the legitimacy and punitive and deterrent effect of prison sentences."[50]

Sen. Abraham never let his audience forget that prisons were intended to be bad places for bad people. He used hyperbole and ambiguous language to describe the Chaos of the current system of federal judicial Power.

- "By *interfering* with the fulfillment of this punitive function [hard time], the courts are effectively *seriously undermining the entire criminal justice system*."[51]

Somehow this senator had decided that the federal judiciary had usurped the Throne and had taken indefinite control of prisons—for their own whims.

- "[N]o longer will prison *administration be turned over to Federal judges* for the indefinite future for the slightest reason."[52]

The "indefinite" control included intrusive micromanagement, already defined as a leading Evil in this mythic battle.

- "This balanced bill that . . . puts an end to *unnecessary judicial intervention and micromanagement.*"[53]
- "[Our bill] requires that the relief be *narrowly drawn* and be the *least intrusive* means of protecting the Federal rights."[54]
- "[Our bill provides that] States will be able to run prisons *as they see fit* unless there is a Constitutional violation . . . ."[55]

While the federal courts were micromanaging, they also cost taxpayers too much money. This fear-mongering reference is not followed by any specific costs.

- "The courts, in turn, *raise the costs* of running prisons far beyond what is necessary . . . ."[56]

50 *Id.*

51 *Id.* (emphasis added).

52 *Id.* (emphasis added).

53 *Id.* (emphasis added).

54 *Id.* (emphasis added).

55 *Id.* (emphasis added).

56 *Id.* (emphasis added).

If prisoners were rewarded by an interfering federal court's requiring prisons to follow the law, prisoners would receive an unearned profit.[57] In the scary world that Senator Abraham described, inmates who filed frivolous petitions would also profit when they were set free on society; no one wanted prisoners to profit. The PLRA would prevent their release, somehow, and provide a blow in the epic battle against the current Chaos.

II. Ipse Dixit

A second characteristic abuse of rhetoric is the use of ipse dixit,[58] to discourage questioning and critique.[59] The ipse dixit statements insert unsupported (bogus) terminology; false anecdote; fear-inducing language; false statistics; exaggeration; sarcasm and mockery; and the deliberate mingling of general and specific terms like "courts" and "liberal federal judges." By forcefully stating their conclusions as fact,[60] the four senators discouraged questioning. The false anecdotes and exaggerations reveal a contempt for the ideal discourse that a Congressional audience should have expected, and, perhaps most surprising and most discouraging, their stereotyping, mockery, and exaggeration reveal a staggering disrespect for the federal court system and its judges.

A. Sarcasm, Insult, and Abused Statistics with Senator Dole

Ipse dixit rhetoric can take many forms, including offering an incomplete perspective with statistics and using undefined terms. When Senator Dole introduced this bill, he labeled it the "new and improved version of S. 866 . . . to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."[61] He did not define "frivolous."[62] Senator Dole quoted American Enterprise Institute scholar

57 Franklin Zimring describes the underlying logic: "The modern politics of criminal justice involve rhetoric that imagines criminal sentencing as a zero-sum game between victims and offenders. If one prefers the victim, then punishment should be increased. Those who oppose increasing punishment must, in this view, prefer offender interests to victim interests. To live in this kind of world is to deny that expert opinion is of any real importance in making policy." Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L. J. 243, 253 (1996).

58 Ipse dixit statements are "Latin for 'he himself said it,' meaning the only proof we have of the fact is that this person said it." WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS (4th ed. 2007).

59 Fajans & Falk, *supra* note 48, at 17 (describing an ipse dixit argument as one "asserted without support but so forcefully as to discourage questioning or critique").

60 Senator Dole read into the record a letter from a group of state attorneys general that argued "[t]his amendment will take us a long way toward curing the vexatious and expensive problem of frivolous inmate lawsuits." 141 CONG. REC. at S14,418.

61 141 CONG. REC. at S14,413.

62 There is a legal distinction between "legally frivolous" (can't meet technical requirement for stating a claim) and "substantively frivolous" (no legitimate grievance). LYNN S. BRANHAM, LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL 40–42 (ABA

Walter Berns as the source of an underlying premise that the number of due-process and cruel-and-unusual-punishment complaints filed by prisoners "has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994."[63] Senator Dole did not report the underlying statistics—the astronomical growth of the prison population during those years.[64] Thus he created a false dichotomy of bogus terms that appeared to stand on solid ground.

Senator Dole abused statistics when he used them to insult the judiciary and mock the democratic concept of releasing overcrowded prisoners:

- "In 1993, . . . Florida put 20,000 prisoners on early release because of a prison cap order issued by a *Federal judge who thought* the Florida system was overcrowded and thereby inflicted cruel and unusual punishment on the State's prisoners."[65]

Senator Dole allowed an ambiguous "estimates" of costs for his basic generalization for "no-merit" inmate lawsuits:

- "The National Association of Attorneys General *estimates* that inmate civil rights litigation costs the States *more than* $81 million each year. Of course, most of these costs are incurred defending lawsuits that *have no merit whatsoever*."[66]

In addition to taking statistics out of context and insulting inmate petitioners, Senator Dole also appealed to the subliminal context of survival. He connected citizens' subliminal and explicit fears to the need for the PLRA. He referred to "violent criminals"[67] rather than, for instance,

1997). Undoubtedly, Senator Dole and his staff understood this distinction but did not raise it. However, the Cato Institute agreed that prisoners' lawsuits needed curtailing, apparently, and referred to the PLRA as "a revolution" against court orders that responded to inmate litigation. Ross Sandler & David R. Schmahmann, *Empowering Local Lawmakers: The Prison Litigation Reform Act*, CATO INSTITUTE (Feb. 10, 1997), https://www.cato.org/ publications/commentary/empowering-local-lawmakers-prison-litigation-reform-act (last visited Mar. 31, 2018). The authors observed that the PLRA "is a revolution longed for by many localities. Twenty-four prison agencies nationwide chafe under population caps imposed by federal courts, and more are subject to court orders regulating prison conditions in general." *Id.* Sandler and Schmahmann then repeated, verbatim, the incorrect and undocumented list of Michigan petition topics. *See id.*

63 141 CONG. REC. at 14,413. Professor Berns was known for dismissing the "pious sentiment" of citizens who believe that criminals need rehabilitation rather than death. *See generally* WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979). Senator Dole's use of Professor Berns' opinions and facts—right at the beginning of his floor speech—set the tone, the theme, and the conclusion to the debate.

64 Lynn Branham explains that while it is true that the number of state prisoner cases filed in federal court had risen dramatically in the years preceding passage of the PLRA, the numbers have not increased faster than the number of people put into state prisons over the years 1980–1995. BRANHAM, *supra* note 62, at 26–28.

65 141 CONG. REC. at S14,414 (emphasis added).

66 *Id.* at S14,413 (emphasis added).

67 *Id.*

"inmate petitioners." Anyone would fear a violent criminal. Then he connected these criminals with citizens' taxes. He stated that taxes would be "better spent prosecuting violent criminals" so that local law enforcement could better use that money "fighting illegal drugs, or cracking down on consumer fraud."[68] He thus reassured senators that their constituents would approve of the PLRA.

His vocabulary screamed "fear!" and compared court filings to the plague and explosions: "Explosion," "plaguing," "astronomically," "no merit whatsoever," "thousands of violent criminals back on city streets," "disastrous results," "alarming explosion in the number of frivolous lawsuits," "the litigation explosion now plaguing our country." The prison world as he exaggerated it was out of control, and the federal judiciary's role in the disaster needed to end.

Senator Dole mocked inmates' prison problems: "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety. The list goes on and on."[69] Importantly, the list is also false. The Hon. Jon O. Newman, Circuit Judge for the United States Court of Appeals for the Second Circuit, investigated the exaggerated claims of the Attorneys General, news reports, and legislators about three cases Senator Dole used to exemplify inmate complaints. Judge Newman stated, "I was skeptical of the description of these three cases because it had not been my experience in twenty-four years as a federal judge that what the attorneys general describe was at all 'typical' of prisoner litigation."[70] Judge Newman decided to review the court documents. Among the facts were these:

> In the "chunky peanut butter" case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account $2.50 under the following circumstances. He had ordered two jars of peanut butter, one sent by the canteen was the wrong kind, and a guard had willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged $2.50 for the item he had ordered but never received. . . . Their misleading characterization of the case was repeatedly

68 *Id.*

69 *Id.*

70 Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521–22 (1996).

cited during congressional consideration of proposals to limit prisoner litigation.[71]

Professor Steve Johansen distinguishes between stories meant to represent truth and those intended as mere example of what might happen;[72] these PLRA stories were repeated as truth rather than hypotheticals.

Senator Dole also abused the standards of professional rhetoric by cherry-picking one academic to quote during this last Senate floor presentation.[73] That academic, current University of Pennsylvania Professor John J. DiIulio Jr., would later be described by the *New York Times* as "super scapegoating" troubled youths through his coining of the term "superpredator" and his apocalyptic pronouncements of impending disasters from youth crime that only harsh prison sentences could restrain.[74] In addition, he harshly criticized federal judges for being too soft on juveniles.[75] Senator Dole quoted one of his quips during the debate regarding a federal judge:

> • "*Federal Judge* Norma Shapiro has *single-handedly decriminalized property and drug crimes* in the City of Brotherly Love . . . Judge Shapiro has done what the city's organized crime bosses never could; namely, turn the town into a major drug smuggling port."[76]

In scholarly articles and T.V. interviews, the professor had repeatedly predicted an impending disaster that required harsh prison sentences to restrain.[77] The *New York Times* reporter Clyde Haberman later summed up the hysteria and false statistics that Senator Dole alluded to: "What

71 *Id.* at 522.

72 Steven J. Johansen, *This is Not the Whole Truth: the Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L. J. 961, 988–89 (2006).

73 *See* 141 CONG. REC. at S14,414

74 Diulio, then a political scientist at Princeton and now a Professor of Politics, Religion, and Civil Society at the University of Pennsylvania, popularized the term "superpredator" for youths, a concept that led to adult sentencing. *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear,* N.Y. TIMES, Apr. 4, 2006, https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html (last visited Mar. 31, 2018). This neologism labeled the fear of masses of youths destroying American society; it was later called "super-scapegoating" by critics. *See id.*

75 *See id.*

76 141 CONG. REC. at S14,414 (emphasis added). Judge Shapiro's recent obituary described the relevant case: "In the best-known case involving her, Judge Shapiro oversaw a prison overcrowding case that would be part of the court system from 1971 to 2001. In 1986, she set a cap on the number of inmates to be allowed in the city prison system. When the limit was reached, those charged with nonviolent crimes were let go. The actor Charlton Heston, then president of the National Rifle Association, denounced her for the cap. Others expressed problems with her decision." *U.S. District Senior Judge Norma Shapiro, 87*, PHILA. INQUIRER, July 23, 2016, http://www.philly.com/philly/news/20160723 _U_S_District_Senior _Judge_Norma_Shapiro_87.html (last visited Mar. 31, 2018).

happened with the superpredator jeremiads is that they proved to be nonsense. . . . [A] funny thing happened on the way to the apocalypse. Instead of exploding, violence by children sharply declined."[78] Yet leaning on the academic credentials of Professor DiIulio, Senator Dole described a city that put "thousands of violent criminals back on the city streets, often with disastrous consequences."[79] Combining sarcasm and insult with synecdoche, he relied on Professor DiIulio's insult of a federal judge as an example of "liberal Federal judges" who used the population prison cap to release criminals.[80] Following the mythological journey of the Hero saving civilization, Senator Dole repeated this disrespectful language and breached the ethic of both ethos and pathos.[81] In their essay *Shooting from their Lip*, Elizabeth Fajans and Mary Falk note that

> Even representative advocates [like senators] are constrained, however, by the threshold "veracity" principle, which forbids lying and gross distortions. Even though representative advocates do not purport to speak in their own voice [e.g., senators speak for constituents], they can still be guilty of falsehood when they purport to recount facts. Although "certain uses of rhetoric or psychological manipulation to highlight evidence and gain attention are permissible, even if undesirable . . . , outright lying and gross distortion of facts are prima facie . . . criticizable."[82]

B. Exaggerated and Loaded Terminology with Senator Hatch

In his speech, Senator Hatch masterly manipulated rhetoric, first using language to invoke fear (*ad baculum*[83]) and then claiming that the PLRA would "restore balance" and "limit" court orders to "actual violations."[84] He began with terminology and anecdotes that pointed to a runaway federal judiciary. The PLRA would save Us:

- "[The PLRA will] help *restore balance* . . . and will *ensure* that *Federal court orders are limited* to remedying actual violations of prisoners' rights, *not letting prisoners out of jail*."[85]

His hyperbole was designed to sway the audience with its references to imbalance, to convince his audience that the Senate's job was to vote for the PLRA and thus restore the Traditional Kingdom. As Joseph Campbell postulates, "That's the basic motif of the universal hero's journey—leaving

77 *See* Haberman, *supra* note 74.

78 *Id.*

79 141 CONG. REC. at S14,414

80 *Id.*

81 *See generally* Fajans & Falk, *supra* note 48, at 20, 22, 43.

82 *Id.* at 10 (quoting Robert Audi, *The Ethics of Advocacy*, 1 LEGAL THEORY 251, 252 (1995)).

83 ARVATU & ABERDEIN, *supra* note 13, at 5.

84 See 141 CONG. REC. at S14,418.

85 *Id.* (emphasis added).

one condition [judicial chaos] and finding the source of life [enact the PLRA] to bring you forth into a richer or mature condition."[86]

To reach that Kingdom, Senator Hatch exaggerated with flame-thrown adjectives. The term "vicious crimes" had nothing to do with prison conditions or habeas request. Rather, it evoked an image of murderers and child rapists. Of course, that term provokes. Similarly, the PLRA would not actually "slam shut the revolving door on the prison gates."[87] The PLRA does not address recidivism. Senator Hatch misdirected the topic to confuse prison-condition litigation with the well-publicized problems of reoffending inmates who eventually are returned to prison. Those Senators who wanted to be seen as tough-on-criminals would be subliminally affected by the active, violent verb "slam shut." Senator Hatch continued misdirecting by labeling the "revolving" door of prison "gates."[88] Behind all that negative terminology was the unspoken, ironic reality: the PLRA does not address recidivism.

Sen. Hatch understood his audience and appealed to them from a perspective of old-fashioned intentionalists, those who "transmit [traditions] from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."[89] Insisting that "it is time to wrest control . . . from lawyers and inmates" is "loaded" terminology, also. He pushed the fear buttons of listeners with a physical image of having to pull control back to the states, to pull that control from lawyers, to pull that control from inmates. This language reiterates his theme that the Traditional Kingdom was under attack. Professor Robert Ferguson describes this as "a rhetoric of inevitability that translates into a language of obedience."[90] Without intervention, Tradition would be doomed, so the Senate simply had to step in and save the day.

Senator Hatch offered hyperbole as truth and vivid inmate stories as examples to sway listeners to believe that inmate petitions were all frivolous; for instance, employing synecdoche, he used one example to imply the whole system was a scheme against law-abiding citizens. Senator Hatch used those vivid stories to crystalize the anecdotes in listeners' minds. Each story stands for a larger "truth." As Professor Berger says, Kairos is a crystallization of the "essential moment [that] leaves us with a lasting image that stands in for and evokes a larger context, picture, or story."[91] Whatever the audience might have thought of inmates before,

86 *See* CAMPBELL WITH MOYERS, *supra* note 7, at 152.

87 *See* 141 CONG. REC. at S14,418.

88 *Id.*

89 Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 200, 215 (1990).

90 *Id.*

91 Berger, *supra* note 10, at 155.

or of prisoner litigation, now they will remember that Senator Hatch reported that an inmate sued over trivia—an inferior athletic shoe.[92]

- "In one *frivolous* case in Utah, an inmate sued *demanding* that he be issued Reebok or L.A. Gear brand shoes . . . ."[93]

How ridiculous that story is . . . and yet how false because the senator did not provide a full picture as he presented the argument. He effectively created a distorted picture of indulged inmates. Notice the verb choice for the prisoner's petition to the court: he "demanded." Exaggerated and slanted language may initially move the audience, but the technique comes with a cost to credibility. And beyond the terminology? The anecdote was bogus: when an inmate pays for a brand of shoe from his scanty commissary allowance, he should get that shoe. When he instead receives inferior goods, then he has been robbed of his limited money. Robbed while in prison. When Judge Newman researched the truth behind these anecdotes, he was critical of these dehumanizing false examples. The judge was aware that critics of prisoner litigation believed small-sum complaints should be relegated to forums other than federal district courts. "But such a sum is not trivial to the prisoner whose limited prison funds are improperly debited. The more important point is that those in positions of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them."[94] Certainly inmates file lawsuits over nonsense; the "foil hat" group will not go away until we expand mental health coverage outside of jail and prison walls. But trivializing an inmate's legitimate complaint made a mockery of all complaints.

That lasting image of an inmate whining over Reebok shoes fulfilled that Kairos moment, that point in time that crystallizes in the listeners' minds.[95] Senator Hatch's audience was left with a memorable example of the absurd waste of taxpayer money, "huge costs" spent litigating trivia, which was a "ridiculous waste of taxpayers' money."[96]

Senator Hatch added a second anecdote as an example of frivolous litigation, but there are even more problems with the second story.

- "[A]n inmate deliberately flooded his cell, and then sued the officers who cleaned up the mess because they got his Pinochle cards wet."[97]

First, the Utah legal system doesn't seem to have a record of it. Second, it defies logic as well. Cherry-picking or inventing nonurgent,

92 *See* 141 CONG. REC. at S14,418.

93 *Id.* (emphasis added).

94 Newman, *supra* note 70, at 522.

95 Berger, *supra* note 10, at 148–49.

96 *See* 141 CONG. REC. at S14, 418.

97 *Id.*

non–life threatening petitioners demeans those who appeal for serious violation of the Constitution or even prison policy. His out-of-context inmate complaints mocked inmates and their appeals.

- "[A] system *overburdened* by *frivolous* prisoner lawsuits. Jailhouse lawyers with little else to do are *tying our courts in knots* with an *endless flood of frivolous litigation*."[98]
- "[A] *flood of frivolous lawsuits* . . . in Federal courts . . . *a staggering 15% increase* over the number filed the previous year."[99]

Adding to his extravagant "flood" metaphor, he ignored any statistical context to exaggerate a "vast majority" as having "validity." He did not distinguish between cases, for instance those disposed of in other forums, disposed of when inmates dropped suits or had their cases mediated. Somehow, from some undisclosed source, he determined that 3.1 percent of inmate petitions had "validity."

- "The *vast majority* of these suits are *completely without merit*."[100]
- "[O]nly a *scant 3.1 percent* have enough validity to reach trial."[101]

If his audience were not convinced with these "statistics," Senator Hatch repeated:

- "The *crushing burden* of these *frivolous* suits makes it difficult for courts to consider meritorious claims."[102]

Most stunning of all the mockery is Senator Hatch's mockery of the intentions of the federal judiciary. He said that federal judges release inmates for "mere technicalities."[103] He did not offer one example of these technicalities. He said that federal court orders had, in the past, just "let[] prisoners out of jail."[104] Senator Hatch insulted the federal judiciary with language that attacked their motives, their rulings, and the consequence of the rulings, labeling the process as "another kind of crime committed against law-abiding citizens."[105] He repeated his colleague's insistence that federal litigation allowed judges to "micromanage." If the Senate passed the PLRA, they would keep frivolous litigation "out of reach of overzealous Federal courts."[106] He didn't point to any particular judge but globally insulted them all.

98 *Id.* (emphasis added).

99 *Id.* (emphasis added).

100 *Id.* (emphasis added).

101 *Id.* (emphasis added).

102 *Id.* (emphasis added).

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

His rhetoric of disdain, of exaggeration and mockery, led listeners to believe that relief from Evil was possible only with the passage of the PLRA. And the alternative if the PLRA was not passed? If the Senate could not stop the Destruction of States' Rights jurisdiction over prison litigation? Obviously chaos, murder, mayhem, and destruction of the American Way.

- "It is past time to *slam shut the revolving door on the prison gate* and to put the key safely out of reach of *overzealous Federal courts.*"[107]

C. False Stories and Misquotes with Senator Kyl

Senator Kyl narrowed his attack to the Special Masters as the extension of the out-of-control federal judges; federal judges allowed Special Masters to be extravagant, to be an expensive burden on taxpayers, and to perform duties outside their purview.[108] His "story" was one of the battle between court-appointed overseers and the burdened taxpayers. His exaggerated rhetoric condemned special masters who were "*supposed* to assist judges" but had "too often been *improperly* used."[109] There, Senator Kyl stepped outside the bounds of professional rhetoric and judicial fact. They did, indeed, assist judges, but Senator Kyl rushed through the negative implication. Moreover, his reference to "improperly used" had little factual basis.

He used several examples to tar all privileges given to Special Masters, implying system-wide abuse: he accused the Arizona Special Masters as being responsible for distributing to Arizona prisons and prisoners' families "up to 750 tons of Christmas packages each year."[110] Why are Christmas packages in this story? Because this telling detail might become the Kairos moment, that moment listeners remember and are both disgusted with a hypothetical overreach and concerned about that overreach affecting taxpayers' budgets. A second anecdote painted Special Masters as pampered demigods riding with chauffeurs.[111] Using false inference, Senator Kyl mocked one Special Master's need for a temporary driver. Using the rhetorical device of synecdoche, he implied, by extrapolating from one example, that Special Masters have a lavish lifestyle courtesy of the federal judiciary and tax dollars.[112]

107 *Id.* (emphasis added).

108 *See* 141 CONG. REC. at S14418 (remarks of Senator Kyl).

109 *Id.* (emphasis added).

110 *Id.*

111 *See id.*

112 *See generally id.*

Senator Kyl's examples appealed to the collective, subliminal knowledge that all inmates are tricksters out to take anything they can from the state. Thus, despite months of earlier testimony debunking this story, Senator Kyl again mocked an inmate who had petitioned in federal court about "being served chunky instead of creamy peanut butter,"[113] making no reference to peanut allergies, or to an inmate in solitary confinement who filed a petition because he had been served only peanut-butter sandwiches three times a day for months, or as the Honorable Jon Newman discovered, the inmate who did not receive his commissary order.[114]

After tossing in the repeated reference to peanut butter, Senator Kyl mischaracterized yet another case, an Arizona case that the judge allowed before the court. Senator Kyl said all the time and money involved in that federal petition centered around the consequences of an inmate "denied the use of a Gameboy video game."

> "[I]n response to almost any perceived slight or inconvenience—being served crunchy instead of creamy peanut butter, for instance, or being denied the use of a Gameboy video game—a case which prompted a lawsuit in my home state of Arizona."[115]

Perhaps Senator Kyl and staff did not investigate the facts of the case. Perhaps. By cherry-picking facts, Senator Kyl ignored the reason a court would agree to hear this case: After his own investigation into the actual facts surrounding the peanut butter incident, Judge Newman chided the prison because it had "incorrectly debited [the inmate's] prison account . . . . [S]uch a sum is not trivial to the prisoner whose limited prison funds are improperly debited. The more important point is that those in position of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them."[116] Half-truths are simply false. Senator Kyl chose to reduce the underlying facts so he could again insult the judiciary, but he did so at a cost to his professionalism.

Senator Kyl's most egregious conflict with Aristotle's ideal rhetoric is his sarcasm of and belittling of inmate complaints. His concrete examples echoed throughout the Senate chambers with the theme of Chaos and implied that inmates file frivolous petitions merely to clog the system and to allow the federal courts to swoop in for a massive takeover of state prison systems. He even told his listeners that inmates' filing was "free."[117]

113 *Id.*

114 *See* Newman, *supra* note 70, at 520–22.

115 *See* 141 CONG. REC. at S14418 (remarks of Senator Kyl).

116 *See* Newman, *supra* note 70, at 521–22.

117 *Id.*

It was not free to indigents then, and it is certainly not free after the enactment of the PLRA.[118]

Senator Kyl apparently found it strange that inmates appealed outside their own state to the federal courts, saying that "Federal prisoners are churning out lawsuits . . . ."[119] Here, he blamed both the federal laws and the federal courts: "The vast majority of frivolous suits are brought in federal courts under federal laws . . . ." [120] Those pesky federal laws include the Constitution and its amendments, including admonition against cruel and unusual punishment and free speech. Senator Kyl's language normalized the idea that, through this legislation, Congress could obliterate a traditional duty of federal courts. He didn't, apparently, blush or blink. Rather, his inflammatory rhetoric led listeners to believe that the PLRA would overcome Chaos and restore Tranquility to the entire criminal-justice system.

The senator concluded his testimony with overt sarcasm about victimization of law-abiding citizens: "These prisoners are victimizing society twice—first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars . . . ."

- "Federal prisoners are *churning out lawsuits* with no regard to this cost to the taxpayers . . . we can no longer ignore *this abuse* of our court system and taxpayers' funds."[121]

With "our" traditional, power-filled world in danger, "we cannot ignore this abuse of our court system and taxpayers' funds."[122]

D. Punitive Hard Time and Mockery with Senator Abraham

Senator Abraham's repetitive word choice reiterated the image of a run-amuck federal judiciary and expensive, coddled inmates.[123] His strategy employed the language of War on Crime, which every Senator understood to be really the War on Criminals—New York Governor Rockefeller's incendiary laws that increased sentences and differentiated between heroin and crack, for instance. These punitive laws sent hundreds of citizens to prison but did not attack the actual source of drugs or causes

118 Under the PLRA, in order to file a federal section 1983 claim, inmates without funds (in forma pauperis) must send an initial court fee of twenty percent from their commissary account of the larger of either their monthly deposit average or their balance for six months. *See* 28 U.S.C § 1915(a)(1)(2012).

119 141 CONG. REC. at S14,418.

120 *Id.*

121 *Id.* (emphasis added).

122 *Id.*

123 See 141 CONG. REC. at S14,418–19 (remarks of Senator Abraham).

of drug addiction.[124] Senator Abraham followed Rockefeller's lead and duplicated the newly invoked fears by insisting that the chaotic federal-court system "undermine[d] the legitimacy and punitive and deterrent effect of prison sentences," despite the PLRA's more limited scope.[125] He, too, insisted that the federal courts created the current chaos by usurping the establishment's Control of the Kingdom's criminals.

- "[J]udicial orders entered under the federal law have effectively *turned control* of the prison system *away from elected officials* . . . and over to the courts."[126]
- "This [balanced bill] . . . puts an end to *unnecessary judicial intervention and micromanagement*."[127]
- "[T]he decree has been a source of *continuous litigation and intervention* by the court into the *minutia of prison operations*."[128]

He wanted to keep the criminal behind bars as long as possible, without that "intervention" by federal judges. To pull his audience with him as he took steps to deprive inmates of their right to appear before a court, he employed emotionally incendiary language, mocking inmate complaints.

Senator Abraham rang the bell of the unconscious negative archetype for "prisoners" when he insisted that those who are incarcerated "deserve to be punished" and that their lives should be governed by "the old concept known as 'hard time.'"[129] Bong! Went a subconscious bell inside a listener–reader's head. That terminology harkens back to days of overseers, of chains connecting men who worked in Southern cotton fields, overseen by armed officers on horseback.[130]

Senator Abraham contrasted liberal federal-court-ordered remedies with hard time and, rhetorically, began normalizing the audience's reaction to "punitive."[131]

124 As New York Governor, Nelson Rockefeller passed drug laws against low-level criminals that kept people behind bars for decades. His zero-tolerance approach became the norm, and changed how the United States punished citizens. *See, e.g.*, Brian Mann, *The Drug Laws that Changed How We Punish*, NPR, Feb. 14, 2013, https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish (last visited Mar. 31, 2018).

125 141 CONG. REC. at S14,419.

126 *Id.* (emphasis added).

127 *Id.* (emphasis added).

128 *Id.* (emphasis added).

129 *Id.*

130 *See generally* VIVIEN M.L. MILLER, HARD LABOR AND HARD TIME: FLORIDA'S "SUNSHINE PRISON" AND CHAIN GANGS (2012). Interestingly, penologists know the term to reflect the full length of a prison sentence (like 'flat time', or a maximum security prison, and even a difficult prison condition). *See* CURT R. BLAKELY, PRISONS, PENOLOGY AND PENAL REFORM: AN INTRODUCTION TO INSTITUTIONAL SPECIALIZATION 65–66 (2007).

131 141 CONG. REC. at S14,419.

- "By *interfering* with the fulfillment of this *punitive* function [hard time], the courts are effectively *seriously undermining the entire criminal justice system*."[132]

This contrast is false. Someone living out a prison sentence is indeed doing hard time, but filing a petition about prison conditions has nothing to do with that hard time. A prison sentence will still be hard, even if the inmate receives proper medical care. It will still be hard, even if his legal mail is now restricted from an illegal search. The logic-gap comparison undermined the truth of prison sentences and the truth of inmate filings.

Senator Abraham switched from invoking hard times to fear mongering about economics. In his testimony, he never revealed the actual costs of either former prison settlements or the costs of court-ordered improvements. Thus, Senator Abraham evoked fear by painting a false picture. His language harked back to the theme of the stolen Throne: federal judges took away state control of prison administrators "for the indefinite future for the slightest reason" and raised "the cost of running prisons far beyond what is necessary . . . ."[133] He did not offer financial statistics for "necessary" or for implied run-away costs.

- "[Taxpayers] deserve better than to have their *money* spent, on keeping prisoners in conditions *some Federal judge feels are desirable*, although *not required* by any provision of the Constitution or any law."[134]

Taking anecdotes out of context is also false rhetoric. To build on the fears of legislators' worries about budgets and their constituents' money, Senator Abraham enumerated six specific complaints about prison life that the court monitors found deficient. His list mocks inmates' complaints. What if listeners had time and experience to reflect on his abbreviated descriptions of actual complaints that reached the federal courts? Let's suppose we add context to his version of some complaints:

"First, how warm the food is."[135]

Suppose food taken to segregated inmates always arrives cold and frequently has not been cooked to proper temperature in, say, pork. Serving cold food could mean serving contaminated food.

"[S]econd, how bright the lights are."[136]

Suppose Senator Abraham ever slept in prison? The lights are on 24/7. If the bulbs are very, very bright, it's impossible to sleep. Continuous

132 *Id.* (emphasis added).

133 *See id.*

134 *Id.* (emphasis added).

135 *Id.*

136 *Id.*

bright light is used to torture prisoners; it disrupts sleep patterns that directly affect attitudes and behavior.[137] Suppose the wattage is so low that inmates cannot read or prepare food. Light is essential in windowless cells, and experts have testified as to the effects of low light on mental health.

"[T]hird, whether there are electrical outlets in each cell."[138]

Suppose inmates did not have electricity to run the tiny fans that help air circulation—in Texas, for instance, inmates suffer 120 degrees with no air conditioning, and the small fans are essential. Other inmates make coffee, read, or heat meal supplements. Apparently, Senator Abraham considered these electrical uses "nonessential."

"[F]ourth, whether windows are inspected and up to code."[139]

Suppose a prison's windows did not allow in light and air, or the opposite: they allowed insects and rodents, rain and snow. If a monitor has been required in Michigan to inspect prison windows, surely Senator Abraham understood that a three-month Michigan snow could seriously injure or kill an inmate.

"[F]ifth, whether prisoners' hair is cut only by licensed barbers."[140]

Suppose an unhappy, untrained inmate is chosen to cut others' hair. Some prisons offer barber schools. Some don't. All require certain prisoner hygiene, including hair length and condition. If the prison does not require a licensed barber, an inmate might get sliced and diced.

"[A]nd sixth, whether air and water temperature are comfortable."[141]

Suppose you are living in Michigan's below-freezing temperatures, locked in by bars. Or the opposite: it would be cruel and unusual punishment to live in 120-degree temperatures, locked in by bars. (In 2017, Texas prison officials and some state legislators are still attempting to defend the 2012 heat-related death of seven inmates.)[142] Obviously air

137 "Due to the invention of the electric lightbulb in the late 19th century, we are now exposed to much more light at night than we had been exposed to throughout our evolution. This relatively new pattern of light exposure is almost certain to have affected our patterns of sleep. Exposure to light in the late evening tends to delay the phase of our internal clock and lead us to prefer later sleep times. Exposure to light in the middle of the night can have more unpredictable effects, but can certainly be enough to cause our internal clock to be reset, and may make it difficult to return to sleep." *External Factors that Influence Sleep*, DIVISION OF SLEEP MEDICINE AT HARVARD MEDICAL SCHOOL, http://healthysleep.med.harvard.edu/healthy/science/how/external-factors (last visited Mar. 31, 2018).

138 141 CONG. REC. at S14,419.

139 *Id.*

140 *Id.*

141 *Id.*

142 The Fifth Circuit Court of Appeals ruled, in 2012, that extreme heat can violate prisoners' rights. *See* Blackmon v. Garza, 484 Fed. App'x 866 (5th Cir. 2012). Ex-inmate Eugene Blackmon sued because the heat index was 130 degrees in his cell. In an unpublished opinion, the Fifth Circuit determined that excessive heat could have resulted from deliberate indifference by prison officials because windows in the unit had been sealed shut. *See id.* In 2015, the Fifth Circuit again investigated heat-related injury and deaths in *Ball v. LeBlanc*, 792 F. 3d 584 (5th Cir. 2015). The Fifth Circuit looked at four issues—evidence, Eighth Amendment, disability, and lower-court injunction—in an Angola death-row case and determined that the excessive

temperature should be "comfortable" if not 5-star-hotel cool. And water temperature? In Virginia, the showers were so hot they scalded. In Florida, guards forced one mentally ill inmate into a shower with boiling water to clean off his excrement. When they finally allowed him out, his boiled skin slipped off to the ground, a condition known as "slippage." He died of infection and exposure.[143]

Senator Abraham wanted state courts and prison officials to return inmate conditions to the way they were supposed to be: hard-time conditions.

After mocking inmates, Senator Abraham degraded and mocked the federal judiciary: "The legislation we are introducing today will return sanity and state control to our prison systems."[144] Thus the federal judges are . . . insane? Or their decisions are? Perhaps listeners did not catch the blatant irony of Senator Abraham's insistence that legislators return prisons to the state officials, so that the PLRA could "allow States to run prison as they see fit."[145] Ironically, if the federal judiciary (They) improved the prison system, their action was "judicial intervention." If state courts (We) did, the world was again in balance. The senators, as Heroes to state and prison officials, should vote for the PLRA to return the proper authority to the very prison staff that created or ignored the pressing prison problems.

heat did, indeed, violate the Eighth Amendment. *See id.* Prison systems are currently scrambling to comply with this new reality while accepting the state budget realities too. *See* Gabrielle Banks, *Prisoners Reach Settlement with Texas in Air Conditioning Case*, GOVERNING, Feb. 5, 2018, http://www.governing.com/topics/public-justice-safety/tns-texas-prison-air-conditioning.html (last visited Apr. 28, 2018). Other cases are pending, including one pursued by the family of Larry Gene McCollom against the Texas Department of Criminal Justice for deliberate indifference over prison temperatures that led to death. Mr. McCollum, convicted of forgery, had no drinking cup or fan. *See generally* Emily Foxhall, *Family Sues TDCJ over Heat-related Death*, THE TEXAS TRIB., June 26, 2012, https://www.texastribune.org/2012/06/26/tdcj-files-wrongful-death-lawsuit (last visited Mar. 31, 2018).

143 *See generally* Julie K. Brown, *Behind Bars, a Brutal and Unexplained Death*, MIAMI HERALD, May 17, 2014, http://www.miamiherald.com/news/local/community/miami-dade/article1964620.html (last visited Mar. 31, 2018). Darren Rainey, a mentally ill inmate with one month left on a two-year sentence for cocaine possession, died after the deliberate scalding shower inflicted by guards. Florida fired thirty-two employees afterwards, finding wide-spread corruption and malignant retribution. *See id;* Julie K. Brown, *Dade Correctional Institution warden fired after inmate death reported*, MIAMI HERALD, July 17, 2014, http://www.miamiherald.com/news/state/ article1975951.html (last visited Apr. 28, 2018). The Florida Department of Corrections also dismissed thirty-two guards in September of 2014 "under intense scrutiny." *See Fla. Prison Guards Won't Face Charges in Darren Rainey's 2012 Shower Death, Family 'Disappointed and Heartbroken'*, N. Y. DAILY NEWS, Mar. 19, 2017, http:// www.nydailynews.com news/national/fla-prison-guards-won-face-charges-darren-rainey-death-article-1.3002638 (last visited Apr. 28, 2018).

144 141 CONG. REC. at S14,419.

145 *Id.*

III. Repetition and Ignoring Both the Facts and Context

One characteristic of successful political rhetoric is **repetition**, especially repetition of a thematic word or phrase: repeatedly referring to prisoner litigation as "frivolous," for instance. The pejorative adjective coded all inmate litigation into a bundle so that listeners–readers could not separate nonfrivolous and frivolous filings. The oft-repeated adjective obscured the legal differences between the cases. The floor debate focused on "frivolous" filings but extended, surreptitiously, to both. Using synecdoche for "prisoner" and "inmate" along with "violent criminal" also blurred a distinction between one example and all inmates. The four senators' continued repetition confused a listener's ability to recognize alternatives ("citizen," "lawbreaker," "person filing"). Plus, the four speakers repeatedly coded federal judges as "liberal judges" throughout.

Senator Dole needed his audience to appreciate the Chaos he wanted to overcome with the PLRA. Thus he divided the American judiciary into federal judges (bad—They let criminals go free) and state officials and judges (good—They understand Our needs). Senator Dole used the court-ordered prison cap as a Strawman that he insisted had created the "explosion" in inmate lawsuits. To achieve his goals, he repeated his terms:

- For inmates and courts: "convicts," "violent criminals," "thousands of violent criminals," "judges issuing orders," "restrain liberal Federal judges," "micromanage," "judicial micromanagement," "so-called prison population cap," "prison cap order," "court-ordered prison cap."[146]
- For consequences: "disastrous consequences," "alarming explosion," "explosion now plaguing our country," "complaints . . . grown astronomically," "no merit whatsoever," "disastrous consequences."[147]

Next, Senator Hatch pointed the finger of Judgment by repeating (and repeating) negative thematic words of the federal courts' Chaos and its causes; on the other hand, he offered positive phrases about the PLRA solution:

- For Chaos: "letting prisoners out of jail," "overzealous Federal courts," "micromanaging," "system overburdened," "frivolous prisoner lawsuits," "endless flood of frivolous litigation," "vicious crimes," "Frivolous lawsuits," "staggering 15% increase,"

146 141 CONG. REC. at 14,413–14.

147 *Id.*

"completely without merit," "crushing burden," "frivolous suits," "crushing burden," "frivolous claims," "frivolous case," "ridiculous waste," "huge costs."[148]

- For positive PLRA: "restore balance," "slam shut the revolving door."[149]

Senator Kyl followed up with a steady stream of repeated, speculative, and purported "facts" about the collective sins of federal courts and Special Masters. He hammered away at Special Masters' oversight, repeatedly insisting that Special Masters were the worst of the worst in the federal court system.

- For the federal system and Special Masters: the federal judiciary "improperly used" them; the Special Masters helped the judiciary that "micromanaged"; Special Masters offered "all manner of services"; Special Masters provided services to "convicted felons."[150]
- For consequences of Special Masters to taxpayers: they allowed taxpayers to "foot the bill" with "no regard to this cost to the taxpayers"; "this abuse of our court system and taxpayers' funds." (Just reviewing this dizzying list might persuade a reader to conclude that the Special Masters were indeed out of control.)[151]

Finally, Senator Kyl repeated insults of the petitioning inmates:

- For the federal system: filing grievances was a "recreational activity"; jail-house lawyers were usually "long-term residents of our prisons"; inmates would always file because "it's free"; "a courtroom is certainly a more hospitable place to spend an afternoon."[152]

Next up with Senator Abraham who repeated "intervention by the court into the minutia of prison operations," "courts are effectively seriously undermining the entire criminal system," "federal courts undermine," and "federal intervention." [153]

- For dire consequences: "no longer will prison administration be turned over to Federal judges," and "end to unnecessary judicial intervention and micromanagement."[154]

148 141 CONG. REC. at S14,418.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 141 CONG. REC. at S14,419.

154 *Id.*

Senator Abraham also repeated his economic fears through ambiguous phrases: "not spending more taxpayer money but by saving it," "accountable to the taxpayer," "raise the costs of running prisons far beyond what is necessary," "People deserve to keep their tax dollars or have them spent on projects they approve," "money spent," and "don't need it spent on defending against endless prisoner lawsuits." [155]

Any one of the above negative and ambiguous characterizations could be recast into a context that would change the image. Any one of these words and phrases could be fairly argued. Instead, the senators used repetition and half-truths about Chaos in the federal-court system that not only allowed but encouraged frivolous inmates to petition the courts and thus burden taxpayers.

IV. Silencing or Ignoring Opposition

A subtle abuse of rhetoric is the silencing of any opposing position. Missing from the brief PLRA floor discussion was the distinction between violent and nonviolent prisoners. Missing was any reference to the historically distinct roles of state and federal courts. Missing also was even a fleeting mention of a federal-prison decision that worked. In this final presentation for the Senate vote, missing is a reference to any individual in jail or prison who filed a nonfrivolous complaint. Silence on these distinctions is not innocent. You must ask, Who profited from these silences? Answer: Those who purport to save the Kingdom from Evil.[156]

Senator Dole wanted, really wanted, the federal judiciary taken out of these large prison consent-decree decisions so that they could return the grievance quagmire back to the state officials whose laws had, in part, created the quagmire. His testimony made no mention of alternative solutions: prison design capacity, jail reimbursement, "outsourcing" inmates to balance overcrowded facilities, or any of the other nuances of the over-population problem. What else is missing from his testimony? He neglected to mention the number of required penological steps that any inmate must take prior to reaching a federal court; he neglected to

155 *Id.*

156 *See* Andre Douglas Pond Cummings, *"All Eyez on Me": America's War on Drugs and the Prison Industrial Complex*, 15 J. GENDER, RACE & JUST. 417, 433–42 (2012) (detailing the profit incentives inherent in the Prison system). Officials and stockholders within the Prison Industrial Complex profit. State power brokers who need budgets to flow their way profit. Local sheriffs and constables profit. Certainly, inmates do not. *See id*. For example, an Alabama sheriff certainly profited from the Prison Industrial Complex: He legally took $750,000 away from inmates' food budget and used it for his oceanside home. *See* Camilla Domonski, *Alabama Sheriff Legally Took $750,000 Meant to Feed Inmates, Bought Beach House*, NPR, Mar. 14, 2018, https://www.npr.org/ sections/ thetwo-way/2018/03/14/593204274/alabama-sheriff-legally-took-750-000-meant-to-feed-inmates-bought-beach-house.

mention how few pro se filings pass through the lower courts before reaching the federal courts.

Senator Hatch withheld context for statistics. His silence on the full picture skewed his entire argument. In hyperbole, Senator Hatch reported a "flood" of federal-court lawsuits, up fifteen percent from the previous year.[157] Yet. Yet he did not put that statistic into the overall population increase in the prisons. Statistics need perspective: Senator Hatch taunted that in prison litigation, "only a scant 3.1 percent [of cases filed] have enough validity to reach trial."[158] Perhaps Senator Hatch did not know how difficult it was to get complaint forms, how state and prison officials thwarted litigation, how few attorneys take inmate cases so that the statistic on pro se filings swamps those petitions underwritten by competent attorneys. He contended that in Utah, 297 inmates had filed suit in 1994, which comprised twenty-two percent of all federal civil cases filed in Utah that year.[159] But missing is the number of suits filed before the prison explosion. Prisoners first filed in federal courts only for constitutional violations; was there a cluster of violations that year? Did the courts routinely vote in favor of the inmates or dismiss the cases? Floating statistics cannot be considered facts, merely part of the facts.

Senator Kyl did not distinguish between legitimate and useful court actions that are outside the purview of a consent decree or Special Master. He was silent about the courts' reasons for inmate releases. He was silent about any relationship between the vague Special Masters and "inmate releases" (there isn't one). He was silent about the cost of Arizona inmate litigation before Special Masters, focusing instead on the $320,000 corrections money spent since 1992.[160] Four years. The senator did not even divide that $330,000 into annual expenditures, which average $80,000 a year to resolve the serious and unconstitutional prison abuses throughout the entire state of Arizona. He was silent about the difference between inmates who file legitimate petitions concerning their cases or their prison conditions. Instead, he blamed the Special Masters and consent decrees for allowing inmates access to law libraries.[161] Nowhere

157 141 CONG. REC. at S14,418.

158 *Id.*

159 Many inmates filed many petitions about U.S. prison conditions. In 1994, the Department of Justice, Office of Justice Program, reported that one in every ten civil lawsuits in U.S. District Courts was a Section 1983 lawsuit. In 1992, nine states' district courts had 2,700 cases. Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, BUREAU OF JUSTICE STATISTICS 3 (1995), https://www.bjs.gov/ content/pub/pdf/ ccpjrs83l.pdf (last visited Apr. 28, 2018).

160 *See* 141 CONG. REC. at S14,418.

161 *Id.*

did Senator Kyl mention the federal requirement that all prisons must have law libraries.[162] Rather, he referred to inmates using libraries as enjoying a "recreational activity," turning a visit to a law library into an indolent, shameful act.[163]

Senator Abraham focused on a Michigan-court consent decree without once, even once, mentioning why the court originally issued a decree. He never mentioned, even once, why his state's decree was still in place. He focused on the marvels of the current Michigan system and carefully enumerated its many positive features; he was, however, silent on the dates these features were enacted: before or during the consent decree? By suggesting that the system had already been a model of penology wonder, Senator Abraham misled his audience. Senator Abraham was silent about the historical costs of Michigan payouts to successful litigation. Senator Abraham did, however, repeatedly emphasize the costs of federal oversight.

Finally, while emphasizing the cost of oversight, each senator was silent about the cost to inmates and their families—their constituents. The senators were silent on the different types of filings and the different types of inmates they collectively labeled as criminals "who deserve to be punished" instead of being allowed to file "endless lawsuits." Were some petitioners in prison for writing bad checks? Did perhaps the prisoner die and their families sue? Did a burglar have his leg amputated after prison officials neglected his medical complaints? Silence on the ramifications of this PLRA vote casts a shroud over Senator Abraham's anecdotes—an embarrassing manipulation of rhetoric deliberately used to hide underlying facts of prison litigation. Therefore, rather than produce a mythical rebirth of a balanced judicial system, this testimony and vote deprived citizens of many Constitutional rights. And rather than emerge as Heroes, these speakers are now seen as the authors of a heinous bill that is costing inmates and their families an opportunity to correct the ills within the prison systems. The four senators, representing the citizens of the United States, were silent on any human consequences of their votes.

The post-PLRA world is ironically still costing taxpayers who must foot the bills for egregious miscarriages of justice that could have been resolved if the underlying grievance system had worked and early

162 In 1961, the Ninth Circuit offered in dicta that prisons and jails were under no obligation to provide library facilities. Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961). But in 1977, the Supreme Court in *Bounds v. Smith*, 430 U.S. 817 (1971) confirmed that prison libraries were not only required, but law libraries inside the bars were required for "access to the courts." *Id.* at 828–29.

163 *See* 141 CONG. REC. at S14,419.

problems had been resolved without inmates needing recourse to the appellate courts.[164]

V. Conclusion

> "Without civic morality, communities perish; without personal morality, survival has no value."[165] –Bertrand Russell

This review of the four Senators' PLRA rhetoric reveals a major irony: under the guise of limiting prisoners' filings, the 1995–96 Congress instead limited the federal judges' power. Passing the PLRA allowed Congress to use inmates as a means to a different end. It was not staggering federal-court caseloads the senators addressed; it was control. They succeeded, and their deliberate rhetorical sabotage of the American court system remains a shameful reminder of that success.

These Senate floor speeches violated the discourse community of professionalism. As detailed above, this lack of professional standards undermined the speakers' credibility; beneath the subliminal theme of Hero–Conquest, they chose "nit-picking strategies, pejorative language, stereotypical depiction, exaggeration, inappropriate jocularity, sarcasm, and imperiousness."[166] Perhaps some listeners and readers can wink-wink about politicians and their clever use of rhetoric. Perhaps some wags can argue that politicians actually have no professional standards.[167] Those responses are disturbing because they give free reign to dishonesty, to a win-at-all-costs mentality, to the destruction of democracy from within.[168]

164 This article examining the rhetoric of the Senate debate cannot extend to a discussion of post-PLRA settlements, but interested readers can look at Margo Schlanger's extensive scholarship. *See, e.g*, Civil Rights Litigation Clearinghouse, *Case Profile:* Neal v. Michigan Department of Correction, *Case No. 96-6986-C2*, https://www.clearinghouse.net/detail.php?id=5550 (last visited Mar. 31, 2018) (reviewing a case where class-action plaintiffs were awarded $100 million after intrusive jail body searches); Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65 (2008) (describing events and law behind a Florida $6.25-million class-action settlement and a California $15-million class-action settlement). After these large settlements, however, the Supreme Court shut down strip-search petitions, saying the body-cavity searches did not violate the Fourth or Fourteenth Amendments because correctional officers had a "legitimate security interest" and "expertise." Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 328 (2010). If a jail inmate had been able to appeal the strip search through a legitimate and functioning grievance process and if a lower court had applied the Fourteenth Amendment to these strip searches, the inmates would have found relief, the courts above would not have had to intervene, and the public would not have been hit with these enormous class-action settlements.

165 BERTRAND RUSSELL, THE BASIC WRITINGS OF BERTRAND RUSSELL 336 (2009).

166 Fajans & Falk, *supra* note 48, at 21.

167 GAINNI VATTIMO, A FAREWELL TO TRUTH xxv (William McCuaig trans., 2009) ("As far as [philosophical aspects of our culture] [go], it is increasingly clear to all and sundry that . . . 'the media lie' and that everything is turning into a game of interpretation—not disinterested, not necessarily false, but (and this is the point) oriented toward projects, expectations, and value choices at odds with one another.")

168 *See id.* at xxvii ("If I say that the lies of [President George W.] Bush and [English Prime Minister Tony] Blair don't matter to me as long as they were justified by good intentions, meaning ones I share, I accept that the truth about the facts is a matter of interpretation, conditional upon a shared paradigm.").

Citizens must depend on elected officials to research and present viable options and balanced decisions. If, instead, important decisions are based on lies and false implicature, then glib politicians endanger our future.

We who believe in the rule of law, and who believe in Democracy, must be vigilant about our own language and examine the language of politicians who shape Democratic law in our names. That means that each of us who represent the law needs to stand against deliberate, unprofessional public speech and prose. Importantly, legal writers should accept their oaths and model professional standards.

Who speaks and writes within the framework of life and liberty? Usually lawyers. Thus the bar is and should be high for those who speak not only of the law but for the law. There are understood constraints on the legal profession: "lying, certain forms of deception, perjured testimony, preventing opposing arguments, misstating the law, tempting the judge [senators] to make decisions based upon means to persuasion that are not part of the rhetorical culture, and any other conduct that can fairly be described as 'not playing the game.'"[169]

Sadly, America's inmates have learned that PLRA restrictions keep them out of the game.

169 Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93, 99 (1997).

ARTICLE

Wait, What?

Harnessing the Power of Distraction or Redirection in Persuasion

Melissa H. Weresh*

I. The Story

In 2006 the American Bar Association's (ABA) Section on Legal Education and Admission to the Bar formed an Accreditation Policy Task Force to study a transition to use outcomes and assessment to determine accreditation of law schools.[1] Specifically, the Task Force was formed in response to concerns that the ABA accreditation standards in Chapter 3—Program of Legal Education—focused too heavily on input measures, such as the resources devoted to faculty and infrastructure, and should instead be focused more specifically on outcomes, or evidence of student learning.[2]

Three years into the process, a working group submitted draft standards proposing outcomes-based accreditation. In response, many constituencies began to comment on the proposed standards.[3] Early

* Dwight D. Opperman Distinguished Professor of Law, Drake University Law School. I would like to extend heartfelt thanks to many individuals for feedback on earlier drafts of this article, including Professors Kristin Gerdy, Margaret Hannon, Joan Magat, Michael Murray, Tracy Norton, Ruth Anne Robbins, Kristen Tiscione, and Jessica Wherry. I would also like to thank Professor of Law Librarianship Karen Wallace for her dependably valuable research assistance and her ever-helpful advice and encouragement. Thanks go as well to the consistently supportive folks at LC&R: JALWD Editors in Chief, Professors Joan Magat and Ruth Anne Robbins, and to the Managing Editor, Professor Sue Bay. Finally, I am extremely grateful for the wise guidance and support from my editors on this piece, Professors Ian Gallacher and Anne Ralph. My goodness, may we all have friends and colleagues like these. Errors that remain are most certainly my own.

1 American Bar Association Section of Legal Education and Admissions to the Bar, *Report of the Outcome Measures Committee* 3 (July 27, 2008), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf.

2 *Id.* (considering outcomes such as "whether the law school has fulfilled its goals of imparting certain types of knowledge and enabling students to attain certain types of capacities, as well as achieving whatever other specific mission(s) the law school has adopted").

3 For example, organizations including the Association of Legal Writing Directors (ALWD), the Clinical Legal Education Association (CLEA), and the Society of American Law Teachers (SALT) responded favorably to the issue of outcomes-based accreditation.

comments from supporters expressed continued commitment to outcomes-based assessment, but also expressed concerns that the initial draft standards did not go far enough to truly advance legal education.[4] On the other hand, the American Law Deans' Association (ALDA) comments noted general support for an inquiry into outcomes, but cautioned against overregulation by the ABA. In a July 14, 2010, letter ALDA wrote, "Even in calm economic times, making changes as significant as those proposed to measure student learning outcomes would be exceedingly complicated."[5] These opposing viewpoints were discussed at length on listservs and blogs for roughly two years. It appeared that that legal education was poised to change and the main concern of the academy was how burdensome and expensive a shift to outcomes might be.

During this time, another committee was also at work. A Special Committee on Security of Position was empaneled to consider provisions relating to academic freedom and security of position in Chapter 4 (relating to the Faculty). This committee considered the current standards that keyed security of position to category of faculty, carving out inferior strata for clinical and legal writing faculty. The Committee's initial report was relatively modest. It considered but did not make a recommendation on an "Alternative Approach," which was "drafted along functional lines based on the policies to be fostered rather than by establishing categories of faculty and setting out precise rules related to those categories."[6] In response to this report, the discussion related to faculty standards in Chapter 4 focused on the category-based approach of the current standards, and whether such distinctions were warranted or desirable.

And then an interesting thing happened. The "Alternative Approach," which was specifically characterized by its authors as differing in terms of its emphasis on function and policy, was mischaracterized as one advo-

4 ALWD characterized initial drafts as "an important symbolic step forward." Letter from Mary Garvey Algero, ALWD President, and J. Lyn Entrikin Goering, ALWD President-Elect, to Hulett H. (Bucky) Askew, Consultant on Legal Education, and Dean Don Polden, Chair, ABA Standards Review Comm., *Comprehensive Standards Review—April 2 Open Forum* 6 (Mar. 31, 2011), http://www.alwd.org/wp-content/uploads/2013/03/pdf/alwd-comments-2011-mar.pdf. Similarly, CLEA indicated that, in its view, "the draft diminishes legal education by significantly weakening the professional skills requirement and reduces outcome assessment to an empty promise." Letter from CLEA to ABA Standards Review Comm., *Clinical Legal Education Association's (CLEA) Comments on Outcome Measures to the ABA's Standards Review Committee* 1 (July 1, 2010), http://cleaweb.org/Resources/Documents/CLEA%20outcomes%20comment%20July%202010.pdf.

5 Letter from American Law Deans' Association to Bucky Askew, *Comments on Standards 301-307—Student Learning Outcomes* (July 14, 2010) (copy on file with author).

6 Report of the Special Committee on Security of Position 16 (May 5, 2008), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_security_of_position_committee_final_report.authcheckdam.pdf. The Alternative Approach consisted of proposed standards and interpretations that were less prescriptive, giving laws schools more flexibility for methods to ensure academic freedom, to attract and retain quality faculty, and to ensure that faculty continue to have a role in governance over academic matters. *Id.* at 15.

cating the elimination of tenure. A July 15, 2010, document (whose authorship was not entirely clear[7]) titled "Draft, Security of Position, Academic Freedom, and Attract and Retain Faculty," indicated, somewhat alarmingly, that the current standards did not require a system of tenure.[8]

Not surprisingly, the tenure discussion captured the attention of the academy and the focus of discussions regarding standards review shifted from the Chapter 3 outcomes standards toward a robust and, at times, divisive emphasis on Chapter 4 and the elimination of tenure. In fact, putting tenure on the table was the catalyst for extraordinary action across the country, with many law schools passing resolutions in support of retaining tenure.

The standard-review process continued, culminating in 2014. Predictably, given the outpouring of concern, tenure was retained and no changes were made to the standards as they relate to academic freedom and security of position. What is more interesting is what *did* happen with Chapter 3—the Standards Review Committee (SRC) did approve a significant change to the accreditation process, moving to outcomes-based assessment. And, while the specific changes that were passed were not the most extensive considered by the SRC,[9] they seem

7 In a July 22, 2010, letter from CLEA, Robert R. Kuehn, President, wrote with regard to the July 15, 2010, document,

> [I]t is troubling that this proposal, which raises issues that are fundamental to the structure of legal education, is posted so late that interested persons and organizations cannot provide comments prior to the Committee beginning its deliberations on those issues. It is also troubling that, although it appears to represent the viewpoint of only a single author (we note that the draft, on page 7, is written in the first-person singular and states that it is not endorsed by the subcommittee), this "discussion" document does not provide the Committee with any alternate points of view.

Letter from Robert R. Kuehn, CLEA President, to Donald J. Polden, Chair, Standards Review Comm., and Margaret Martin Barry, Vice-Chair, Standards Review Comm., *Standards Review Committee's July 15, 2010 Draft re Security of Position, Academic Freedom, and Attract and Retain Faculty* 1 (July 22, 2010) (copy on file with author).

8 Draft Memorandum from American Bar Association Section of Legal Education and Admissions to the Bar Standards Review Comm. *Security of Position, Academic Freedom, and Attract and Retain Faculty* (July 15, 2010) (copy on file with author) (stating "the current Standards do not require approved law schools to have tenure earning systems for any or all of their faculty members and this draft retains the current policy").

9 One example of how the original standards became somewhat less rigorous over the course of drafting was in the articulation of assessment of students' learning. An early draft of the assessment standard—then 304—had required "valid" and "reliable" assessment methods. This was later revised to eliminate the terms "valid" and "reliable," resulting in the current articulation under Standard 314 which reads, "A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students." Am. Bar. Ass'n *ABA Standards and Rules of Procedure for Approval of Law Schools* (2016-17) 23, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf; *see also* Letter from Mary Garvey Algero, ALWD President, to Hulett H. (Bucky) Askew, Consultant on to ABA Section of Legal Education & Admissions to the Bar, *Response to the Standards Review Committee* 6 (Sept. 30, 2010), http://www.alwd.org/wp-content/uploads/2013/03/pdf/alwd-comments-outcome-measures-2010-sept.pdf ("We applaud the subcommittee's recognition that both formative and summative assessment methods should be introduced throughout the curriculum, as we have done in legal writing. We note, however, that the current draft omission of 'reliability' and 'validity' requirements found in earlier drafts tends to undermine the value of the outcomes assessment process[.]"); Letter from Richard K. Neumann, Jr., to the Council of the ABA Section of Legal Education and Admissions to the Bar, *Chapter 3 notice and comment Proposed Standards 302, 202, and 314* (Jan. 31, 2014) http://www.alwd.org/wp-content/uploads/2014/02/Chapter-3-Neumann.pdf. Neumann noted, "The original draft required that assessment methods be valid and reliable. Those are terms of art among people who design measurement methods, including tests like the LSAT. A measurement method is considered valid if it accurately measures what it's being used to measure. The method is reliable if it produces consistent

to be more significant than appeared possible during early discussions when most commentary focused on the dire and expensive consequences of outcomes-based assessment. It appeared that the academy had forgotten about that crisis, turning its full attention away from outcomes and instead squarely focusing on the protection of tenure.

II. A Story about the Story

Was tenure a foil, or a red herring? It was certainly a distraction, although not likely an intentional one, but it nonetheless may have affected the final changes to Chapter 3 and outcomes.

To be clear, this is not an article about the ABA, tenure, or outcomes—the story was merely an illustration of distraction at work. This article studies how distraction influences results and whether there is therefore a potential for the intentional use of distraction, or redirection, in advocacy. Of course, with such an inquiry, inevitable questions arise. Can we effectively refer to the concept of *distraction* in the context of advocacy? How might distraction or redirection be deliberately employed to influence results? What sources could be consulted to determine how this phenomenon is effectively employed to guide an audience? If distraction or redirection does influence results (spoiler alert: it does), how might this concept be used in advocacy? Would such uses be ethical?

One article cannot fully answer all of these questions but, with these issues in mind, the purpose of this article is to begin an analysis of the potential role of distraction, misdirection, or redirection in persuasion. Attempting to draw a possible connection between the effective use of misdirection in narrative, psychology and, ultimately, persuasion, the article will traverse varied terrain. Thus, some direction is in order lest the reader be distracted by shifts in focus.

The article first explores the concept of persuasion in story, examining how the concept of narrative realism tolerates the use of misdirection techniques in successful stories. This section is a deep dive into

results when administered by different people at different times measuring different samples." *Id.* at 8. Neumann also challenged another revision from the original standard that resulted in reduced rigor in terms of amount of required assessment, explaining that

> [t]he 2009 draft would have required assessment "systematically and sequentially throughout the course of the student's studies." It also would have required feedback communicated to students individually "throughout their studies about their progress in achieving" specific learning goals.
>
> [**]The 2014 proposed Standard 314 would require none of that. It would only require a school to use both assessment types "in its curriculum" and to "provide meaningful feedback to students" in its curriculum. And proposed Interpretation 314-2 exempts schools from any obligation to use both methods in all courses. It would be enough to use one method per course.

Id. at 10.

narrative theory, but is an attempt to explain how distraction works in narrative, providing an analogous framework for how distraction might work in legal advocacy. Along the same albeit similarly somewhat attenuated line, the article then considers the role of distraction in persuasion, examining psychological theories that demonstrate a positive relationship between the two and that support a plausible foundation for consideration of distraction (which will shortly be recharacterized) in advocacy.

With the backdrop of those studies providing context, the article then turns to a brief examination of techniques used in advocacy that could be characterized as redirection techniques. Finally, the article raises—but does not fully resolve—concerns about the ethical use of misdirection or redirection in advocacy. These inescapable concerns, beyond the scope of this article, certainly warrant a more thorough examination.

To set an appropriate framework for the discussion, terms must be managed. Referring to the discussion of tenure in the ABA story as a *distraction* may have unintended consequences for the foregoing objectives. ***Distraction*** as the term is commonly understood would hardly be viewed an effective strategy in legal advocacy. And yet the psychological studies frame distraction as a potentially powerful component of persuasion. The term ***misdirection*** has sinister and/or pejorative connotations. So, for purposes of avoiding those potentially confusing or misleading impressions, and because effective advocacy does, after all, involve the management of focus and attention, the section on advocacy will, at times, refer to the technique as ***redirection***. Offering a relatively fluid definition, distraction, misdirection, and redirection should be understood throughout as deliberately redirecting the attention of the listener with persuasive intent in mind.

A. Distraction, Perception, and Storytelling

Studying stories and how they work is fascinating, but can also be frustrating. This work can be particularly difficult for the student of story who is also a writer. As readers, "we are sublimely vulnerable to fiction's effect,"[10] reacting with admiration to particularly effective prose.[11] We read and react differently as writers, responding more actively with text. As writers, '[w]e are not so much recipients [but rather are] coparticipants of a kind, simultaneously confronting and digesting the fictional universe

10 DOUGLAS BAUER, THE STUFF OF FICTION: ADVICE ON CRAFT 2 (2006).

11 *Id.* (noting that when we, as readers, encounter effective prose, "we might think to ourselves, 'Wow. How in the world did he or she do *that*?' But this reaction, as evidenced by the clue in the inflection, is inspired less by a craftsman's curiosity than by sheer, awestruck admiration.").

presented to us and all the while looking for clues to the handiwork."[12] Certainly, as legal writers, we are more keenly interested in techniques associated with effective storytelling because, as we know, stories persuade.

Our discussion of the effect of distraction or misdirection in story might therefore begin with defining story. That, in itself, presents a bit of a dilemma. In *The Law is Made of Stories*, while acknowledging that "[a]mong literary narrative theorists, the precise definition of *story* is still very much in debate,"[13] Stephen Paskey addresses the various ways in which legal storytelling scholars have attempted to define both "story," and "stock story."[14] He asserts that the distinction lies in the details. Arguing that because "[t]he concept of a *stock story* is too valuable to use loosely, [] a more precise definition is needed,"[15] Paskey offers the following: "A stock story is a recurring story template or 'story skeleton,' a model for similar stories that will be told with differing events, entities, and details."[16]

Questioning, however, the "[e]pistemological [l]imits of [d]efinitions,"[17] Linda Edwards cautions that "as a matter of epistemology, definitions are usually constructed by human beings in order to support or advance their own project,"[18] and "[w]hen we try to define a term, we do so from our own rhetorical situation."[19] Because of the "inescapable subjectivity" associated with definitions, Edwards ponders, in contrast with Paskey, "whether the concept [of stock story] is too valuable to use *precisely*."[20]

12 *Id*. Bauer notes that writers, when reading, are "blatant opportunists" who, when encountering a particularly effective passage, evaluate how the writer accomplished this feat. *Id*. at 3. Writers "roll up our sleeves and study the piece, the scene, the passage that has impressed us; we disassemble it, examining its parts to see how they cue and complement one another." *Id*. He does not elevate one frame of reference with the text above another, noting that the writer's experience "is neither preferential nor even—to the degree that it makes the more direct reading experience elusive—desirable," but it is, for writers, inevitable. *Id*. (noting that, for the writer, it is difficult "to push away the craftsman's microscope and look up to find oneself elatedly, uncritically amid a cast of characters and their harkening dilemmas").

13 Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51, 61 (2014).

14 *Id*. at 70.

15 *Id*.

16 *Id*. Paskey notes, "A stock story, then, is a conventional story type, a story stripped of all but essential details. The key elements of the story—events, entities, and consequences—are stated generally, and are thereby reduced to stock structures (a stock character, for instance) or to an idealized cognitive model." *Id*.

17 Linda H. Edwards, *Speaking of Stories and Law*, 13 LEGAL COMM. & RHETORIC: JALWD 157, 167 (2016).

18 *Id*.

19 *Id*. at 168.

20 *Id*. (emphasis added); *see also id*. at 167 (reinforcing the skepticism "about how well we can analyze important issues by redefining terms and then applying those newly defined terms to the questions of the day").

So, with this debate in mind, I do not attempt to *define* story here, for such an attempt would likely be influenced by my premise that distraction in story likely has an impact on the reader's acceptance of the story itself. Rather, I will offer some characteristics of story that might explain the role of distraction within effective storytelling and therefore reveal to us how distraction works within a complete, coherent, and persuasive narrative.

1. Story as Relationship with Reader

Stories can be viewed as a promise from the writer to the reader. Robert McKee explains, "To tell story is to make a promise: If you give me your concentration, I'll give you surprise followed by the pleasure of discovering life, its pains and joys, at levels and in directions you have never imagined."[21] In making the promise to the reader, the writer also agrees to bring the reader along in revelations, engaging in a partnership of sorts. "The effect of a beautifully turned moment is that filmgoers experience a rush of knowledge *as if they did it for themselves*. In a sense they did. Insight is the audience's reward for paying attention, and a beautifully designed story delivers this pleasure scene after scene."[22]

Another author describes the opening of a story as a contract with the reader.[23] Noting that this contract envisions the writer telling a story, albeit "not necessarily a highly plotted one," but nonetheless told in terms of people and scenes, the writer "promises that there will be an end, just as there is, in front of the reader's eyes, a beginning. And that adds up to a promise of some kind of fictional action—narration, conflict, change, and resolution."[24] This contract then reinforces the expectations the reader has as to the structure of the story.

2. Story as Structure

In *Story Proof: The Science Behind the Startling Power of Story*,[25] Kendall Haven explains that story should be viewed as structure rather than content.[26] Emphasizing the importance of structure and the organization of material, Haven further addresses the manner in which we process story, assuring "that all parts of a narrative or event are connected, and that we can—and must—impose order and common structure on new

21 Robert McKee, Story: Substance, Structure, Style, and the Principles of Screenwriting 237 (1999).

22 *Id.* at 237.

23 William Sloane, The Craft of Writing 44 (1979).

24 *Id.*

25 Kendall Haven, Story Proof: The Science Behind the Startling Power of Story (2007).

26 *Id.* at 15–16 ("Story is a way of *structuring* information, a system of informational elements that most effectively create the essential context and relevance that engage receivers and enhance memory in the creation of meaning. . . . Story is the framework, not the content hung on that scaffolding.").

narrative information and sequential experience. Another way of saying this is, We require that *It Makes Sense*."[27]

Readers expect order and will fill in information based on expectations.[28] Readers who are actively engaged in story are filling in these details in expectation of the inevitable ending of the story. As one writer notes, endings "must honor the contract [the writer] made with the reader in the opening paragraphs. This doesn't mean the ending must be happy or predictable. But it does mean that the ending must be *inevitable*."[29] So, if the writer has employed redirection techniques such as false protagonists or red herrings, these need to be resolved in a manner that is internally consistent with the narrative.[30] Addressing the "truth" of narrative, James Wood emphasizes internal consistency and plausibility, noting that, for "mimetic *persuasion*[,] . . . it is the artist's task to convince us that this could have happened."[31] Similarly, Robert McKee asserts that "[s]torytelling is the creative demonstration of truth": the "audience must not just understand; it must believe."[32]

Story authors take us on journeys within the story, redirecting our attention between characters and their motives, plots and their subplots.[33] These middle aspects of a story often involve redirection in the form of false protagonists, foils, and red herrings. These must ultimately be resolved effectively in endings. Endings, like beginnings, bring "[e]verything, all of the story's varied motions, down to a particular Something again: a single, crucial action."[34] There must be an identifiable connection between the structural aspects of beginning, middle, and end: "If beginning and end aren't strongly tied, the result will be inconclusive,

27 *Id*. at 34. Haven asserts that "[w]e'll create (mentally invent) what we have to create to make it make sense by using such mental tools as cause-and-effect sequencing, temporal sequencing, centering around a common theme, character analysis, etc." *Id*.

28 Haven notes,

> Our system of filling in around incomplete information with what we most expect is the basis of countless visual tricks and illusions. It is the foundation of magic. You see what you expect to see and are fooled every time by what you didn't see because you never expected it and so never looked for or observed it.

Id. at 39.

29 Nancy Lamb, The Art and Craft of Storytelling: A Comprehensive Guide to Classic Writing Techniques 88 (2008) (emphasis added); *see also id.* at 89 (stressing that the ending needs "to be the inescapable outcome of plot lines and promises [the writer has] set up throughout the book").

30 As one author cautions, the reader will be dissatisfied "if he hasn't been told about something he wanted to be told about, if the narrative has caused him to ask a question which hasn't been answered . . . ." John Braine, Writing a Novel 132 (1974).

31 James Wood, How Fiction *Works* 238 (2008).

32 McKee, *supra* note 21, at 113.

33 Ansen Dibell, Plot 120 (1998). Tracing the connection between phases of a story, Dibell asserts that "[m]iddles have ups and downs, characters coming and going, intermediate crises." *Id.*

34 *Id*.

unsatisfactory, a letdown, however interesting in itself."[35] However, because the ending "has the whole weight of the story resting on it," it "must reflect the coming to a dynamic stability of all the major forces that produced it."[36] The ending just has to *fit*, which means that any form of misdirection employed in a story must be resolved in a manner that satisfies the expectations of the reader. In other words, the reader has to be persuaded.

3. Story as Persuasion

Stories are persuasive. As Ruth Anne Robbins explains, "stories or narratives . . . are cognitive instruments and also means of argumentation in and of themselves."[37] In order to be persuasive, they must be plausible, or believable within the context of the particular story. In other words, upon concluding a story, the reader must accept the resolution.

a. The Rhetorical Explanation of Acceptability

While persuasive stories should be plausible, they do not have to be realistic. Rather, they have to be constructed so that the reader can make sense of them—the elements of the story have to *hang together*. Steve Johansen clarifies: "[T]he persuasiveness of a story does not turn on its truth. It turns on its narrative rationality—its logical coherence, its correspondence to audience expectations."[38]

Christopher Rideout explains three properties of narrative that comprise narrative rationality: coherence, correspondence, and fidelity.[39] Coherence and correspondence are *formal* properties, meaning "the structural properties of narratives—the internal characteristics of the structure of a given narrative and the way in which those structural parts interact to tell a story persuasively."[40] In contrast, fidelity is a *substantive* property. Fidelity persuades based not upon the structure, but upon the

35 *Id.* at 123.

36 *Id.*

37 Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING 3, 6 (2008). Robbins explains that because stories are response-shaping, response-reinforcing, and response-changing, they "help us create knowledge, reinforce knowledge, and change existing knowledge and beliefs." *Id.* at 6–7.

38 Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 68 (2010).

39 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 55 (2008); *see also* 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 (2012). Sheppard notes that the internal consistency of a narrative "focuses on making sure that the internal elements of the story (such as factual reconstruction, character, setting, plot, etc.) make sense when viewed as a whole and that the story and the evidence presented match up." *Id.* at 189.

40 Rideout, *supra* note 39, at 56.

substantive appeal of the content of the narrative.[41] Formal or structural features of narrative—coherence and correspondence—influence persuasion based upon how well the structural elements of the narrative meet the expectations of the audience. In contrast, fidelity implicates the substance of the story and whether it "comports with what the audience knows of the world based on the audience members' personal experience."[42]

Coherence refers to the consistency and completeness of the story—how accurately it comports with logic and audience expectation.[43] Rideout explains that "narrative coherence can be best understood when it is further broken down into two parts: internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems."[44] Consistency relates not only to whether the story itself is organized in a consistent manner,[45] but also whether the framework of the story comports with other material the reader is exposed to in building the story.[46] So, for example, "[i]nternal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction?"[47] Completeness, the other quality of coherence, refers to "the extent to which the structure of the story contains all of its expected parts."[48]

Correspondence is the other formal, structural feature of narrative. As a structural feature, correspondence requires the advocate to organize the story in a manner that comports with what is plausible, or

41 *Id*. (explaining that the persuasive appeal of fidelity is not "a matter of the structure of the narrative, but rather as a matter of its content and the particular substantive appeal that the content makes").

42 Sheppard, *supra* note 39, at 202. Sheppard explains that narrative fidelity seems similar to narrative correspondence, but the two differ in terms of focus: "narrative fidelity assesses the substance of the story, whereas narrative correspondence matches the structural elements of the client's story with those of the stock story that has been triggered." *Id*. at 201–02; *see also* Rideout, *supra* note 39, at 69–78. Rideout distinguishes "narrative probability," having "to do with whether an audience finds that a story is coherent," from "narrative fidelity," which "has to do with 'whether or not the stories they experience ring true with the stories they know to be true in their lives.'" *Id*. at 69–70 (citations omitted).

43 Rideout, *supra* note 39, at 63–66.

44 *Id*. at 64.

45 *Id*. at 65.

46 *Id*. at 64 (noting that internal consistency is extended "beyond the story framework itself; the framework must also be consistent with the credible evidence that is being presented and around which the juror is building the story").

47 *Id*. (citations omitted).

48 *Id*. at 65. Rideout explains that the "need for completeness extends to the inferences that a jury is willing to make. . . . [A] jury, in making inferential steps in the construction of a story, will refer to other cognitive models—narrative scripts—for guidance." *Id.*

49 "What 'could' happen is determined, not by the decision makers' undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories." *Id*. at 66 (emphasizing that "[t]he narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it 'really happened'").

what could happen, rather than what actually took place.[49] Rideout refers to "'external factual plausibility,' a matter of the story's satisfying the decisionmaker's sense that it 'could . . . have happened that way.'"[50]

Fidelity, the third property of narrative, relies on *communal validity*, "'a validity within the public horizon of the community with which the judging subject identifies.'"[51] The appeal of fidelity is not simply a matter of accuracy or realism, but is dependent on the judgment of the audience.[52] "Narrative fidelity is based on the audience's personal evaluation of the plausibility of the story [and is] measured by the extent to which the story is consistent with the audience's expectations and experience."[53]

Thus, the structural elements of a story (setting, plot, and character), and the substance and culmination of the story have to be plausible in order for the story to be persuasive, or even engaging.[54] Narrative is a form of human comprehension,[55] and a process by which individuals reconcile expectations.[56] If "[t]he launching pad of narrative is breach, a violation of expectations, disequilibrium [and the] landing pad of narrative is balance, the reestablishment of equilibrium,"[57] how can techniques of misdirection function appropriately within story? Mightn't these types of techniques instead interfere with a story's coherence or completeness, or its fidelity? We turn to that discussion in the following sections.

b. The Engagement Explanation of Acceptability

Psychological studies on the impact and importance of narrative often focus on narrative engagement. These studies explain how an audience is able to navigate misdirection in narrative such as plot twists and false protagonists. Not unlike the rhetorical explanations, these studies emphasize that such disruptions are tolerated only to the degree that the audience is still able to *make sense* of the narrative.

50 *Id.* (citations omitted).

51 *Id.* at 74 (citations omitted).

52 *Id.* at 67.

53 Sheppard, *supra* note 39, at 200–01.

54 *See* section A(3)(b) and accompanying notes *infra*.

55 Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 5 (noting that narrative is "'a primary and irreducible form of human comprehension,' humankind's basic tool for giving meaning to experience or observation for understanding what is going on").

56 *Id.* at 6 ("[T]he narrative process is specialized for reconciling our expectations about the normal, proper course of life with deviations from it.").

57 *Id.*

Focusing on the concept of engagement, a "number of constructs describe different aspects of engaging with a narrative, such as *transportation, identification, presence*, and *flow*."[58] Other terms associated with narrative engagement include "*absorption*, and *entrancement*."[59] In attempting to measure engagement in story, Rick Busselle and Helena Bilandzic focused on the concept of realism in story and its relationship to engagement.[60] They assert that it is possible that stories that are perceived to be true are likely to be engaging, but that it is also possible that the engagement we have with story creates the sense that the story is plausible.[61] "In either case, it is remarkable that the power of narrative is not diminished by readers' or viewers' knowledge that the story is invented. On the contrary, successful stories—those that engage us most—often are both fictional and unrealistic."[62]

These researchers focused a study on two types of perceived realism.[63] The first was *external realism*, or "the extent to which stories or their components are similar to the actual world."[64] The second focus returns us to Rideout's examination of *narrative realism*, or "plausibility and coherence within the narrative."[65] Noting that the interpretation of the story by the audience is realized not only by the presentation of material itself, but by the inferences made by the audience based upon that material,[66] the researchers explain that "the story is 'the imaginary construct we create progressively and retroactively . . . the developing result of picking up narrative cues, applying schemata, and framing and testing hypotheses.'"[67]

58 Rick Busselle & Helena Bilandzic, *Measuring Narrative Engagement*, 12 MEDIA PSYCHOL. 321, 321–22 (2009).

59 Rick Busselle & Helena Bilandzic, *Fictionality and Perceived Realism in Experiencing Stories: A Model of Narrative Comprehension and Engagement*, 18 COMM. THEORY 255, 255 (2008).

60 *Id.*

61 *Id.* at 256 (noting that it is "plausible that stories we consider authentic and true to life are most engaging . . . [b]ut, it is also plausible that engagement with a story leaves us with a sense that the story was authentic").

62 *Id.*

63 *Id.*

64 *Id.* at 256. This aspect might be likened to the rhetorical discussion of fidelity, *supra* sec. A(3)(a) and accompanying notes.

65 *Id.* This aspect might be likened to the rhetorical discussion of coherence and correspondence, *supra* sec. A(3)(a) and accompanying notes.

66 *Id.* at 257 ("Psychologists distinguish between the text on the page and the construction, performance, or realization of the story in the mind of the reader.").

67 *Id.* (citations omitted). Thus, "'the reader becomes the writer of his or her own version of the story' [and this] conception of narrative processing positions the audience member as an active participant and defines reading or viewing as an active process that occurs online and in real time as the audience member constructs or realizes the story from the text." *Id.* (citations omitted).

One essential component of audience engagement in a narrative is perceived realism, both external and internal. Literal external realism is not imperative because "[w]hen we enter into a fictional world, or let the fictional world enter into our imaginations, we do not 'willingly suspend our disbelief.'" [68] In fact, as readers engaged with fiction, we "do not *suspend a critical faculty*, but rather [we] *exercise a creative faculty*."[69]

With respect to internal realism, "audience members are concerned with coherence and logic within a particular fictional context."[70] Busselle and Bilandzic assert that "two interrelated activities are central to processing: coherence and explanation."[71] Coherence focuses on creating a model in which materials such as actions and events make sense.[72] Explanation focuses on explaining "*why* the explicit actions, events and states occur."[73] An audience loses engagement when a narrative is incoherent or unexplainable.[74] Experiments demonstrate that "audience members begin to question or counterargue if a narrative becomes incoherent or unexplainable."[75] This study of engagement—focusing on junctures where the audience's engagement is disrupted, leading to counterargument—informs persuasion in story and may also lend itself to an examination of how persuasion works in advocacy.

Busselle and Bilandzic assert that narrative comprehension and engagement require a shift by audience members "into the fictional world [,] [positioning] themselves within the mental models of the story [and enabling] them to experience the story from the inside and to assume the point of view implied by the story."[76] Audience members use several structures to make sense of the narrative, including the text itself, schemas, and real world knowledge.[77] Perceived inconsistency between

68 *Id.* at 264. By this I mean that the external realism of stories is not dependent on their correspondence with the way the world *actually* works. In fact, "[f]ictionality is not a problem for consumers of fiction. Within our mental models approach, we conceptualize the information that a story is fictional as part of the mental model that viewers create from a narrative." *Id.* at 266. The "willing suspension of disbelief" originated with Samuel Taylor Coleridge. See his *Biographia Literaria*, ch. XIV (1817), https://www.gutenberg.org/files/6081/6081-h/6081-h.htm.

69 *Id.* at 265 (citations omitted); *see also id.* (noting that the audience does "not actively suspend disbelief— [it] actively [creates] belief.").

70 *Id.* at 270.

71 *Id.* (citations omitted).

72 *Id.*

73 *Id.* (including "for example, how actions fit with the traits and motives of characters") (internal quotations omitted).

74 *Id.*

75 *Id.* (citing studies that manipulate consistency and which showed that reading slows "apparently because inconsistencies interfered with comprehension").

76 *Id.* at 272.

77 *Id.* at 273.

these structures, including questions about a narrative's fictionality, external realism or internal realism, "may prompt spontaneous evaluations of realness and subsequent disengagement from a narrative."[78]

Ruling out fictionality as a source of questioning,[79] Busselle and Bilandzic focus on disruptions prompted by potential inconsistencies in external or narrative realism. They suggest that a violation of both external and internal realism "result[s] from an inconsistency between the mental models that represent the narrative, general knowledge structures, and incoming narrative information [and that these] inconsistencies prompt negative cognitions, interfere with the processing of the narrative, and inhibit the sense of being lost in the narrative."[80] When the reader encounters these inconsistencies, flow is disrupted as the reader engages in realism evaluation and counter-arguing.[81]

The foregoing underscores that when audience members' engagement with the text is undisturbed, readers are actively processing information, filling in gaps as they go. "There is . . . wide agreement that, during narrative processing, people construct a dynamic situation model of the story in which causal relations between events and situational actions of characters are central."[82] Studying the impact of surprising or novel information on viewers' level of narrative engagement, "[r]esearchers have extensively investigated the brains' response to the introduction of novel sensory information during information processing and termed it the

78 *Id*. The authors explain that deviations from real-world realism (external realism) that are not explained in the narrative cause the audience to disengage. They cite anachronistic errors like the use of cell phones in a 1960s-situated plot. *Id*. at 269. Violations of internal realism that interfere with engagement are characterized as internal inconsistencies with respect to objects (such as referring to an item as blue and then later red), or with respect to character traits (such as a vegetarian character described eating meat). *Id*. at 270. Either type of deviation or disruption interferes with audience engagement with the narrative:

> As in counterarguing provoked by violations of external realism, negative cognitions caused by violations of narrative realism disrupt the construction of the mental model and lower the experience of transportation. In the same way, identification is interrupted because the viewer or reader is drawn from the story world and forced to think about the story from a more distanced perspective.

Id. at 271.

79 The authors note that fictionality is not typically a source of disruption for the audience because "knowledge of fictionality is integrated into the mental models of the narrative but normally remains tacit during the narrative experience. In fact, tacit knowledge about a narrative's fictionality prepares the viewer or reader for a possible need to extend the story world logic." *Id*. at 273.

80 *Id*. at 256 (further proposing that "observed inconsistencies undermine a narrative's potential to entertain, persuade, or enlighten").

81 *Id*. at 273 ("When inconsistencies are observed, negative online cognitions about a narrative's realness disrupt the flow of constructing a mental model from a narrative and will reduce the phenomenological experience of transportation.").

82 Freya Sukalla, Heather Shoenberger & Paul D. Bolls, *Surprise! An Investigation of Orienting Responses to Test Assumptions of Narrative Processing*, 43 COMM. RES. 844, 846 (2016); *see also id.* at 845 (describing study focusing "on how viewers' level of narrative engagement influences processing of narrative content that follows a surprising plot turn in the program by recording psychophysiological indicators of the orienting response—a temporary, unconscious increase in attention allocated to processing media content").

orienting response (OR) or 'what is it' response."[83] Narrative redirection in the form of plot twists or other aspects of a narrative that appear inconsistent with prior information[84] have been shown to elicit an OR.[85] As the plot unfolds, the audience must continually process events. In response to a surprising event, such as a plot twist or revelation of an unexpected character trait, the audience must "reassess its current story model[,] [which] requires additional cognitive resources allocated to changing the mental representation of the story to *make sense of* the surprising content."[86]

Thus, as the audience actively attempts to make sense of the narrative, assessing consistency within the narrative appears to be an essential component of the persuasive effect of narrative. Researchers have identified several characteristics of perceived realism in narrative, including narrative consistency.[87] "Narrative consistency is the degree to which a story and its elements are judged to be congruent and coherent, and without contradictions."[88] In a study focusing on how these characteristics affect narrative persuasion, perceived narrative consistency was shown to directly predict message evaluation, "defined as the assessment of 'persuasive potential' of the message [or] [c]olloquially, . . . how good a story is."[89] Narrative consistency influences how a message is evaluated and, in turn, how persuasive it is.[90]

83 *Id*. at 847.

84 *Id*. (hypothesizing that "a sudden discontinuity or surprising turn in a narrative drama plot line introduces novel information in a similar manner as structural changes in video . . . will elicit an OR").

85 *Id*. at 856.

86 *Id*. at 846 (citations omitted) (emphasis added). The researchers explain,

> The protagonist or other character of interest has done something that contradicts his prior actions, and thus, in the case of our study, the viewer is signaled to process information more carefully, updating the event nodes that could include updates to the protagonist index (information about the protagonist and his goals), or the causal index (information about events that are causally related. Surprise structures have been shown to result in slower reading times, signaling an increased focusing of attention and deeper information processing of the relevant events. In fact, even the mismatch of a stereotype to actual events such as the introduction of a female in a traditionally male role (e.g., plumber) may slow reading or intensify information processing.

Id. (citations omitted).

87 Hyunyi Cho, Lijiang Shen & Kari Wilson, *Perceived Realism: Dimensions and Roles in Narrative Persuasion*, 41 COMM. RES. 828, 830 (2014). Additional characteristics include "plausibility, typicality, factuality, . . . and perceptual quality." *Id*.

88 *Id*. at 832.

89 *Id*. at 835 (citations omitted). The researchers concluded that "narrative consistency and perceptual quality directly predicted message evaluation. Narrative consistency and perceptual quality may be concerned more with the characteristics of the narrative itself, whereas the dimensions of plausibility, typicality, and factuality may be concerned more with the narrative's connection to reality." *Id.* at 845.

90 *Id*. at 836 ("Narrative consistency may also foretell the quality of the narrative [because] . . . structural coherence of a narrative is one of the criteria that the audience employs to evaluate whether the narrative has 'good reasons,' which then provides assurance for adhering to the advice offered in the narrative.").

4. What Storytelling Suggests about the Role of Distraction in Persuasion

There is a tremendous amount of scholarship addressing the role of storytelling in persuasion.[91] The foregoing suggests that, to use distraction in persuasion in storytelling, it is critical to maintain coherence and correspondence. An engaged audience will navigate distractions such as plot twists and false protagonists only if the writer is able to bring them to a plausible conclusion. This is because, after all, our audience must make sense of the story. As advocates, we should therefore ensure that any intentional redirection technique employed in advocacy be evaluated as to whether it will lead the decisionmaker to a result that, within the context of the dispute, makes sense.[92]

B. Distraction, Influence, and Psychology

In addition to the narrative studies, psychological studies reinforce the role of distraction in persuasion. The reader will note yet another incarnation of our distraction terminology in the psychological studies involving both ***disruption***[93] and ***fear*** as forms of redirection.[94]

1. Psychological Studies Exploring the Role of Distraction in Persuasion

There is also support for distraction or redirection as a successful persuasive technique in psychology. Milton Erickson developed the confusion technique to overcome resistance to hypnosis.[95] Using "confusion techniques, including non sequiturs, syntactical violations, inhibition of motoric expression, interruption of cues correlated with counter arguing (such as glancing up into the left), and even interruption of a handshake," Erickson was able to demonstrate that, by engaging the conscious mind, he could divert "it from maintaining the resistance to the hypnotic suggestion."[96] In fact, "[h]e observed that confusion was likely to increase compliance with whatever suggestion immediately followed."[97]

Another disruption technique used to demonstrate compliance with requests is known as the pique technique.[98] In the first study on this technique, researchers asked subjects for money using either traditional

91 *See, e.g.*, J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

92 Of course, the technique should also be evaluated in the context of ethical and professional considerations, discussed briefly *infra*.

93 *See infra* section B (1) (a) and accompanying notes regarding Disrupt-and-Reframe Theory.

94 *See infra* section B (1) b) and accompanying notes regarding Fear-then-Relief Theory.

95 Barbara Price Davis & Eric S. Knowles, *A Disrupt-then-Reframe Technique of Social Influence*, 76 J. OF PERSONALITY & SOC. PSYCHOL. 192, 192 (1999).

96 *Id.*

97 *Id.*

98 Nicolas Guéguen, Sébastien Meineri, Alexandre Pascual & Fabien Girandola, *The Pique Then Reframe Technique: Replication and Extension of the Pique Technique*, 32 COMM. RES. REP. 143, 143 (2015).

requests such as asking them for "some change," or unusual pique requests, such as asking for "37 cents."[99] In that study as well as others, the research revealed a positive effect of the pique request not only on compliance with the request itself, but on the amount the subject agreed to give in response to the request.[100] Researchers theorized that the "pique technique was effective to increase compliance because the unusual request disrupts the script of refusal activated when a solicitor asks for money. The authors also argued that the pique technique could have aroused the participant's curiosity and focused his/her attention on the unusual request."[101] In a subsequent study, a "reframe" in the form of an explanation for the request or a reason to comply was added after the disruptive request.[102] Adding the reframe, researchers found that the technique resulted in participants giving even more money.[103] The researchers concluded that the reframe acted as a legitimization for the request, or "an opposing argument against the script of refusal that is probably activated when a stranger in a street asks someone for money."[104]

Building on this research, two related areas of inquiry demonstrate how distracting an individual may make her more receptive to a message. The first, disrupt-then-reframe, seems to work at a cognitive level. The second, fear-then-relief, seems to work on a more emotional level.

a. Disrupt then Reframe

The disrupt-then-reframe technique (DTR) was identified in 1999 by psychologists Barbara Price Davis and Eric S. Knowles. Davis and Knowles demonstrated that an individual "can substantially increase the likelihood that a target will comply with a request if confusing phrasing or language is added to the pitch (disrupt) and is followed immediately by a reason to comply with the request (reframe)."[105] Their original study involved the sale of notecards by individuals who claimed to be associated with a nonprofit organization. After a general introduction, a prospective buyer was asked whether he or she wanted to know the price. In test conditions, a disrupting phrase was inserted, such as stating the price of an item in pennies rather than dollars.[106] In another series of studies, cupcakes were referred to as half cakes as a disruption in a charity bake sale study.[107] Other researchers told prospective survey takers that the survey

99 *Id.* at 144.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 146.

104 *Id.* (citations omitted).

105 Christopher J. Carpenter & Franklin J. Boster, *A Meta-Analysis of the Effectiveness of the Disrupt-Then-Reframe Compliance Gaining Technique*, 22 COMM. REP. 55, 55 (2009).

106 *Id.* at 56.

107 *Id.*

would take about 420 seconds to complete.[108] These studies found the likelihood of either purchasing the goods or completing the survey to be one-and-a-half to two times more likely in DTR than in control conditions."[109]

The effectiveness of the DTR technique has been explained in the context of another series of studies on social cognition known as "Action Identification Theory." This theory posits that when people perform certain actions, they actually identify what they are doing on a continuum, "from matter-of-fact reasoning up to abstract contemplation."[110] Action identification theorists posit that individuals typically identify their actions at higher levels of abstraction, reverting to the identification at lower levels when disrupted.[111] So, for example, when the price of an item is stated in pennies rather than dollars, the audience's perception is shifted from an abstract identification level directed, for example, at the motive of the seller, to a more specific level of the detail of the offer.[112] The "[s]udden clarification of the 'odd bit' (e.g., giving the price in dollars, or the duration of a telephone survey in minutes) enables the subject to recapture the sense of control and[,] consequently, return to the higher level of action identification, which is preferred in typical, everyday conditions."[113] It appears to be that, in the moment of distraction, disruption of cognitive functioning makes the subject susceptible to a simple and explicit request.[114] Other theories to explain the effectiveness

108 Dariusz Dolinski & Katarzyna Szczucka, *Emotional Disrupt-then-Reframe Technique of Social Influence*, 43 J. OF APPLIED SOC. PSYCH. 2031, 2032 (2013).

109 Bob M. Fennis, Enny H.H.J. Das & Ad Th.H. Pruyn, *"If You Can't Dazzle Them with Brilliance, Baffle Them with Nonsense:" Extending the impact of the disrupt-then-reframe technique of social influence*, 14 J. CONSUMER PSYCHOL. 280, 288 (2004).

110 Dolinski & Szczucka, *supra* note 108, at 2032.

111 *Id.* The authors explain,

> A man painting a wall can be thinking about the way he is covering the wall with new paint, but he can also be thinking that he is redecorating his daughter's room or that he is tinkering. According to the authors of the action identification theory, people usually tend to identify their actions at the higher (abstract) level ("I'm redecorating a room," "I'm tinkering"); low-level identification of the action ("I'm putting on a new layer of paint") occurs in exceptional conditions—like the situation when something unexpected happens that disrupts their control over the current action. In our example with wall painting, the man would shift to the low-level interpretation of his action if, for instance, the wall was difficult to paint evenly because of stains. Shifting to the lower, matter-of-fact level of specific details of the action allows us to regain the lost control over what we are doing.

Id.

112 *Id.*

113 *Id.*

114 *Id.* ("The unique state of the subject's mind, resulting from a double shift from one level of action identification to another within a very short time, makes the subject lose his or her normal orientation and disrupts to a certain extent his or her cognitive functions. In this peculiar moment of disorganization, the subject becomes susceptible to simple and explicit argumentation . . . .").

of DTR focus on how the disruption interferes with the subject's tendency to counter-argue[115] or to evaluate the request.[116]

b. Fear then Relief

The DTR technique has been described as a cognitive phenomenon.[117] Following up on the research involving how a cognitive disruption can impact receptiveness, researchers explored how to employ emotional disruption and reframing, a technique known as fear-then-relief (FTR).[118]

The FTR studies involved a variety of scenarios. In one study, high-school students were asked to participate in a laboratory study. While waiting for the study to begin, they were sorted into the three groups: fear, FTR, and control. The fear group was told they would be given electric shock.[119] The FTR group was initially informed they would be given shocks, but were then told they would be in a different experiment.[120] The control group was not subject to any initial procedure.[121] After these expectations were created, during a waiting period before the experiments were supposed to begin, each participant was asked to join a charity action.[122] The FTR was more likely to join the charity action (75% participation rate) than the control group, who participated at a 52.5% rate, and the fear group, who participated at a 37.5% rate.[123]

Another study induced fear and then relief in a parking situation. A paper matching the appearance of a parking ticket was placed either on a windshield or door.[124] The control group found shampoo advertisements on their doors, prompting no fear.[125] The fear group found parking tickets on their windshields and the FTR group found advertisements on their

115 Fennis, Das & Pruyn, *supra* note 109, at 289 ("[B]y gently confusing the consumer, the DTR sows the seeds of compliance by reducing rejection responses and fostering mindless acceptance through heuristic processing of the reframe and of any other congruence-based persuasion technique present in this influence setting.").

116 Carpenter & Boster, *supra* note 105, at 60.

117 Dolinski & Szczucka, *supra* note 108, at 2032. "The DTR technique is strictly cognitive in nature: The subject, hearing simple argumentation during the short state of their cognitive disorganization, becomes more inclined to fulfill the requests made to her or him. In the relevant literature, empirical evidence can be found proving that compliance can be successfully induced not only during a momentary state of cognitive disorganization, but also under emotional disorganization." *Id.* at 2032–33.

118 *Id*. at 2033.

119 *Id*.

120 *Id*.

121 *Id.*

122 *Id*. (The charity action was supposed to be for an orphanage.).

123 *Id*.

124 *Id*.

125 *Id.*

windshields.[126] Drivers who experienced FTR were significantly more likely to subsequently complete a questionnaire (62%) that those who continued to experience fear (8%) or the control group (38%).[127]

The researchers explain the effectiveness of FTR in the context of the disruption. Fear redirects our attention on the source of the fear. When the source is withdrawn, "people may experience a short-lasting state of disorientation and may function automatically and mindlessly, reacting with ready behavioral models (scripts) assimilated in the past."[128] This "sudden and unexpected occurrence, which derails the subject from the normal way of functioning, disrupts the promptness of the subject's reactions, and in consequence, makes the subject susceptible to external requests or suggestions"[129] connects FTR with DTR. One significant difference initially existed between the two approaches, however. In order to be effective, the DTR "requires also an extra argument to make the subject comply with the request. This simple additional argument plays the role of a ready-to-take instruction for what to do next."[130] Early studies conducted using FTR included no additional argument to induce compliance; rather, submission was "based solely on the sudden withdrawal of the source of strong emotions."[131]

In a follow-up study, researchers concluded that an additional argument did encourage compliance for FTR participants. "This suggests that this additional element has an impact on compliance only when the person undergoes the specific moment of emotional disorganization, and does not work when the person is in an emotionally neutral state (which was demonstrated in all three studies) or under the emotion of fear."[132]

126 *Id*.

127 *Id*. In this study it is noteworthy that positive emotion levels had no impact on compliance. All participants were evaluated for positive and negative emotions. *Id*. Not surprisingly, the drivers who received a ticket experienced higher negative emotions than the other groups. *Id*. However, there was no significant disparity among groups for positive emotions. *Id*. "These results show that increased compliance achieved in the 'fear-then-relief' conditions cannot be explained by the fact that people relieved from fear experience positive emotions, as these emotions were not any stronger in the 'fear-then-relief' condition than in the control group." *Id*.

128 *Id*. (citations omitted).

129 *Id*. at 2034. The researchers explain "the role of the affective system as the primary mechanism that acts in a generalized manner":

> Feeling certain emotions entails the simultaneous activation of memory structures and cognition as well as sharpens the perception. . . . [P]ossible emotional disorganization . . . can [also] occur under conditions where a positive emotional state is suddenly replaced by a negative state (e.g., when an aversive stimulus appears suddenly and unexpectedly). In this state of disorganization, the subject tends to assess reality in a very specific and often inadequate way, making inaccurate interpretations of the surrounding events. Although the mental representations that appear under such conditions are cognitive, their very genesis remains emotional.

Id.

130 *Id*.

131 *Id*.

132 *Id*. at 2039.

Dolinski and Szczucka emphasize, however, that while the additional argument increased compliance, it was not a necessary component for compliance in FTR, as it is in DTR. To explain this difference, the researchers assert that a "person's disorganization in the case of a sudden relief from experienced fear is much more intense than the cognitive disorganization resulting from a sudden change of the action identification level."[133]

Schema and frames, similar to those employed when individuals read stories, may also partially explain the phenomenon. In FTR, with no opportunity to evaluate the situation, individuals "tend to use the ready and automatic schemes of action that they gained through prior experience ('when you are asked politely to do a small favor, you should agree to fulfill it')."[134] "The verbal argument then works in the same way as the heuristic action indication, based on the generalization of previous experience. However, it works more decisively. In the cognitive DTR, the possibilities of a person's adequate judgment of the situation are probably higher than in the state of emotional disruption."[135]

2. What the Psychological Studies Suggest about the Role of Distraction in Persuasion

As these psychological studies suggest, a person may be more receptive to a request when distracted in part because s/he is trying to return to a higher level of processing and cannot do so until s/he makes sense of the disrupting prompt. Advocates who seek to employ redirection techniques should therefore be aware that the timing of redirection and a request for action, together with the ethical considerations associated with the use of distraction, should be considered.

C. Distraction and Equilibrium

In light of the foregoing, is there now a way to reconcile the efficacy of redirection in story, redirection in psychology, and redirection in persuasion? While the effect of redirection in narrative and in the psychology of persuasion differs, there does appear to be some similarity, as well. That similarity appears to hinge on equilibrium, or resolving uncertainty. Coherence and narrative realism in story—essential for the reader's belief in the ultimate resolution—depend on the story's coming

133 *Id.* ("Human behavior triggered by emotions is more rigidly defined than behavior triggered by cognitive processes. The former behavior is also triggered more automatically, immediately, and unconditionally—without any delay option.").

134 *Id.* (citations omitted). "The external verbal argument in support of fulfilling the request, which shows the persons the right direction of their actions and eventually makes them compliant, in fact, only more convincingly confirms the scheme of action the persons have already developed on their own." *Id.*

135 *Id.*

together in a plausible way, notwithstanding redirection techniques throughout the story. Similarly, cognitive and emotional distraction in DTR and FTR, respectively, work, in part, because of our innate desire to regain equilibrium, or control. So, for example, when an individual's cognitive or emotional equilibrium is disrupted, attention is shifted from abstract identification to specific details.[136] The shift causes the subject to try to regain control of the content and, when the reframe clarifies the situation for the subject, the subject can return to a higher level of identification.[137] It is within that return to equilibrium that the subject is more susceptible to acquiescence.[138]

D. Distraction (Redirection) in Advocacy

To the extent that research demonstrates a positive relationship between distraction or redirection and persuasion, is there a role for distraction in advocacy? In this section I propose that advocates may indeed be using redirection techniques in some areas, even if these techniques are not labelled as such. If that is the case, can the lessons of storytelling and psychological research help refine the ways in which advocates use redirection (within ethical limits), or help us better understand its impact? Persuasion in advocacy depends on the audience's accepting the story told by the advocate. If we recognize the audience's propensity for equilibrium, how would redirection facilitate such resolution? And, if redirection techniques are persuasive in certain contexts, is the use of such techniques ethical?

Recalling the foundational distinctions set forth at the beginning of this article, some clarification regarding distraction, misdirection, and redirection in advocacy are also in order. To that end, John W. Cooley differentiates between lies, or "intentionally deceptive statements,"[139] and other ways to manage information. Viewed in this manner, "'deceiving is the business of persuasion aided by the art of selective display,' and it is effected by two principal behaviors: hiding the real and showing the false."[140] And these choices that advocates make as to what to reveal or

136 *Id*. at 2032 ("When it comes to the disruption of a typical, everyday action that we would normally identify on a higher level (e.g., the price is given in cents instead of dollars, or the time of a survey—in seconds instead of minutes), our attention is shifted from the abstract action identification level (e.g., 'What are the seller's possible motives in trying to sell me these products?') to the level of specific details of the action (e.g., 'What was it they have just said to me?')").

137 *Id*.

138 *Id*. at 2039.

139 John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 10 (1997).

140 *Id*. (citations omitted). Deception, Cooley notes, can be active or passive and can be achieved in the following ways: "by either causing or permitting (1) the acquisition of a false belief; (2) the continuation of a false belief; (3) the cessation of believing something true; or (4) the inability to believe something that is true." *Id.* at 10–11.

emphasize are choices that orient the audience's focus or attention. They can therefore be used to redirect the attention to a persuasive result. The following represent some advocacy devices that rely, in part, on redirection.

1. Redirection in Criminal-Defense Tactics

a. Confusing the Issue or the Story

Lawyers for criminal defendants may employ forms of redirection in representation. "Conventional wisdom dictates that although criminal defense lawyers may pursue a variety of different trial tactics, three reliable strategies stand out: 'If you've got the facts on your side, argue the facts to the jury. If you've got the law on your side, argue the law to the judge. If you've got neither, confuse the issue with other parties.'"[141] Because the job of defense counsel is to convince the decision maker of reasonable doubt, such representation might rely on a form of misdirection. Richard K. Sherwin explored the use of narrative in a criminal trial, beginning by emphasizing that "[p]eople prefer stories neat," and "stories are supposed to make sense."[142] "The trouble with having one's stories neat, however, is that they tend to leave things out—the things that make a story messy, hard to keep in mind."[143] But, because a good story can't "trail off, or break up, or have another story poke its nose in,"[144] the advocate must make choices about what details to include, and how to include them.

As a result, the advocate makes choices, and "[t]hat's the story [the advocate is] telling. It could have been otherwise, but it isn't. The story told, in order to be told, represses other possibilities."[145] Misdirection techniques employed by defense counsel to create doubt might include keeping relevant material out of consideration, confusing witnesses, or redirecting the flow of the argument.[146] So, for example, an attorney representing a defendant in a rape trial might redirect the jury's attention to the victim's past sexual behavior.

Legitimation studies confirm the efficacy of these redirection tactics. For example, researchers have shown that legitimation, a form of

141 Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 67–68 (1994) (citation omitted).

142 *Id*. at 40–41.

143 *Id*. at 40.

144 *Id.* at 41.

145 *Id.*

146 *Id*. at 45 ("Many techniques of the effective advocate . . . include techniques for keeping relevant information out, for trapping or confusing witnesses, for 'laundering' the facts, for diverting attention or interrupting the flow of argument, and for exploiting means of non-rational persuasion.") (citing WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 22 (1990)).

persuasion, is sustained to a degree by keeping attention diverted from certain topics and focused on others.[147] In fact, studies demonstrate "that a focus on *attacks on the legitimacy of others* might be especially effective in diverting attention away from questions about one's *own* legitimacy."[148] These researchers explore the persuasive effect of framing, which of course involves management of attention, finding that

> Contrary to the norms of most scientific or scholarly disciplines, which are generally seen as involving a good-faith search for answers and explanations, what we are suggesting here is that the arena of politics may generally have become one where *it is far more important to activate the salient questions than to offer answers*—partly because, . . . "[i]f they can get you asking the wrong questions, they don't have to worry about the answers."[149]

Sherwin explains the objective of defense counsel who seeks to confuse the issue: effectively to undermine the plausibility of the story offered by the prosecution and therefore to interfere with the coherence of the story offered by the prosecutor. This type of redirection strategy "attempts to attack the prosecutor's history, impeach the credibility of the state's witnesses, and deconstruct the linear narrative that the prosecutor offers, breaking it up until it is transformed into a nonsensical, incredible tale too full of inconsistencies and loose ends to withstand the onslaught of reasonable doubt."[150] This method of distracting is explicit, asking the decisionmaker to explicitly focus on something other than the actions of the defendant, effectively distracting the decisionmaker from a focus on the defendant. The following strategy is a more implicit form of redirection.

b. Redirecting the Role of the Jury

Anthony G. Amsterdam and Randy Hertz explored the closing arguments in one criminal case from a forensic, rhetorical, narrative, and

147 William R. Freudenburg & Margarita Alario, *Weapons of Mass Distraction: Magicianship, Misdirection, and the Dark Side of Legitimation*, 22 SOC. F. 146, 158 (2007).

148 *Id*.

149 *Id*. at 159.

150 Sherwin, *supra* note 141, at 68. Sherwin distinguishes between historical narration, whose focus is on the past, and historical deconstruction, whose focus is not the present. Because a historical narrative account is "temporally closed," it can be accepted in a "Makes sense to me. That must've been the way it happened" manner. *Id*. In contrast, a "good deconstruction, by introducing hesitation, emphasizes and dilates the present moment of doubt. ('Hey, wait a minute. First he said it was 10 p.m., then he said midnight. He must be lying.') The believable history is what already happened; the deconstructed history is what happens in the courtroom." *Id*.

151 Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55, 104 (1992).

dialogic perspective.[151] Their evaluation of defense counsel's strategy emphasizes that defense counsel seeks to engage in a "dialogue" with the jury but one which, by necessity, must be "imaginative."[152]

In this particular criminal trial, the prosecution presented all of the evidence while the defense offered none.[153] If, in the view of the jury, the truth is based on the evidence, and not some construction of the facts by the jury, the prosecution enjoys an advantage.[154] "If the jury takes the evidence at face value, a murder verdict is assured. Imaginative pursuit of alternative meanings is required to derail that train. Defense counsel wants to stimulate the pursuit; the prosecutor wants to suppress it."[155] So, defense counsel opted for a narrative structure involving "*the jury* as protagonist and the courtroom as its setting."[156]

As the protagonists, the jurors had to solve the riddle of the trial. In closing argument counsel emphasized, "[I]f you just look at the evidence, the lack of evidence and don't make any irrational leaps or bounds . . . [,] you can't find proof beyond a reasonable doubt that my client intended to cause the death. The ambiguity remains."[157] Cast in their role of making sense of the evidence, counsel draws jury members implicitly into this "imaginative dialogue," with counsel "while *explicitly* insisting that [the jury] 'stick to the facts.'"[158] "[T]he notion that the jury has an active role to play in the creation of facts" must be embedded subtly in the minds of the jurors because "the notion is at war with powerful legal and folk-cultural conceptions of 'facts' as objective realities."[159] The misdirection of attention is effective, because it enables the jury to make sense of the

152 *Id*. at 76. The authors explain,

> But defense counsel cannot explicitly invite the jury to be imaginative, for at least three reasons.
>
> First, the judge will charge the jury that it is not permitted to "speculate," so defense counsel cannot allow what he is doing to be perceived as asking the jury to speculate.
>
> Second, the common image of defense counsel in a criminal case includes the con-artist (smoke-and-mirrors) stereotype and the "Officer Krupke" stereotype. Defense counsel must avoid the appearances of being either a trickster or a peddler of psychological soft stuff.
>
> Third, the judge will charge the jury that the prosecution bears the burden of proving every element of the crime beyond a reasonable doubt. Defense counsel cannot afford to forfeit the benefit that this standard of proof, as applied to the elusive element of intent to kill, confers on the defense.
>
> *Id.*

153 *Id*. at 75.

154 *Id*. ("So long as meaning, reality, truth are conceived as immutable, inherent properties of 'the facts,' to be found in the evidence and not constructed out of it, the prosecutor has a big advantage.").

155 *Id*. at 75–76.

156 *Id*. at 64.

157 *Id*. at 64–65.

158 *Id*. at 76.

159 *Id*. ("To counter those conceptions, defense counsel must proceed by immersing the jury in a different and more compelling reality—the reality of the trial in which they are actors, the reality of the dialogic process, which assigns meaning to events.").

narrative and "permits the defendant's activity in killing the victim—an activity that defense counsel is not denying and can hardly tuck under the rug—to be fitted into the narrative without becoming the dominant action of the tale."[160]

c. Offering a False Defense

One final form of misdirection employed in defense advocacy is that of the "false defense," or the tactic of "discrediting a truthful witness on cross-examination and later during closing argument."[161] Todd Berger explores several types of false defense tactics, including false-story cross examination, false-implication closing argument, "evidence-reflects" closing argument, and false-story closing argument.[162] Each of these rely on a form of redirection.

In *false-story* cross examination, defense counsel asks the witness, whom defense counsel knows to be testifying truthfully, "a series of questions in which defense counsel knows that the underlying factual predicate on which the question is based is false."[163] Defense counsel expects the witness to answer in the negative, denying the implication of the question.[164] "As a result, the questions asked on cross-examination amount to nothing more than innuendo the defense attorney knows to be false . . . [allowing] the defense attorney to present the full theory of defense as an alternative story to the one being offered by the prosecution."[165] It is therefore designed to misdirect the jury's attention from the story offered by the prosecution.

In the *false-implication* closing argument, the defense counsel does not explicitly make false statements to the jury.[166] "Importantly, this includes not telling the jury that the defendant is innocent but merely that the defendant is not guilty."[167] However, "the jury is presented with an alternative explanation that exculpates the defendant without the trial attorney affirmatively telling the jury something he knows to be false [allowing the jury] to draw false inferences from true facts and to evaluate the evidence through the prism of reasonable doubt."[168]

160 *Id*. at 66.

161 Todd A. Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means*, 99 MARQ. L. REV. 283, 285 (2015).

162 *Id*. at 303, 305, 307, 308.

163 *Id*. at 303.

164 *Id*.

165 *Id*. 303–04

166 *Id*. at 305.

167 *Id*.

168 *Id*. at 306 ("As a result, the theory of defense is only implied—it is never actually stated.").

Turning to the *evidence-reflecting* closing argument, Berger explains that the advocate must be sure to "use a qualifying phrase when asking the jury to expressly draw an inference that the lawyer knows to be untrue."[169] By using qualifying statements, "the lawyer is not expressly vouching for an alternative version of events to the one presented by the state, but merely stating that the evidence technically reflects such a possibility."[170]

Finally, in the *false-story* closing argument, defense counsel "asks the jury to draw false inferences from true facts"; "in doing so, the attorney phrases that argument through a series of explicit statements that he knows to be false, without the use of any qualifying language. This includes affirmatively stating that the defendant is actually innocent of the crime charged."[171] Berger explains that while each of these closing arguments strategies attempt to provide alternative versions of the facts, the false-story technique is characterized as such because it is told in story form, as opposed to "suggesting to the jury in a series of carefully worded and qualified statements asking the jury to draw certain inferences." [172]

The ethics of these techniques are clearly worth examining and are explored further below.[173] Berger first reinforces the role of narrative in using these types of tactics. Because "'we are typically able to doubt an explanation only when we are persuaded, at least provisionally, of an alternative explanation[,] the effective defender cannot simply protest that the prosecution has not made its case. Rather, she must introduce and embellish plausible alternatives to the prosecutor's explanations.'"[174]

2. Redirection by Framing—The Reptile Strategy

The manner in which an advocate frames or reframes an issue may provide an opportunity for mis- or redirection. One example is the "reptile strategy." This technique, advanced by trial attorney Don Keenan and trial consultant David Ball in their book *Reptile: The 2009 Manual of the Plaintiff's Revolution*,[175] is a form of misdirection strategy typically employed by

169 *Id*. at 307.

170 *Id*. Berger explains that

> when making this type of closing argument, the lawyer need not preface every statement by qualifying it first with "the evidence reflects." The lawyer can, of course, still continue to make the types of statements that are used in the false implication closing argument that are technically true and only imply the theory of defense. In this regard, the evidence–reflects type of argument is really a modified version of the false–implication closing argument.

Id.

171 *Id*. at 308.

172 *Id*.

173 *See infra* sec. E. Berger, too, does explore such ethical questions. Berger, *supra* note 161, at 309–62.

174 *Id*. at 338. (citing David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1760 (1993)).

175 DAVID BALL & DON C. KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).

plaintiffs' counsel. This tactic involves invoking the fear of the decisionmaker—typically the jury—to advance the position of the plaintiff. "The 'reptile theory' seeks to pit the jury against the defendants by making the jury feel that the defendants' actions and products threaten themselves, their families, and their societies."[176] This is a tactic often used in medical-malpractice claims and seeks to redirect the jury's attention from a focused consideration of the conduct of the defendant vis-à-vis the plaintiff to a more widespread fear that the defendant's violation of some safety standard threatens the very safety of the community.[177]

Of course, savvy defense counsel have formulated their own redirection tactics to respond to the reptile strategy. One such tactic involves redirecting the jury's understanding of its role in processing the evidence.[178] The reptile strategy asks jurors to use their decision-making authority to right some threatened wrong committed by the defendant, and may imply a low threshold of proof required of plaintiffs' counsel.[179] A defensive technique might therefore be to redirect the jury's understanding of its deliberative role. Because studies have shown that jurors generally take their deliberative role seriously,[180] defense lawyers combat the reptile strategy by emphasizing the "obligation jurors undertook when swearing the oath of service, elevating the value of what they are about to do as a group over the particulars of the themes, emotions, and the plaintiff's call to action. In a sense, it is a competing call to action by and for the defense."[181] This can be accomplished by providing the jury with a verdict graphic, redirecting its attention to specific deliberative prompts and away from the simple call to action strategy employed by the plaintiff.[182]

176 Michael Crist, *Mass Tort Mania, The Effect of Saturation Advertising on Claims, Courts, and Memories*, 59 DRI FOR DEF., Apr. 2017, at 54.

177 David C. Marshall, *Legal Herpetology: Lizards and Snakes in the Courtroom*, 55 DRI FOR DEF., Apr. 2013, at 64 ("[T]he lawyer using this strategy must show a jury how the dangers presented by a defendant extend beyond the facts of a case and affect the surrounding community so the entire case boils down to community safety versus danger.") (citation omitted).

178 Theodore O. Prosise & Peter Ehrlichman, *How Defendants Can Combat the 'Reptile Strategy' (and Its Ilk)*, INSIDE COUNSEL BREAKING NEWS, Oct. 9, 2015.

179 *Id.* (suggesting the reptile strategy implies a "presumption shift and 'low bar' of proof implied by plaintiff's counsel (e.g., the 'scale' metaphor used to portray to a jury that only a feather of evidence is needed to meet the burden and tip the scale in their client's favor)").

180 Leah Sprain & John Gastil, *What Does It Mean to Deliberate? An Interpretative Account of Jurors' Expressed Deliberative Rules and Premises*, 61 COMM. Q. 51, (2013) ("[Jurors] believe deliberation should be rigorous and democratic [and] actively consider information.").

181 Prosise & Ehrlichman, *supra* note 178.

182 *Id.* "The 'verdict map' can guide the 'directionality' of the deliberative process. A step-by-step graphic of each question, a few key instructions, and several anchoring pieces of evidence can allow jurors to impose calm order on deliberations. This helps combat the 'reptile' or the general plaintiff 'call to action.'"

3. Redirection by Fear—Mutt and Jeff

Another form of redirection employs the "good cop–bad cop" or "Mutt and Jeff" routine of questioning. This is an example of distraction that may be employed in negotiations[183] and police interrogations.[184] In a negotiation example, the good cop garners favor with the opposing side by appearing receptive to an offer and, when an accord appears imminent, the bad cop summarily rejects the offer as insufficient.[185] In response to the predictable frustration of the opposing party, the good cop steps back in to suggest that modest, additional accommodations might resolve the situation.[186]

This technique is also employed in police interrogations and such use has been the subject of a significant amount of scholarship exploring how the technique can be misused by police to elicit false confessions.[187] Variations of the good cop–bad cop routine exist in police interrogations of defendants, ranging from the conveyance of false and intimating incriminations to the less-deceptive use of an empathetic followed by aggressive interrogator.[188] These techniques, while varied, share the misdirection or distraction element and have been used for centuries.[189] In fact, they form the basis for the efficacy of distraction in persuasion fear-then-relief studies explored earlier.[190]

4. Redirection by Confusion—Bullshit

Another persuasive strategy involving redirection is what Harry Frankfurt characterized as "bullshit."[191] Frankfurt distinguishes bullshit from deliberate misrepresentation, noting that the truth is unimportant to the bullshitter. "A person who lies is thereby responding to the truth, and he is to that extent respectful of it. When an honest man speaks, he says only what he believes to be true; and for the liar, it is correspondingly indispensable that he considers his statements to be false."[192] A bullshitter need not attend to truth:

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183 Charles B. Craver, *Classic Negotiation Techniques*, 52 IDAHO L. REV. 425, 454 (2016).

184 Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?,* 99 MICH. L. REV. 1168, 1169–70 (2001).

185 Craver, *supra* note 183, at 454.

186 *Id*. ("[T]he reasonable partner assuages their feelings and suggests that if some additional concessions were made, she could probably induce her seemingly irrational partner to accept the new terms.").

187 *See, e.g.,* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 627 (1979).

188 *Id*. at 625–28.

189 Dolinski & Szczucka, *supra* note 108, at 2033. The authors note that the "*bad cop–good cop* interrogation procedure was in fact used as long ago as the Middle Ages, to make women admit they were witches, and also in the Soviet Union, particularly under the rule of Stalin—to make people admit they were enemies to the working class." *Id*. (citations omitted).

190 *See supra* section B(1)(b).

191 HARRY G. FRANKFURT, ON BULLSHIT (2005).

192 *Id*. at 55–56.

> For the bullshitter, however, all these bets are off: he is neither on the side of the true nor on the side of the false. His eye is not on the facts at all, as the eyes of the honest man and of the liar are, except insofar as they may be pertinent to his interest in getting away with what he says. He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose.[193]

The bullshitter makes statements untethered to truth which, in many instances, can confuse the listener and enable the bullshitter to persuade. Matthew L.M. Fletcher asserts that lawyers are, at times, bullshitters, noting that "[w]hile it is well established that lawyers may not lie to their clients, it is not well established whether counsel can bullshit their potential and active clients."[194] Fletcher asserts that lawyers bullshit clients when they make representations that they not only *cannot* verify to be true, but likely *could* not verify to be true.[195] Fletcher provides several examples, including a representation to a prospective client that the lawyer is more likely to prevail on an appeal than another lawyer, or a representation to the court that there will be widespread and significant consequences of a ruling.[196] He notes, "If at the moment an attorney makes these representations, he or she does not know if the representations are true, or even likely to be true (and in most instances here the lawyer simply cannot know), then the lawyer is bullshitting."[197]

Bullshitting is a form of redirection because the objective of the bullshitter is to distract the listener from the truth. The bullshitter may not be actively lying, but is obscuring the truth. "[I]n the typical case, the bullshitter is strongly connected to the truth via a desire to obscure a specific part of it."[198] Indeed, the bullshitter likely has an agenda: "the bullshitter acts with the goal not simply of hiding or muting the truth but also of using these tactics to alter the listener's behavior in some way . . . ."[199] In this respect, bullshitting can be viewed as a persuasive strategy involving redirection.

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193 *Id*. at 56.

194 Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435, 1436 (2015).

195 *Id*.

196 *Id*.

197 *Id*.

198 Sara Bernal, *Bullshit and Personality*, *in* BULLSHIT AND PHILOSOPHY 63, 64 (Gary L. Hardcastle & George A. Reisch eds., 2006) ("This desire may be more or less conscious. The bullshitter may have that part of the truth in mind clearly or fuzzily, or it may be in some mental compartment to which she has no immediate conscious access.").

199 Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1385 (2007) ("[T]he bullshitter may act with varying levels of awareness of what he is doing, sometimes suppressing, or even being entirely consciously unaware of, his troubling dance with factuality.").

5. Redirection by Erroneous Reasoning—Informal Fallacies

The use of informal fallacies in legal advocacy is another form of mis- or redirection. "[F]allacies are mistakes in reasoning that involve ambiguity and vagueness. A fallacy can be a type of error in an argument, a type of error in reasoning (such as arguing, defining, and explaining), a false belief, or a rhetorical technique that causes any of these errors."[200] Fallacies can be formal, involving technical errors in the structure of an argument, or informal, involving "the content (and possibly the intent) of the reasoning."[201] "Informal fallacies can be grouped under four headings: (1) fallacies of relevance; (2) fallacies of defective induction; (3) fallacies of presumption; and (4) fallacies of ambiguity."[202] Arguments based on fallacies of relevance include ad hominem attacks, or arguments designed to redirect attention from a central argument and toward an attack on the opposing party or counsel.[203] Arguments that are based on emotional appeal, such as pity, fear, or terror, are similarly fallacies of relevance whose objective is to redirect attention from facts and logic to emotional appeals.[204]

In a fallacy of defective induction, premises, while possibly relevant, are too weak to support the conclusion. "A classic example of this is an appeal to ignorance (*argumentum ad ignoratiam*), when it is argued that a proposition is true on the ground that it has not been proved false, or when it is argued that a proposition is false because it has not been proved true."[205] Plaintiffs in toxic-exposure cases make arguments based on defective induction when "they argue that because there is no known safe dose of a product, the product is defective and caused the injury at

200 Cory S. Clements, *Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words*, 2013 B.Y.U. L. REV. 319, 332 (2013).

201 *Id.* at 333. Informal fallacies appear to be accurate but are "'flawed in their reasoning or construction.' And from a psychology perspective, 'a fallacy is often defined as a mistake in reasoning used for deceptive purposes.' While this certainly is not categorically true of all informal fallacies, 'many of the informal fallacies are often used in the manipulation of opinion.'" *Id.* (citations omitted).

202 Frank C. Woodside III & Jacqueline R. Sheridan, *Responding to Table Pounding: Defense Through the Exposure of Fallacies*, 58 DRI FOR DEF., Sept. 2016, at 63.

203 *Id.*

204 *See, e.g.*, G. Fred Metos, *Appellate Advocacy: Logic and Argument*, 23 CHAMPION, Mar. 1999, at 33 (explaining arguments based on force, pity, or group passion); *see also* Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH & LEE L. REV. 733, 778–80 (2004). Scharffs explores the ethical implications of the use of informal fallacies in legal argumentation:

> Consider the following abbreviated list of informal fallacies that logicians condemn, each of which is commonplace in the law: the appeal to pity, the fallacy of complex question, the fallacy of special pleading, the red herring, the slippery slope argument, the straw man fallacy, fallacies of personal attack (such as the genetic fallacy, *ad hominem* arguments, and the fallacy of poisoning the well), the appeal to terror, fear, or force, and the appeal to authority or prestige.

Id.

205 Woodside and Sheridan, *supra* note 202, at 63.

issue."[206] Again, this is an argument involving a form of redirection insofar as "it also attempts to shift the burden of proof to the defendant. Just because there is no 'known' safe dose does not mean that there is no 'actual' safe dose."[207]

An example of an argument using redirection based on a fallacy of presumption is the complex-question fallacy. "The complex question fallacy (*plurium interrogationum*) involves two unrelated points that are combined and treated as a single proposition. Through the improper use of the word 'and,' the listener is encouraged to accept or reject two separate propositions when really only one proposition is acceptable."[208] A frequently used example is the question, "Have you stopped beating your wife?"[209] If the answer is "yes" it suggests the responder did beat his wife in the past, but no longer does.[210] If the response is "no" it suggests the responder still beats his wife.[211] "The complex question argues by asking a question in such a way as to presuppose the truth of some assumption buried in that question—an assumption which may or may not be true."[212]

6. Redirection in Mediation

One author explores the use of redirection—deception, in his terms[213]—in caucused mediation.[214] John W. Cooley asserts that "[c]onsensual deception is the essence of caucused mediation."[215] This is true, he argues, for three reasons. First, because the mediator has an obligation not to disclose confidential information, neither party to a mediation knows what information, if any, has been disclosed to the mediator.[216] "In this respect, each party in a mediation is an actual or potential victim of constant deception regarding confidential information—granted, agreed deception—but nonetheless deception."[217]

Second, because the bargaining strategies of the parties and the mediator are "layered and interlaced," they create "an environment rich in gamesmanship and intrigue."[218] The mediator is then in the business of managing information, or controlling the direction of attention. This results in a likelihood that mediators will use "deceptive behaviors because

206 *Id.* at 66 ("This argument constitutes an appeal to ignorance by attempting to avoid the dose–response requirements of toxicology and epidemiology . . . .").

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* ("More appropriately, one should first ask: 'Have you ever beaten your wife?' If an affirmative response results, a second question may be asked: 'Have you stopped?'").

213 Yes, I know, another iteration, but stay with me, Reader, for Cooley's emphasis on a term I have tried to sidestep is addressed clearly and effectively above the line, so to speak.

214 Cooley, *supra* note 139, at 6 (citations omitted).

215 *Id.* at 5.

216 *Id.*

217 *Id.* at 5–6.

218 *Id.* at 6.

they are the conductors—the orchestrators—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control."[219] "A third reason for the presence of deception in mediation is that the information system manipulated by mediators in any dispute context is itself imperfect."[220]

Comparing the techniques of the mediator to those of the magician, Cooley then outlines several misdirection strategies employed in mediation. Using the magician's technique of "appearance,"[221] mediators may "use statistical data and graphs to lure other mediation participants (audience members) into believing that they should draw certain conclusions from a given set of data."[222] For example, mediators can employ techniques like the selective use of data,[223] artful presentation of data to suggest expansibility,[224] and careful selection of the frame of reference to redirect attention and perception about data[225] relevant to the mediation. Cooley further observes the use of persuasive but false counterarguments employed in mediation, such as the red herring,[226] the "where there's smoke there's fire" arguments,[227] and the "if it ain't broke, don't fix it" arguments.[228] Mediators can also employ mis– or redirection techniques to control the overarching focus of the mediation through strategies such as confusion,[229] diversion,[230] distraction,[231] and specific

219 *Id*.

220 *Id*.

221 *Id*. at 24 ("An appearance, or a production, is an effect in which the result is the materialization of something or someone.") (citation omitted).

222 *Id*.

223 *Id*. at 25.

224 *Id*. at 26 ("The trick of using big numbers instead of percentages, in certain circumstances, can create the appearance of enhanced size.").

225 *Id*. at 29 ("The concept of frame of reference is often a crucial ingredient in deception employed to produce a desired appearance.").

226 *Id*. at 31 ("Magicians make a solid argument disappear by drawing the audience's exclusive attention to a side issue. In doing so, they employ a type of misdirection.").

227 *Id*. at 32–33 ("In order to distract the audience's attention from an original unpalatable proposal, the magician may create a feeling of alarm in the audience by directing its attention to a situation which may erupt into a much larger problem.").

228 *Id*. at 33 ("To make a solid, innovative proposal for improvement disappear, magicians may misdirect the audience's attention to the apparent security of the status quo, despite knowing that such security will be of brief duration.").

229 *Id*. at 75. Cooley explains,

> In a multiple issue case, mediators might use the misdirection stratagem of confusion to accomplish their ends by spending most of the mediation session on one or two tough issues. Near the end of the session, when they have achieved agreement on one or both of the tough issues, they then call the parties' attention to the twelve or so incidental issues that were not previously addressed and say something such as "we'd better work these out now or you'll have to work them out on your own without me." Fearing that deadlocks on the small issues might scuttle the overall settlement, and not wanting to spend more money to take another day in mediation, the parties begin resolving the multiple small issues with a mediator's assistance. The mediator makes little effort to

direction.[232] All of these strategies involve some form of mis- or redirection, and many are quite effective.[233]

E. Ethical Questions

Of course, on its face, the use of misdirection in advocacy—if viewed as active deception—raises serious potential ethical concerns. Lawyers are expected to be truthful and not engage in deception. As noted earlier, many of these potential issues are beyond the scope of this article and worthy of further consideration. Nonetheless, some shall be noted here.

Linda Berger explores ethical questions relating to the creation of false inferences in cross examination and closing arguments.[234] Noting primary ethical sources including the ABA Model Rules of Professional Conduct Model Rule 3.4(e), which prohibits a lawyer from "allud[ing] to any matter . . . that will not be supported by admissible evidence,"[235] and *Restatement (Third) of the Law Governing Lawyers* section 107(2), Berger concludes that the false-implication and evidence-reflecting closing arguments are ethically permissible.[236] This is because both forms of closing argument "only ask the jury to draw reasonable inferences based entirely on the existence of admissible evidence, without ever explicitly telling the jury something the defense attorney knows to be untrue."[237]

In contrast, Berger concludes that the false-story cross examination and closing argument are unethical. The false-story cross examination technique is unethical "because the defense attorney's questions are not premised on a good faith basis. Instead, defense counsel knows that he is

sort or organize the issues, which induces the parties in their state of "disarray, turmoil, and disorder," to deal with the issues hastily, to make reasonable concessions, and to consent quickly to tradeoffs.

Id.

230 *Id*. at 75–76 (explaining the technique of reorienting focus from the legal to emotional conflicts).

231 *Id*. at 77–78 (explaining the use of the paradox).

232 *Id*. at 78–80 (explaining the mediator's control of issue selection).

233 Cooley also does an excellent job exploring the ethics of these strategies in light of the obligations imposed on lawyers regarding truthfulness. He makes many interesting observations about how the ethics rules apply to lawyer–negotiators, mediator advocates, and mediators, emphasizing the somewhat uncharted territory involving acceptable behavior in each of these roles. This article, in turn, raises but does not fully respond to questions regarding the ethics of redirection techniques and, specifically, the ethical use of such techniques in different representational settings. Those questions are set forth *infra* in section E.

234 Berger, *supra* note 161, at 311.

235 *Id*. at 311. "While Model Rule 3.4(e) does not use the actual words 'good faith basis,' or specifically reference cross–examination, commentators and courts have generally viewed Model Rule 3.4(e) as requiring a good faith basis for the questions asked on cross-examination." *Id.*

236 *Id*. at 315.

237 *Id.* "Even though these types of closing arguments attempt to create a false impression by asking the jury to draw a series of knowingly false inferences concerning the witness's version of events," they remain within ethical limits because they "present the jury with an alternative version of events, without technically asserting the truth of those alternatives." *Id.*

planting a version of events in the jury's mind by forcing the witness to deny the answer suggested by each question."[238] Similarly, the false-story closing argument is unethical because, "in addition to explicitly stating the client's innocence, the false-story closing argument . . . involves a host of other explicit statements the trial attorney knows to be untrue."[239] This type of closing argument, which relies on knowingly false statements, violates the ethical prohibitions against making false statements[240] and "engaging in conduct that involves 'dishonesty, fraud, deceit or misrepresentation,'"[241] and the prohibition against "conduct that is prejudicial to the administration of justice."[242]

Cooley also explores the ethics of misdirection or redirection techniques in mediation. He observes that evaluating the ethical use depends upon the player, noting that there are no ethical rules applicable to mediators themselves[243] and that "[i]n relation to lawyers representing clients in negotiation, there is a wide chasm dividing expert opinion on the applicable standard of truthfulness."[244] On one extreme is absolute truth,[245] and on the other is the view that "misleading the other side is the very essence of negotiation and is all part of the game."[246] Cooley notes that defining ethical conduct in negotiations is complicated for several reasons, including the "numerous excuses and justification lawyers typically marshal for lying in negotiation," and the varied conventional strategies employed in negotiations that "rely for the effectiveness on techniques of timed disclosure, partial disclosure, nondisclosure, and overstated and understated disclosures of information—all of which involve degrees of deception."[247] Cooley argues that because "the present ethical norms for lawyers do little more than proscribe fraud in nego-

238 *Id*. at 314.

239 *Id*. at 321–22.

240 *Id*. at 321–22 ("Model Rule 3.3(a)(1), Restatement section 120 and ABA Standard 4–7.7 all prohibit defense counsel from making false statements to the judge or jury.").

241 *Id*. at 322 (referring to Model Rule 8.4(c)).

242 *Id*. (referring to Model Rule 8.4(d)).

243 Cooley, *supra* note 139, at 94 ("[M]ediators—lawyers and non-lawyers—currently have no specific formal guidance regarding how truthful they must be in conducting mediations. It is unclear what kinds of mediator deception are ethically acceptable.").

244 *Id.* at 95.

245 *Id*. at 95–96 (exploring "two 'precepts to guide a lawyer's conduct in negotiations: (1) 'The lawyer must act honestly and in good faith, and (2) 'The lawyer may not accept a result that is unconscionably unfair to the other party.'").

246 *Id*. at 96 (internal quotation omitted).

247 John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 268 (2004) (citations omitted) ("'Puffing'—a type of deception—is generally thought to be within the permissible limits of a lawyer's ethical conduct in negotiation, yet even with puffing, at some mysterious, undefined point the line may be crossed and 'the lack of competing inferences makes the statement a lie.'").

tiation—or, at most, they proscribe only very serious, harmful misrepresentations of material fact made through a lawyer's false verbal or written statement, affirmation, or silence,"[248] efforts should be made to develop rules that are consistent with the underlying "game" of mediation.[249]

Scholars have considered the ethics of the Mutt and Jeff routine, particularly in police interrogations.[250] While deception in police interrogation clearly raises ethical concerns,[251] the use of the Mutt and Jeff routine that does not employ deception but merely capitalizes on the fear-then-relief phenomena (in instances in which such use does not elicit a false confession) is less clear. Addressing the debate about the potentially coercive nature of interrogations, one author distinguishes between confessions prompted by "offensive governmental conduct" and those which simply result from the use of persuasive techniques, concluding that "in some circumstances, [interrogators] should be allowed to express false sympathy for the suspect, blame the victim, play on the suspect's religious feelings, reveal incriminating evidence that in fact exists, confront the suspect with inconsistent statements, and more."[252]

Ethical concerns are also complex when viewed through the unique position occupied by criminal-defense counsel. In *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation*,"[253] W. William Hodes references "Justice White's famous dictum in *United States v. Wade*, that defense counsel has been assigned 'a different mission' in our system, one that

248 *Id*. at 269–70.

249 *Id*. at 274–77. Cooley identifies several criteria that must be considered in fashioning rules, including the observation that the rules must be "compatible with the game's nature and purpose," "comprehensible, reasonable, and fair," and "capable of compliance by all of the game's players in all situations." *Id*. at 274. Further, the rules "must not significantly interfere with the means by which the players can accomplish the game's purpose." *Id*. at 275. *But see* Buzz Tarlow, *In Defense of Lying: The Ethics of Deception in Mediation,* 11 NO. 2 J. AM. C. CONSTR. LAW. 1 (2017) (asserting that "[w]hile some would propose a more defined set of ethical rules, practitioners should consider whether such rules would comport with mediation's role in our legal system as an alternative to trial. The generally desired outcomes of mediation may be halted if more limitations were placed on lawyers' and mediators' behavior.").

250 *See* Magid, *supra* note 184, at 1169 ("Commentators have sought to show that deception causes many false confessions and, thus, the wrongful convictions of many innocent persons.").

251 *See, e.g.,* Margaret L. Paris, *Trust, Lies and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 9 (1995) (advocating that interrogators should be prohibited from lying in interrogations).

252 Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 (1997).

253 W. William Hodes, *Seeking the Truth versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation*," 44 S. TEX. L. REV. 53 (2002). Hodes elaborates:

> One of the most brutal clashes between competing values is that between "truth" and "justice," with implications for the very nature of the legal system itself. Finding the truth and then resolving disputes on the basis of that truth ranks very highly in our value system. But so does achieving justice, even though justice as Peter defines it will often be purchased at Paul's expense, and even though some of the truth is frequently obscured or even sacrificed along the way. And, of course, the elusive and essentially fatuous concept of "the whole truth" is always lost in the fog of adversarial combat.

Id. at 57–58.

does not include an 'obligation to ascertain or present the truth.'"[254] Hodes notes that "while lawyers must tell the truth, they are not required to seek the truth or to aid in the search. Instead, they are often required by their roles to work to obscure inconvenient truths and to prevent the truth from coming out."[255]

III. Conclusion

We have navigated quite a bit of ground, exploring how distraction can be tolerated in narrative and how psychological studies explain the persuasive effect of distraction. With regard to narrative, distraction only *works* when the audience can nonetheless make sense of things. Coherence requires the story to hang together in terms of character and plot. Misdirection is accepted—even enjoyed—when the story remains plausible within its own framework. The psychological studies also suggest that trying to make sense of things during a distraction makes a target more susceptible to a prompt, and that therefore persuasion is facilitated during a disruption.

In light of these studies, advocates might consider how redirection tactics could be effectively employed, but should also be cautious about their appropriate and ethical use. For example, psychological studies demonstrate that redirection or distraction affects a subject's responsiveness to a request in real time. This suggests that redirection tactics may have more influence in real-time advocacy settings, such as a mediation or closing argument. Storytelling experts might assert that the efficacy of such use in written advocacy is less clear. Redirection strategies involved in argument construction in written advocacy, such as the use of informal fallacies or reframing of issues, should be carefully considered in this setting as the audience has more time to evaluate, process, and react to argumentation. In this context, therefore, misdirection techniques may be more apparent and less effective.

Moreover, while the ethical implications of the use of misdirection in advocacy are far-reaching and beyond the scope of this article, they are certainly worthy of further evaluation. Lawyers are prohibited from misrepresenting or misleading, and terms such as misdirection and

254 *Id.* at 69. White explains that defense counsel, having been assigned "a different mission" and under "no comparable obligation to ascertain or present the truth," may therefore "present nothing, even if he knows what the truth is." United States v. Wade, 388 U.S. 218, 256–57 (1967). White concludes, "In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth." *Id.* at 258.

255 Hodes *supra* note 253, at 60–61.

distraction certainly connote notions of misrepresentation, the management of terms notwithstanding. However, there are certainly some forms of argumentation that rely on redirecting the attention of the decisionmaker. The ethical line for many of these is somewhat blurry and advocates should therefore carefully consider strategies and context. This is particularly true in light of Hodes' conclusion that "[a]n ethical and professional lawyer must live close to the bounds of law—yet the bounds of law are not only elusive, but can shift without a great deal of warning."[256]

Oh, and what about outcomes and tenure? I suggested at the beginning of this journey that the introduction of tenure into the discussion of the standards-review process was, in all likelihood, an unintentional distraction. Does storytelling help explain why the ultimate adoption of outcomes standards made sense to the academy? Can the result be explained in the context of psychological studies, such that the cognitive and emotional distraction of tenure made the academy more receptive to the adoption of outcomes standards? Or were the outcomes standards simply passed because the academy's attention was so focused on tenure that it stopped resisting so emphatically to assessment? Perhaps a bit of each were at work.

256 *Id*. at 78.

ARTICLE

Telling Tales

The Transactional Lawyer as Storyteller*

Susan M. Chesler** and Karen J. Sneddon***

I. Introduction

Transactional lawyers are storytellers, although they may not think of themselves as such. They work with provisions and clauses to build transactional documents that encapsulate the wishes, hopes, and fears of the transacting parties to promote, guide, and control the relationship of those parties. Narratology, the theory of narrative, can provide a resource to transactional lawyers that facilitates the construction of a wide range of transactional documents, which can themselves be considered narratives.

The form documents that transactional lawyers use as starting points in the drafting process are already rife with narrative characteristics; they are embedded with characters and plots, and they tell the stories of the particular types of transactions.[1] By way of illustration, a typical form employment agreement may represent the unequal bargaining power between the powerful employer and the weaker employee—in other words, it tells the widely recognized biblical story of David and Goliath.[2] The provisions and clauses often contained in this form contract embody the predicament of the underdog who needs to overcome great obstacles to secure a victory that is against all odds. This may be seen, for example, in a form termination clause permitting the employer to fire the employee

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** Clinical Professor of Law, Sandra Day O'Connor College of Law, Arizona State University.

*** Professor of Law, Mercer University School of Law.

1 *See generally* Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237 (2017).

2 *Id.* at 252.

at its discretion, for any reason or no reason at all. Or in an arbitration clause requiring that the employee's claims against her employer be decided by arbitration, while the employer makes no reciprocal promise.[3]

Similarly, a typical form premarital agreement may incorporate the characters and plots of fairytales, such as the story of Cinderella. One party is cast as the damsel in distress and the other party cast as prince charming. The form agreement is thus presented as a mere formality on the road to "happily ever after." Such forms may include inadequate protections for property distributions upon dissolution by failing to include provisions that are dependent upon the length of the marriage at the time of dissolution, either by death or divorce. After all, death and divorce are not part of the "happily ever after" of fairy tales. At times, the narratives contained in the form agreements used by the transactional lawyer correspond well with the narrative of the particular transaction, but that is not always the case. The transactional drafter as storyteller can often improve the effectiveness of the document by incorporating additional, or different, narrative characteristics and techniques.

Telling tales is the work of the transactional lawyer. The aim of this article is both to educate transactional lawyers as to the role of the storyteller and to share how best to use storytelling in a manner that facilitates transactional drafting. This article first defines narrative and narratology, and then explains the role of the transactional lawyer as one of storyteller. To promote the work of drafters, the article then shares five practical strategies that drafters can use to leverage the components and characteristics of narrative to craft more-effective transactional documents.

II. Narratology and Transactional Documents

A. Transactional Documents as Narratives

Building a better transactional document resembles the task of Sisyphus. As punishment, Sisyphus was doomed to perform a task of perpetual futility. He was forced to propel an immense boulder to the top of a mountain, only to watch as the boulder rolled to the bottom. His task would thus begin again. When a transactional lawyer revises and reworks one clause or provision in a transactional document, often another clause

3 *Id.* at 253.

4 While litigators seldom question the amount of time spent drafting briefs primarily from scratch, transactional lawyers often express reluctance to devote time redrafting and revising existing form agreements because this redrafting and revision may be perceived as inefficient. However, failure to do so may often result in a transactional document that is not sufficiently tailored to the parties and their particular transaction. For an exploration of efficiency and drafting, see Robert Anderson & Jeffrey Manns, *Engineering Greater Efficiency in Mergers and Acquisitions*, 72 BUS. LAW. 657, 661–63 (2017) (summarizing the role of technology and precedent in the transactional drafting process).

or provision is revealed to need revision and the process begins yet again. At times drafting may seem like a task of futility with little guidance to facilitate the drafting process. That sense of frustration may be alleviated by drawing on narratology for guidance. Narratology provides a new lens to critically examine transactional documents. While at first glance it may seem that incorporating narrative techniques in transactional drafting may lead to increased inefficiency,[4] there is significant value to both recognizing the existence of narrative in form documents and in applying narrative techniques to highlight the stories inherent within transactions.

A typical definition of narrative is "a story, whether told in prose or verse, involving events, characters, and what the characters say and do."[5] Narratology is the theory of narrative.[6] Famed narratologist Mieke Bal defines narratology as a theory that facilitates the understanding, analysis, and evaluation of narratives.[7] Narratology thus "studies perspectives of telling: who sees and who tells, the explicit or implicit relation of the teller to what is told, the varying temporal modalities between the told and its telling."[8]

Narratives are by no means limited to fictional texts. A broader definition of narrative is a series of events shared by a narrative agent.[9] Even such a broader definition initially seems incompatible with transactional documents. Much scholarship addressing the application of narrative and legal writing often focuses on litigation-based documents.[10] This approach conceptualizes the litigator as the storyteller spinning a tale in front of a jury or crafting a tale in an appellate brief in order to better persuade the intended audience.[11] But the definition of narrative also encapsulates transactional documents. After all, a transactional document is a series of events described in clauses and provisions by a narrative agent.

5 M.H. ABRAMS & GEOFFREY GALT HARPHAM, A GLOSSARY OF LITERARY TERMS 233 (11th ed. 2015). For an examination of the consequences of using "narrative," "story," and "storytelling" in the law, see Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81, 82–86, 93–94 (2012) (arguing that "narrative," "story," and "storytelling" are ambiguous and overused and suggesting the appropriate term is "narrativity").

6 *See generally* MIEKE BAL, NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE (3d ed. 2009).

7 *Id.* at 3.

8 Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?,* 18 YALE J. L. & HUMAN. 1, 2 (2006).

9 *E.g.*, ROBERT SCHOLES, JAMES PHELAN & ROBERT KELLOGG, THE NATURE OF NARRATIVE 4 (40th anniversary ed. 2006) (articulating the core characteristics of narrative as "the presence of a story and a story-teller").

10 *E.g.,* Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297 (2012); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING 3 (2009); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127 (2008); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001).

11 For a bibliography of legal storytelling, see J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

Despite this resemblance, some may point out that transactional documents have a different function. Transactional documents are to inform, not to entertain or even persuade. Transactional documents may be classified as expositive texts with the sole intention of delivering information. Nonetheless, transactional documents do convey a narrative. Whether employment contract or trust agreement, the documents are more than mere delivery of information. The purposes of transactional documents include the building of relationships, the safeguarding of property, and the securing of legacies. These purposes are furthered by presenting the narratives inherent within each transaction.

Narrative is a prevalent method of communication.[12] Communications from Facebook Stories to persuasive legal writing incorporate the characteristics of narrative to improve communication. And transactional documents should not be segregated from these other forms of communication—as they, too, can benefit from the inclusion of narrative.

B. The Transactional Lawyer as Storyteller

The transactional lawyer, like all lawyers, is a storyteller.[13] Equating lawyers to storytellers may seem at first to be an inaccurate analogy. After all, transactional lawyers and litigators do not spin yarns in front of crackling fires. Nonetheless, all lawyers are storytellers. The role of the transactional lawyer, for instance, is to construct a cohesive narrative that represents a particular series of events that informs the future actions of the parties, whether through contract, trust, or will. The transactional lawyer weaves together strands of phrasing and clauses to produce a coherent text that is built around characters, locations, and events.[14] While the roles of transactional lawyers and litigators may differ given the nature of their representation, all lawyers draft documents to advance the goals of their clients. Thus, the lawyers become the narrators of their clients' stories.

As with all storytellers, the transactional lawyer begins to construct a story by recognizing the conventions of the genre. For transactional drafting, that begins with the acknowledgment of the applicable forms.[15]

12 *See, e.g.*, JEROME BRUNER, ACTS OF MEANING 45 (1990) (identifying the human "predisposition to organize experience into a narrative form").

13 *E.g.,* Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012); Maureen B. Collins, *Lawyer as Storyteller*, 88 ILL. B.J. 289 (May 2000).

14 The word "text" is related to "textile." MARIO KLAVER, AN INTRODUCTION TO LITERARY STUDIES 1 (3d ed. 2013) (writing that "just as single threads form a fabric, so words and sentences form a meaningful and coherent text"). For an exploration of the role of the transactional lawyer, see generally Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

15 One author describes the drafting process as follows:

Forms are valuable resources to drafting attorneys, transacting parties, courts, and other third parties.[16] As one author wrote, "The repetitive nature of much of legal drafting makes the use of form documents economically efficient."[17] In practice, "[a]lmost all drafting done today begins with a precedent."[18] The term "precedent" as used here refers to executed documents that were used in actual transactions and are either made publicly available on a variety of legal-research databases, or are only privately available to lawyers within the same firm or company. These are sometimes referred to as model agreements, instead of form agreements. Lawyers begin with precedents for two reasons. "First, it is efficient. Precedents save time and money. Rather than reinventing the wheel for each new deal, a lawyer gets a head start. Second, if the precedent is a good one, using it will reduce errors and improve a contract's quality."[19] The use of forms as a starting point can save lawyers time and money, and make them more efficient in the drafting process.[20] Ultimately, that greater efficiency will financially benefit clients.[21]

Form documents also provide a series of prompts and reminders, encouraging the parties to the transaction and the drafters to insert key information that otherwise may be neglected, omitted, or forgotten.[22] It thus follows that form use provides a lawyer with useful information that can assist him in being more competent in the drafting process.[23] In fact, clients often believe that a drafter's use of forms is beneficial to them not

> The process of legal drafting typically begins with an associate dragging examples out of the firm's form file and changing the names, dates, and description of the transaction. (Drafting is perhaps the only form of writing in which plagiarism is considered a positive.) Particular provisions are then modified to suit the singularities of the business deal. When the deal is done, the new document is added to the form file, ready for the next associate.

HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING xi (2d ed. 2008). For a brief history of form books, see M.H. Hoeflich, *Law Blanks & Form Books: A Chapter in the Early History of Document Production*, 11 GREEN BAG 2d 189, 191–92 (2008).

16 *E.g.*, WILLIAM K. SJOSTROM JR., AN INTRODUCTION TO CONTRACT DRAFTING 44 (2d ed. 2013) (identifying the first step in the drafting process as "locat[ing] a form or sample contract (often called a precedent) to use as the starting point for your contract"); TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 335 (2007) ("Think of a precedent as a template that you tailor for each transaction.").

17 Hoeflich, *supra* note 15, at 191.

18 STARK, *supra* note 16, at 335.

19 *Id.*

20 Kirsten K. Davis, *Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency*, 79 UMKC L. REV. 667, 669 (2011); *see also* Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI.-KENT L. REV. 59, 70 (2001).

21 According to one author, using form documents "enables the product to be produced by lower-paid, less-senior and less-experienced lawyers." Hill, *supra* note 20, at 63.

22 *See generally* Erik F. Gerding, *Contract as Pattern Language*, 88 WASH. L. REV. 1323 (2013). *See also* Chesler & Sneddon, *Tales from a Form Book*, *supra* note 1, at 244–45 (exploring the value and limitations of form documents and the stock stories inherent within them, which includes using form documents as checklists).

23 Davis, *supra* note 20, at 669.

only because of financial savings, but also because standardization of documents will yield fewer lawyer mistakes.[24] Over time, as the form evolves, many mistakes get corrected.[25] The forms become curated model documents. The use of forms can thereby promote confidence in the document created. The existence of standardized terms within form documents conveys the value of provisions that have been used in countless transactions.[26] And those provisions have presumably been interpreted by courts on numerous occasions.[27] This also alleviates a level of uncertainty for the parties to the transaction. Thus as the forms themselves become more credible, so too can the story of the related transactions become more credible.

As a consequence, form agreements are a great starting point for the drafter to shape the narrative of the transaction. The form agreement selected must be a deliberate choice. A recent empirical study of public merger agreements concluded that drafting attorneys tend "to use precedents that they are more familiar with or that relate to the particular client they are dealing with, rather than those that may be more readily adapted to the transaction at hand."[28] Confidence in particular forms can increase efficiency. Yet, overreliance on particular forms can also act as a limitation. All standard form agreements are not created equal, and they do not all contain the same terms, language, structure, or narrative techniques. The drafter should, therefore, evaluate a variety of form documents to select the most appropriate base form document to use.[29] Different forms may contain many of the same legal and business concepts, but the forms do not necessarily treat the concepts in the same way, or treat the parties to the transaction in the same way. Understanding the form document is the most basic role of the transactional lawyer[30] and informs the selection of the appropriate form as a starting point for the drafting process.[31] The form is the base for the narrative.

24 *Id.* at 672.

25 Hill, *supra* note 20, at 70 (reviewing "network effects" of having multiple attorneys consider, interpret, and use standard contract provisions).

26 *See generally id.*

27 *See id.* at 70–71.

28 Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 61 (2017).

29 DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 101 (1982) (remarking that forms provide "the illusion of security").

30 In describing the basic role of the drafting attorney, one commentator observed that "[y]ou must understand the documents no matter how opaque [or dense] they are. That's your job." DARMSTADTER, *supra* note 15, at 229.

31 *See, e.g.*, Scott Burnham, *Transactional Skills Training: Contract Drafting—Beyond the Basics*, 2009 TRANSACTIONS: TENN. J. BUS. L. 253, 265–67 (2009).

Since form documents are generalized documents that cover a broad range of situations, they are very similar to the widespread recognition of patterns of stock stories. A stock story is a story that is readily identifiable by the audience; the story need not be told in detail for the audience to understand the story, whether that means the identification of the characters, the plot, the situations, or the outcomes.[32] Shorthand references and allusions will be understood by the audience. As one author pointed out, stock stories function "as a template for a wide variety of similar stories to follow."[33] In a similar manner, form documents are templates that are also narrative short cuts. When interpreting the provisions in the transactional document, the parties to the transaction, third parties, and the court can—and will—rely upon the shorthand references. The narrative short cuts not only facilitate the interpretation, but also reduce the time and cost needed to develop the documents in the first place.[34] The parties to the transaction and the drafter can rely upon the form document to structure the parameters of the transaction and supply some of the details. The recognition of the stock stories within the transactional forms is particularly beneficial because many transactions do in fact follow the narrative, or pattern, of the stock story. Part of the power of stock stories is that the pattern does in fact fit so many narratives. For example, the employee and employer in a contractual relationship often have very unequal bargaining power, like the recognizable stock story of David and Goliath. Likewise, the "rags-to-riches" plot underscores a number of private foundation documents, such as articles of incorporation and bylaws.[35] Even though stock stories may fit a variety of narratives, stock stories will not be an accurate reflection of all narratives. Too much reliance upon the stock story will compress the actual events into a flat, one-dimensional narrative.

When selecting which forms to consult as the starting point in the drafting process, the transactional lawyer must first pay attention to who drafted each form agreement. It may not be important to determine the specific identity of the drafter, but it is important to know whose interests that original drafter was representing. Consider whether it was a lawyer

32 Chesler & Sneddon, *supra* note 1, at 238–39.

33 Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairytales 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, 192 (2012).

34 *E.g.*, DARMSTADTER, *supra* note 15, at 213 ("It's comforting to pontificate that every document should be poured over by highly trained lawyers bent on absolute perfection. The truth, however, is that clients often prefer Quick, Cheap, and No Surprises.").

35 For further analysis of stock stories and transactional documents, see generally Chesler & Sneddon, *supra* note 1.

36 Burnham, *supra* note 31, at 263.

who represented one of the parties in a specific transaction, such as whether the lawyer was representing the seller or the buyer in the creation of the Purchase and Sale Agreement. Understanding which party the lawyer was representing will help identify provisions that are "pro-seller" or "pro-buyer," such as a one-sided arbitration provision that favors the seller. Other considerations include whether a lawyer is employed by a publisher of a form book or by the legal-research company making the form available to its subscribers, or whether a group of lawyers drafted a standardized form for general use or use by only one category of users. The possibilities are numerous and varied. The form's drafter most certainly had an impact on the decision of which terms to include or omit, and the drafting choices made by him may benefit one party over another. And it may have affected the form drafter's use of embedded narrative techniques, whether intentional or not.

Accordingly, in addition to selecting a form base document based on the objective content of the form (such as the inclusion or omission of certain substantive terms, and its organizational structure), the drafter should consider the narrative techniques embedded within such form documents. A form employment agreement may contain broad restrictive covenants intended to protect a vulnerable employer from the nefarious actions of a former employee. However, for the particular transaction, the employer may be a well-established company with a global brand that would not suffer the loss of goodwill by any actions of an ex-employee. A form premarital agreement may assume that the parties have differing net worth and require protection of the assets of just one party from the claims by the other party in the event the marriage is dissolved upon death. One such clause is the complete waiver by one of the parties of the elective share, homestead protection, or probate allowance. In fact, the parties may have similar net worth and thus require a reciprocal waiver. Failure to account for the similarity of assets may produce ill-fitting provisions. The drafter should review the form to ensure that the embedded characters and series of events, which could be described as the plot, reflect the actual parties and events of the transaction.

In addition to form selection, transactional drafters must recognize that form documents are helpful only to a certain point. For each drafted document, modification is required because the facts and circumstances in each transaction are quite varied.[36] Revising transactional documents raises risks that deletion of a critical provision will occur or that uncertainty will be injected with new provisions. "[R]evising and clarifying legal

37 Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 109–10 (2000).

documents always involves some judgment and some risk. But the risk is worth it, and writers should not be dissuaded. Otherwise, the legal profession will never start to level the mountain of bad forms and models that we have created."[37] In other words, transactional lawyers must overcome fear of new provisions or risk perpetuating poor, ill-fitting forms.

Storytelling involves relying upon standard conventions and pushing the boundaries. This innovation is also part of the drafting process. Innovation can be an underrated aspect of transactional drafting.[38] Drafters, like storytellers, must recognize the limits of the forms and the constraints of conventions. Drafting attorneys should not be afraid to modify the language of form agreements or to draft a provision from scratch to fit the needs of the particular transaction or goals of the transacting parties. In other words, modification to forms can be used to ensure the transacting parties' stories are reflected in the document that binds them. As two commentators recently cautioned in a bar-journal article, "sometimes too much reliance is placed upon a prior draft from a previous deal, which can lead to an updated contract that omits material information."[39] Just as aspects of narratives are crafted to resonate with audiences, provisions included in transactional documents need to be crafted to speak to the particular audience for the particular purpose. Equating a transactional lawyer to a storyteller reflects the responsibility the drafting lawyer assumes to tell the tale of the transaction.

III. Practical Strategies to Leverage the Benefits of Narrative

Narratology provides a theoretical foundation for drafting. This section aims to present concrete application of narratology to transactional drafting. Specifically, this section shares five practical strategies to promote the work of drafters by using the components and characteristics of narrative. These strategies range from the simple substitution of words to the reimagining of a stock story embedded within a form document. This section addresses the issues raised in the first part of this article.

38 For a general discussion of contract-drafting innovation, see Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170 (2013). For suggestions on how to promote contract drafting innovation, see generally William E. Foster & Emily Grant, *Memorializing the Meal: An Analogical Exercise for Transactional Drafting*, 36 HAW. L. REV. 403, 404 (2014) (presenting classroom approaches to encourage student drafters to "think[] creatively about drafting legal documents").

39 Robert Hernquist & Robert L. Rosenthal, *Drafting Business Contracts: Practical Pointers for Protecting Yourself and Your Clients*, 24 NEV. LAW., Feb. 2016, at 20, 21.

40 WILLIAM SHAKESPEARE, ROMEO AND JULIET Act. II, Sc. 2, Lines 85-87, *in* THE NORTON SHAKESPEARE (2d ed. 2008).

A. Use Actual Names in the Document

"What's in a name? That which we call a rose
By any other name would smell as sweet"
—William Shakespeare[40]

Assignor and Assignee. Buyer and Seller. Employer and Employee. Leasor and Leasee. Trustee and Beneficiary. Donor and Donee. Wife and Husband. The transacting parties are often presented in documents with reference to their roles as transacting parties. These terms accurately describe the role that the particular party will play in the transaction. But these terms do not necessarily make a meaningful connection to the transacting parties. Despite the accuracy of these terms, the use of terms alienates the parties from their own transaction. The individuality of names is replaced with a legal term of art.

Legal terms represent more than conventionally used vocabulary—they reflect substantive meanings that embody certain rights and obligations. Additionally, using legal terms minimizes the need to edit certain portions of the documents. But the terms can act as barriers for identification by the transacting parties themselves. For instance, the actual parties do not see themselves as the one-dimensional terms of "assignor" or "assignee" in the example above. Individuals are multi-faceted. Individuals identify with their names,[41] the names of their employer, and the names of their family members. In short, individuals identify with names they are familiar with. Using the names of the parties thus allows for the parties to identify with the rights and obligations, not of a generic "assignor" and "assignee" but an individual party. By approaching the transactional document as embodying a narrative, using the actual names of the parties allows those parties to become the characters in the story of their own transaction. This instills ownership in the parties of their rights and obligations. The document becomes more than a mere generic form. The document becomes personal to the transacting parties.

Consider the following language from a form document:

> Assignor assigns to Assignee all of Assignor's right, title, and interest under the Purchase Agreement, including without limitation, all right, title, and interest in any down payment or earnest money.[42]

41 Indeed, individuals even demonstrate a preference for words with letters in common with their name. *See, e.g.,* Gordon Hodson & James M. Olson, *Testing the Generality of the Name Letter Effect: Name Initials and Everyday Attitudes*, 31 NO. 8 PERSONALITY & SOC. PSYCHOL. BULL. 1099 (Aug. 2005); John T. Jones et. al., *Name Letter Preferences Are Not Merely Mere Exposure: Implicit Egotism as Self-Regulation*, 38 NO. 2 J. EXPERIMENTAL SOC. PSYCHOL. 170 (2002).

42 1A CAL. REAL EST. FORMS § 1:140 (2d ed. 2017).

As written, the provision accurately reflects the roles of the parties. Nevertheless, the use of the legal terms does not encourage the transacting parties to take ownership of the roles. Transactional documents are more than the mere memorialization of past events. The transactional documents will inform and guide future behavior. To that end, the parties should feel a connection to the documents that embody their current obligations and future responsibilities. The parties may not identify themselves by these accurate, yet faceless, legal terms.

The form provision may be revised as follows:

> Gavin Revel assigns to Bridget Simms all of Gavin Revel's right, title, and interest under the Purchase Agreement, including without limitation, all right, title, and interest in any down payment or earnest money.

Simply replacing "assignor" with Gavin Revel and "assignee" with Bridget Simms allows the transacting parties to see themselves in the document and in their specific transaction. There's power in the personal rather than the generic.[43] It thus facilitates not only the parties' understanding of their rights and obligations, but encourages performance under the agreement. This straightforward substitution can easily be completed with the aid of a word processing program and proofreading. But this discrete change will have a big impact on the ability of the transacting parties to identify with the personal story of their transaction, and consequently with the documents themselves. As storyteller, the drafting lawyer can easily accomplish this goal by using actual names in the documents.

B. Customize the Order of Provisions

> *"A story has no beginning or end: arbitrarily one chooses the moment of experience from which to look back or from which to look ahead."*
> —Graham Greene[44]

While Aristotle observed that everything has a beginning, a middle, and an end,[45] the events that are chosen for each part are often selected by the storyteller. Narratives are constructed, at least in part, on the order of events relayed. The nature of the events to be relayed and the order in

43 For an exploration of the narrative power of names, see Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques in Drafting*, 68 OKLA. L. REV. 263, 280–82 (2016)

44 GRAHAM GREENE, THE END OF THE AFFAIR 3 (1996).

45 Cynthia A. Freeland, *Plot Imitates Action: Aesthetic Evaluation and Moral Realism in Aristotle's Poetics*, *in* ESSAYS ON ARISTOTLE'S POETICS 115 (Amelie Oksenberg Rorty ed., 1992) (applying one of Aristotle's most quoted sections in the *Poetics* to understandings of plot).

which those events are described reflect the goals of the storyteller. In other words, the storyteller's selection of events and characterization of those events as the beginning, the middle, or the end, shapes the narrative. Transactional lawyers should thus consider the order of provisions in their transactional documents. Altering the order of provisions from the order of provisions in a form document may promote the creation of a narrative that better reflects the understanding and intent of the transacting parties.

Conventions inform the sequence and order of texts in any genre, including transactional documents.[46] These conventions may have substantive consequences, such as placing preresiduary gifts before a residuary gift in a Last Will and Testament. Other conventions, such as leading with the identification of the testator's family, reflect common usage. The overall organizational structure of contracts reflects common usage, but also has substantive consequences. For example, placing the recitals or background section in the beginning of the contract ensures that the reader is familiar with the understanding and intent of the parties to the transaction. This knowledge, especially when the reader is the court, may have a significant impact on how the document's terms are interpreted. Similarly, placement of the definitions up front also is based on convention, but has a substantive impact on the reader's understanding of the subsequent terms.

In the case of the transactional document, the organizational approach also projects the narrative.[47] The beginning of the narrative establishes a base or starting point. The purpose or goal of the narrative is either explicitly stated or is subtly foreshadowed. The middle presents conflict and describes tension. The end presents resolutions and shares takeaways. The manner in which those events are ordered will alter the narrative.

Consider how altering the structure of a Will may convey the individual's story. For a testator with young children,[48] the narrative is not a celebration of the accumulations of a lifetime but the importance of caregiving. The Will's introduction can thus be followed by the nomination provisions for the minor children's guardians. The provision can be followed by the property management device for the children, such as the creation of custodianship accounts or testamentary trusts. The Will would

46 *See, e.g.,* Gisela M. Munoz, *Writing Tips for the Transactional Attorney*, 21 NO. 3 PRAC. REAL EST. LAW., MAY 2005, at 33 (describing the order of typical provisions in a contract and sharing drafting tips).

47 *E.g.,* DANIEL L. BARNETT, PUTTING SKILLS INTO PRACTICE: LEGAL PROBLEM SOLVING AND WRITING FOR NEW LAWYERS 108 (2014) ("Using the narrative as an organizing principle is often the simplest way to structure an agreement.").

48 Such testator may be referred to as the "Young Family Client." *See generally* Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 345 (1969).

continue to include other provisions, such as the administrative powers of the personal representative. But by front-loading the Will with provisions relating to the minor children, the narrative emphasizes the caregiving as its central theme. The substantive integrity of the Will is preserved by the inclusion of all of the provisions necessary for the transmission of wealth. But the focus of the document for the testator—the creator of the Will—and the beneficiaries becomes caregiving: not mere wealth transmission. In contrast, a Will that begins with a series of specific gifts to various charitable organizations conveys a different narrative. The narrative centers instead on benevolence. This attention to ordering of provisions facilitates the initial creation of the document and the ultimate implementation of the document. In the case of a Will, the document may be created fifty years—or more—before implementation. By aligning the order of the provisions with the narrative of the individual Will-making, the ultimate implementation of the document is facilitated. The interpretation and implementation are guided by the testator's intent. The order of the provisions showcases that intent by highlighting the most important aspects of the story from the storyteller's perspective.

The transactional drafter must make conscious choices about how to organize the clauses and provisions of the document. One obvious choice is to arrange the terms in chronological order, in terms of how the life of the transaction will proceed. Another option is to organize the terms by their relative importance to the transaction, placing the terms that the parties view as most significant in the beginning of the document. Finally, the drafter may opt to keep the terms in their "traditional" sequence, meaning the way in which they are most commonly ordered in form documents. The principal advantage of the traditional sequence is familiarity, yet the rearranging of the document may yield a different understanding of the transaction. For example, if the employer's attorney is drafting an employment agreement, she may choose to place the restrictive covenant near the beginning of the operative terms because that particular term is of utmost importance to her client. Yet if the terms were organized in a chronological order, that term, which comes into effect only upon termination of the employment relationship between the parties, will likely be placed towards the end of the operative-term section. It will be preceded by the terms outlining the parties' performance during the employment relationship, such as job duties, salary, and benefits. As can be seen in this illustration, the arrangement of the terms thus influences the "story" told in the employment contract. The order of the provisions reflects the hierarchy of importance of the terms to the client because on the very first page, the client, as well as any subsequent reader, immediately sees that essential provision.

The order of provisions in a transactional document may have started somewhat arbitrarily. Repeating the same order became convention and then calcified into an immutable order.[49] Repeating particular sequences can be comforting to individual drafters and arguably promote efficiency. Yet, barring substantive restrictions, comfort and efficiency should not be used to override the individual concerns of the transacting parties. The order of provisions should reflect deliberate choices by the drafter to convey the narrative as appropriate to the transacting parties.

C. Incorporate Expressive Language as Appropriate

"It's embarrassingly plain how inadequate language is."
–Anthony Doerr[50]

Customizing a transactional document is not limited to altering the order of provisions or even the wholesale creation of a new provision. Customizations may come from the injection or infusion of expressive language into the document. Expressive language is the general description of a variety of explanations and enhanced descriptions.[51] Expressive language is thus "extra" language because the enhanced descriptions are often in excess of what would be legally required. But far from being superfluous, expressive language serves a powerful narrative purpose. Transactional documents are more than the vessels that facilitate the acquisition of Greenacre or the selling of widgets. Transactional documents are motivated by personal goals and are crafted for particular purposes. Expressive language may be used to convey those motivations, goals, and purposes by including the person and the personal in the documents.

The knee-jerk dismissal of expressive language is caused by the uncertainty of "extra" language that is "unnecessary" with "low value." Expressive language is worrisome to drafters because expressive language conjures concerns of ambiguities, inconsistent language, conflicting terms, and

49 Altering the order of provisions may sometimes raise the specter of cut-and-paste mistakes. Deviation from the customary order of provisions may lead a drafter to mistakenly believe a provision has been included when in fact the provision has been deleted. For an examination of the benefit of "incomplete contracts, see Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297 (2014). To prevent against unintentional omission, checklists can be, and frequently are, used to ensure that all the appropriate provisions have been included. M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ALWD 79, 79 (2008) ("With a thorough checklist of these requirements and considerations, a drafter need not reinvent the wheel with each contract. Instead, with the use of a checklist, drafters of contracts can ensure that their contracts are complete and effective."); *see also* Jay E. Grenig, *Checklists for Document Assembly*, 18 WIS. PRAC., ELDER LAW § 2:34 (2017 ed.).

50 ANTHONY DOERR, ALL THE LIGHT WE CANNOT SEE 503 (2014) (winner of 2015 Pulitzer Prize for Fiction).

51 *See generally* Karen J. Sneddon, *Not Your Mother's Will: Gender, Language and Wills*, 98 MARQ. L. REV. 1535 (2015); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379 (2011).

even libel. The worry surrounding use of emotional, rather than legal, language may prevent some drafters from engaging with expressive language. For instance, untrue statements included in the recitals section of a contract may create interpretation issues.[52] Mistakes included in the Will may raise an issue of a testator's lack of capacity.[53] However, completely dismissing the value of expressive language based on such fears is an overreaction that has the potential to undermine some of the value of the transactional document.

Transactional documents are intended to be used by the parties to guide behavior. Consider, for example, a premarital agreement. Premarital agreements have historically been viewed as suspect.[54] The recitals in a premarital agreement may share the reasons why the parties are creating the agreement.[55] This may be beyond the stock recitation that "the parties desire to clarify their property rights in the event of dissolution of the marriage." For instance, the parties may have a particular asset that requires customized treatment or special management. The generic recitation may be "the parties desire to clarify their property rights in the event of dissolution of the marriage." The generic recitation may then be customized to "Jaime and Dana desire to clarify their property rights as relates to Family Co., Inc. in the event of dissolution of the marriage." The personalization replaces the generic. The narrative thus becomes one of the two particular individuals or characters, and not two faceless parties.[56] Including the reason for the creation of the premarital agreement may

52 RESTATEMENT (SECOND) OF CONTRACTS § 218 cmt. b (1981) ("A recital of fact in an integrated agreement is evidence of the fact, and its weight depends on the circumstances. Contrary facts may be proved. The result may be that the integrated agreement is not binding, or that it has a different effect from the effect if the recital had been true. In the absence of estoppel, the true facts have the same operation as if stated in the writing.").

53 Although concern about mistakes is a legitimate concern, expressive language is by no means the only source of potential mistakes. *See, e.g.*, Robert D. Lang, *Auto-Correct: Changing Sua Ponte to Sea Sponge; A Mixed Blessing for Attorneys*, 32 SYRACUSE J. SCI. & TECH. L. REP. 1, 1–2 (2015–2016) (highlighting the "hidden danger of auto-correct" with "the creation of entirely new words and new phrases, none of which were intended by the drafter"). In the context of estate planning documents, part of the concern is that mistakes in language may provoke a will contest or require a construction proceeding. A case frequently presented in casebooks for this concern is *Lipper v. Weslow*, 369 S.W.2d 698 (Tex. Civ. App. 1963). The language at issue in *Lipper* is a statement of reasons, which is not the type of expressive language referred to in this article. Yet, mistakes are often included in descriptions of property when individual testators share misdescriptions with the drafting attorney. Family lore and actual facts are often shown to be incompatible on PBS's *Antiques Roadshow*.

54 *E.g.*, Suzanne D. Albert, *The Perils of Premarital Provisions*, 48 R.I. BUS. J., Mar. 2000, at 5. *But see* Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 355 (2016) (arguing that "[p]remarital agreements should be encouraged, socially accepted, and relatively easy to enter into").

55 Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting, and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 27 (2002) (recommending that the recitals of a premarital agreement include not only the facts of valid contract creation, but also "the situation of the parties at the time of the agreement").

56 With some transactional documents such as a will, one party's story (the testator's) dominates. In other transactional documents including some premarital agreements and corporate contracts, the story of both parties is told. Which party's lawyer drafts the documents and the relative bargaining power of each may influence which story is the primary story that is told in the document.

guide not only the development of the document, but also the subsequent interpretation of the document.[57] The generic, rote recitations may provide little guidance to the subsequent interpretation. In contrast, the slight customization allows the transactional drafter to more effectively tell the story of the two individual parties and their particular property interests.

Expressive language can also be used to humanize documents.[58] The most obvious example of a personal transactional document is the will. A will is in fact a first-person narrative. As Emily Dickinson wrote, "I willed my Keepsakes—signed away/ what portion of me be/ Assignable . . . ."[59] The will disposes of probate property, both real and personal property, and nominates representatives to oversee the transfer of that property upon the death of its owner. To deny the human aspect to will making is to deny the expressive function of will making.[60]

A transactional document need not be a Last Will and Testament to be a personal document.[61] An employment contract is likewise a personal document. The document outlines obligations and responsibilities. But the document also creates a personal relationship. The choice and terms of employment have a daily impact on the employee. Ignoring the personal is to devalue the importance of employment to an individual.

All transactions are products of human fears, concerns, wishes, and hopes. Expressive language need not inject ambiguity or uncertainty. Expressive language can be used to develop the narrative. The following is a standard bland provision from a Will:

> I give my diamond earrings to my daughter Lauren Richards, if she survives me.

With the addition of expressive language, the provision becomes a narrative that is both meaningful to the testator and the beneficiary.

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57 *See, e.g.,* Clare Robinson, *Pre-Nuptial Agreements—The End of Romance or an Invaluable Weapon in the Wealth Protection Armory?*, 13 TR. & TRUSTEES 207 (2007); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998).

58 *E.g.*, Karen J. Sneddon, *Speaker for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 736 (2011) (positing that a will "is not a one-size-fits-all form, or even a one-size-fits-most form, but a unique document for a unique individual"); Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 958 (2010) (arguing that "the unique, personal, and emotional voices of testators should be allowed to be heard in their wills").

59 Emily Dickinson, *I Heard a Fly Buzz—When I Died, in* THE COMPLETE POEMS OF EMILY DICKINSON 223, 224 (Thomas H. Johnson ed., 1960)*; see also* Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 267 (2016) (asserting "that nearly every individual owns at least one possession that the owner, rich or poor, male or female, old or young, sees as reflecting something important about her personality, history, and values").

60 *See generally* Karen J. Sneddon, *Memento Mori: Death and Wills*, 14 WYO. L. REV. 211 (2014); David Horton, *Testation and Speech*, 101 GEO. L.J. 61 (2012).

61 For an examination of the Will as personal narrative, see Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L. J. 355 (2013).

> I give my diamond earrings that I received as an anniversary gift from her father to my daughter Lauren Richards, if she survives me.

The transactional document is more than a mere legal instrument. In the example above, the Will is more than a listing of widgets and identification of individuals and entities. The will reflects a lifetime of accumulations and the selection of the appropriate individual or entity to receive particular items of property. The expressive language can honor that aspect of the Will, and become a more valuable document to the testator and to the beneficiaries by directly referencing the financial and nonfinancial value of possessions and relationships.

D. Plan for Alternative Outcomes

> *"By failing to prepare, you are preparing to fail."*
> —Benjamin Franklin[62]

The life of a transaction follows certain paths; these paths can be conceptualized as narrative plotlines. And each transactional document should be drafted to plan for a variety of potential, or alternative, outcomes—just like stories. The terms of a contract, for example, set forth the sequence of events that will take place during the contract term and provide for different contingencies, or alternative plotlines, that may occur during that time period.[63] Contract terms thus enable the parties to understand how to perform their duties in accordance with the anticipated plot.

Terms may also protect one party if the other party to the contract breaches its obligations, representing a foreseeable alternative plotline. A shift in the narrative movement may be presented in the body of the contract to acknowledge and guide the various foreseeable plotlines. For example, terms may set forth a sequence of events that leads to disputes between the parties. Additional terms may then be added to provide for what is to happen when those disputes arise—such as the circumstances under which a party may terminate the contract and the determination of where disputes may be litigated. By anticipating the various potential splits in the plot of the contract, the drafter can better create contract terms to deal effectively and efficiently with each contingency.

62 This quote is often attributed to Benjamin Franklin. *See, e.g.,* Matt Mayberry, *By Failing to Prepare, You Are Indeed Preparing to Fail*, ENTREPRENEUR (Apr. 22, 2016), https://www.entrepreneur.com/article/274494. Verification of authorship of many of Franklin's purported quotes has not been established. *See generally* Baylor University, *Misquotes and Memes: Did Ben Franklin Really Say That?*, SCI. DAILY (July 1, 2015), https://www.sciencedaily.com/releases/2015/07/150701152634.htm.

63 Chesler & Sneddon, *supra* note 1, at 252–57. *See generally* D. Gordon Smith, *The "Branding Effect" of Contracts*, 12 HARV. NEGOT. L. REV. 189 (2007) (exploring the types of problems contracts attempt to address).

While the terms of a contract generally address the anticipated plot narrative of contract performance, unanticipated or alternative endings should also be introduced in the contract. Failing to consider an unanticipated ending may produce an agreement that fails to include, for example, a *force majeure* clause.[64] During the term of the employment contract, an employer corporation may be unable to continue its operations; but, without the inclusion of a *force majeure* clause, the parties must seek the intervention of the court to apply the default common-law rules.[65]

Therefore, from the perspective of a storyteller, the drafter must think through the life of the contract under various fact patterns.[66] First, hypothesize performance. What will happen, moment by moment, if the parties comply with all of the terms in a timely manner? The drafter must consider whether the contract contains all of the necessary "rules" and details to assist the parties in knowing how to perform their duties. Most form contracts do not adequately set forth the steps necessary for the parties to understand what needs to be done to carry out their contractual obligations. This includes sufficient information as to who is obligated to perform, what is the specific obligation and how is it to be performed, and by when and where must the obligation be performed.

Second, the drafter must hypothesize nonperformance and default by addressing what happens if one or both parties fail to perform all or part of the contract.[67] In other words, the drafter must prepare for the contract to fail to reach its intended outcome. The consequences of failure to perform must be stated in the agreement and closely linked to the performance required. These issues should be addressed at the drafting stage, rather than waiting for the parties to have a dispute. The contract should protect the parties by stating remedies for potential breaches of each obligation.

Finally, the drafter should consider the worst-case scenario by assuming that the parties become hostile towards each other, seeking to undermine the other party at every opportunity.[68] Will the contract provide sufficient guidance to govern the relationship? Will it provide sufficient guidance to a court interpreting the contract or imposing

64 A *force majeure* clause allows a party to suspend or even terminate a contractual obligation when unexpected circumstances, such as a natural disaster, make performance impossible or impractical. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2016).

65 For an "Anatomy of the Employment Agreement," see Joseph T. Ortiz, *Trends, Developments, and Best Practices Relevant to Drafting Employment Agreements*, *in* INSIDE THE MINDS: NEGOTIATING AND DRAFTING EMPLOYMENT AGREEMENTS (2014 ed.). The procedure for termination is identified as a key provision in an employment contract.

66 Susan M. Chesler, *Effective Contract Drafting: How to Revise, Edit, and Use Form Agreements*, BUS. L. TODAY, Nov./Dec. 2009, at 35 [hereinafter Chesler, *Effective Contract Drafting*].

67 *Id.*

68 *Id.*

remedies, if necessary? The drafter must consider this alternate outcome and draft the contract so as to best benefit his client even in the unfortunate event of court intervention.

Providing guidance to the transacting parties and anticipating future court intervention is a facet of all transactional documents and thus the responsibility of the transactional drafter. Using the concept of plot to anticipate future events produces a more complete transactional document. Similar to the contractual relationship, a trust agreement may be structured with reference to plot to anticipate changes in the relationship of the transacting parties.[69] For example, an individual who is creating the trust relationship may wish to create a trust to be used for the education of his or her descendants.[70] The provisions in the trust agreement should consider the most likely use of the trust property (i.e., education). But that likely use is not the only use. An alternate situation in which the descendants have no need for educational support, but require other support, should be included in the terms of the trust. This change can be seen as a divergence in the anticipated plot. Moreover, the possibility of the settlor leaving no descendants should also be included in the trust instrument to represent a further divergence in the plot.[71] In this sense, the plot becomes similar to a "choose your own adventure" novel where the drafter anticipates multiple divergences that should nevertheless still reference the trust creator's intent.

The conscious recognition of plot helps "shape" and provides "direction" to the narrative.[72] Envisioning the structure of events as plotting a narrative enables the drafter to foster the full development of a transactional document that effectuates the parties' intent and better addresses any foreseeable contingencies.

E. Alter the Stock Story When Necessary

> *"'Ronald,' said Elizabeth, 'your clothes are really pretty and your hair is very neat. You look like a real prince, but you are a bum.' They didn't get married after all."*
> —Robert Munsch[73]

69 *E.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 650–67 (1995). For an exploration of the development of trusts, see James Barr Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261 (1908); E.W. Ives, *The Genesis of the Statute of Uses*, 82 ENG. HIST. REV. 673 (1967); Austin W. Scott, *The Trust as an Instrument of Law Reform*, 31 YALE L.J. 457 (1922).

70 For an examination of incentive trusts, see generally Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445 (2006).

71 *See generally* Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91 (2000); Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63 (2012).

72 PETER BROOKS, READING FOR PLOT: DESIGN AND INTENTION IN NARRATIVE xi (1992).

As discussed above, one of the benefits of using a form document as a starting point may be the embedded inclusion of a stock story. Yet a concern with all stock stories is the compression of the narrative in a manner that distorts or misrepresents the individual story.[74] The stock story is a generic narrative which, by definition, may not represent the uniqueness of the individual parties, the particular sequence of events, or the likely outcome. The stock story necessarily relies upon generic stock characters, stock situations, stock plots, and stock outcomes.

The recognition and identification of stock stories produces an instant, strong, and automatic response.[75] "Cheering the hero and booing the villain" are examples of stock responses. The strong response to a stock story means that triggering an alternate response may be difficult.[76] Because of the immediate recognition of stock stories by the audience, the audience may also use the stock story to fill in gaps in the narrative. Accordingly, "the outcome suggested by the stock story will seem to be the natural result of the events that preceded it."[77] The audience may also project an intent of the parties to the transaction that is not representative of the actual intent.

Thus, it may often be necessary for the drafter to supplement the stock story or alter the stock story, which requires deliberate drafting choices. When relating stock stories to transactional form documents, the compression may unintentionally direct the drafting of the transactional document such that the drafter fails to fully customize the document for the individual parties and instead relies upon standard provisions.[78] The drafter must pay careful attention to whether the stock story embedded within the form actually corresponds with the parties' intent.

73 ROBERT MUNSCH, THE PAPER BAG PRINCESS 23 (1980). This children's book switches the gender roles typically assigned in fairytales so that the Princess Elizabeth must save the Prince Ronald from the dragon. Upon doing so, Prince Ronald comments on the physical state of the disheveled Princess Elizabeth. She makes the remark above and calls off the wedding. *See id.*

74 Chesler & Sneddon, *Tales from a Form Book*, *supra* note 1, at 238.

75 *See* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5–7 (1984).

76 J.A. CUDDON, A DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 865 (4th ed. 1998).

77 Sheppard, *supra* note 33, at 193.

78 For an exploration of the need to develop documents to reflect individuals, see Avi Z. Kestenbaum & Amy F. Altman, *Have We Got It All Wrong?: Rethinking the Fabric of Estate Planning*, 155 NO. 2 TR. & EST. 29 (Feb. 2016); Thomas L. Stover, *Will the Tax Tail Still Wag the Estate Planning Dog?*, 41 EST. PLAN. 3 (2014); James H. Siegel, *The Importance of Analyzing Family Dynamics to Provide Clients with Appropriate Trust and Estate Plans*, ASPATORE, 2012 WL 4964459 (2012); Avi Z. Kestenbaum, Jeffrey A. Galant & K. Eli Akhaven, *The State of Estate Planning*, 150 NO. 3 TR. & EST. 35, 39 (Mar. 2011) ("Instead of concentrating on particular estate planning techniques and forcing their clients into these same techniques over and over again, estate planners will now be compelled to focus on each individual and unique client."); Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 SYRACUSE L. REV. 451 (2015).

From the perspectives of the transactional drafter and the parties to these agreements, this recognition of stock stories must be accompanied by the understanding that, at times, the stock story may need to be deliberately altered or even omitted. The transactional drafter as storyteller may alternatively need to create a counterstory. To create such a counterstory, the drafter must use the structure, format, and language of the transactional document to sidestep the stock story embedded within the form agreement to "reveal a new or different reality."[79] The drafter may use a variety of techniques to supplement the stock story, to supplant the stock story, or to counter the stock story. The customization of the story then accurately reflects the uniqueness of the particular parties and their particular transactions.

Even the title of the transactional form document can further the generic stock story and thus present an inaccurate representation of the parties' actual intent. For example, consider the narrative formed by title. The title "Prenuptial Agreement" is an accurate title to a standard form agreement. This title may be reproduced as the actual title for the document. But compare that to a customized title, such as "Drafting the [Premarital] Agreement—Not to Encourage Dissolution."[80] The generic title conjures up the stock story of the need for a prenuptial agreement to deal with the inevitable, and unavoidable, demise of a marriage through dissolution proceedings. Including a subtitle of "Not to Encourage Dissolution" or even "Not Anticipating Dissolution Proceedings," expands upon the intent of the parties. In a similar manner, the title of a trust agreement may be tailored to reflect the goal of the Settlor, the person who creates the trust. Instead of the generic "Trust Agreement dated X," the title could be "the Klein Family Trust." By including "family" and the name of the Settlor's family, the trust agreement is more than a computer-generated form. The trust is an embodiment of the Settlor's wish to care for his or her family. Alternatively, the names of the beneficiaries could be included. The trust may be titled the "Beth Klein Trust," to emphasize the importance of providing resources of the individual rather than the accumulation of assets. Altering the title presents an opportunity to reframe the purpose of the agreement and override that stock story.

The transactional drafter can also use "recitals" or a background section to tailor the form to the parties' specific transaction.[81] The recitals

79 Sheppard, *supra* note 33, at 195.

80 Frank L. McGuane Jr. & Kathleen A. Hogan, *Drafting the Agreement Not to Encourage Dissolution, in* COLO. PRAC., FAMILY LAW & PRACTICE § 39:7 (2d ed. 2012).

81 *See supra* notes 46–47 and accompanying text addressing order of provisions and the role of background or preliminary information.

contained in a form agreement, especially if it is a precedent agreement, may play into the stock story of the form agreement. These recitals represent an ideal opportunity to draw from narratology.[82] The recitals can illustrate the points of view of the transacting parties. Despite presenting an ideal opportunity to draw from narrative, recitals often provide little to no background. This is, in part, because the recitals in form documents are generic or often nonexistent. Yet the drafter as storyteller may effectively use recitals to consciously reframe the narrative by acknowledging the parties' true intent behind the agreement, thus replacing the stock story. Recitals can effectively be used to present the parties' specific intentions and to provide relevant and individualized background information.[83] The information in the recitals may be useful to explain the parties' contractual relationship, any past history, and the parties' intentions that may present an alteration of the generic stock story provided by the form language. Recognizing the transactional lawyer's role as storyteller can be particularly valuable in encouraging the tailoring of the recitals to the specific story of the transaction.

Additionally, the use of definitions enables the drafter to tailor the meanings of certain terms used in the contract to the subject transaction.[84] Generally, if the word or phrase as used in the contract is intended to vary in any way from the standard dictionary definition of that word or phrase, or if the word or phrase does not have a standard dictionary definition, it should be defined within the contract. Definitions can also be drafted to customize the meaning of words or phrases used; in other words, they can be used to supplement or alter the stock story.

For example, consider the definition of the terms "child," "children," and "issue" in a form Will.

> As used in this instrument, the term "child" or "issue" means the blood descendants of any individual; provided, however, that an adopted child and such child's issue, whether natural or adopted, shall be considered as issue of an individual. A child born out of wedlock shall *[not]* be included in the term issue.[85]

The standard definition will correspond with the intent of a number of people who create a will. But the standard definition may not reflect the

82 Chesler & Sneddon, *Once Upon a Transaction*, *supra* note 43, at 273–74.

83 Chesler, *Effective Contract Drafting*, *supra* note 66, at 35.

84 *Id.*

85 Mary F. Radford, 2 Redfearn: Wills and Administration in Georgia § 17:40, 238 (7th ed. 2008).

86 *See generally* Susan N. Gary, *Definitions of Children and Descendants: Construing and Drafting Wills and Trust Documents*, 5 Est. Plan. & Community Prop. L.J. 283 (2013).

individual family relationships created by some testators.[86] In other words, the standard definition may not match who the individual would consider to be his or her children. The definition could then be modified to not only consider technological changes to reproduction, such as posthumously conceived children,[87] but also to include individuals who are not legally considered children. For instance, a stepchild may be defined for purposes of a Will as a "child." The particular child could be identified by name to limit the definition to one particular individual. This would include the stepchild in all class designations and reflect the fact that the particular testator treated all children, whether stepchild, adopted child, or biological child, the same.

Finally, in order to ensure that the transactional document reflects the story that represents the actual parties and their situation instead of a mismatched stock story, the drafter may need to modify the operative terms of the form and possibly delete some of the form's clauses. In the example of the form employment agreement, the standard arbitration clause requires the employee to agree to arbitration for claims or disputes against the employer, but does not require the employer to agree to the same.[88] This form provision represents the widely recognized stock story of David and Goliath—of the powerless employee pitted against the overbearing and powerful employer. At times, this does not represent the actual relationship between the parties. Consider, for example, an executive employment agreement where the employer is just one of many companies vying for the same highly valued potential executive. Or consider the employer as a start-up venture, where the employee is taking on potentially high risks by leaving her employment with a stable company for this new opportunity. In both scenarios, the traditional view of employee and employer as David and Goliath is not applicable—and the transactional drafter must alter the stock story of the form agreement by modifying clauses to make them more reciprocal, as in the case of the standard one-sided arbitration clause. Alternatively, other form clauses may need to be omitted altogether, such as the "right to invention" term under which the employer obtains exclusive ownership of the employee's ideas or inventions, sometimes regardless of whether such inventions are outside the scope of the employer's business.[89]

87 *See, e.g.*, Cassandra M. Ramey, Note, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 NEV. L.J. 773 (2017); Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347 (2011).

88 24A WEST'S LEGAL FORMS, EMPLOYMENT § 2.52 (2003).

89 *See* Chesler & Sneddon, *supra* note 1, at 253–54.

A stock story is by definition a generic story type. Thus, the stock story may reflect the actual story of a transaction. But often the stock story will not. For instance, not every story involving the formation of a marriage is premised on the fairytale of a damsel in distress being rescued upon marriage to prince charming. Marriage may represent a partnership formed by parties with similar assets and sophistication. In the context of transactional documents, the "happily ever after" may not correspond to the stock story. Indeed, the "happily ever after" may be the starting point to drafting the transactional document. The drafter must have the confidence to alter stock stories when necessary.

IV. Conclusion

Transactional lawyers share attributes with Aesop, the Brothers Grimm, and Scheherazade. All are storytellers. Telling tales is the work of transactional lawyers. Drafting is far more than the cutting and pasting of standardized provisions from one form document to another form document. Transactional lawyers recognize that drafting is the creation of a document that projects the narrative of the transacting parties. Whether employment agreement or trust agreement, transactional documents are more than mere devices to mechanically deliver information. The transactional document is a product of relationships and interactions between the transacting parties. Transactions address the hopes, wishes, and fears of the parties to inform behaviors—long after the documents are signed.

From the selection of a form document to the customization of clauses, transactional lawyers use provisions to craft the narrative. Form agreements are a great starting point for the drafter to shape the narrative of the transaction. But the forms must be altered for the particular transaction. Narratology can provide the inspiration and techniques to enhance the power of transactional documents. The five practical strategies outlined in this article offer guidance on how to harness the power of narrative. Replacing generic legal terms with the actual names of the parties allows those parties to become the characters in the story of their own transaction. Making deliberate choices about the ordering of the provisions of the document can better convey the narrative as appropriate to the parties. And expressive language may be used to convey the motivations, goals, and purposes of the transacting parties. The power of narrative can also be enhanced by drafting transactional documents to plan for a variety of potential outcomes, just like the alternate plotlines of stories. Finally, the transactional drafter may use a variety of techniques to alter or replace the generic stock story of the form document to reflect the

unique story of the particular parties. In other words, transactional lawyers can, and should, use the power of narrative to more effectively tell their clients' stories. After all, transactional lawyers are storytellers.

ARTICLE

Applying *Daubert* to Flaubert

Standards for Admissibility of Testimony of Writing Experts

Heidi K. Brown*

> "*One day I shall explode like an artillery shell and all my bits will be found on the writing table.*"[1]
> –Gustave Flaubert

Experts routinely play a vital role in the resolution of legal disputes involving a wide range of subject matter, from "hard science" topics like blood-spatter analysis,[2] to "soft science" matters such as damages quantification,[3] to art authentication,[4] to gang tattoos,[5] to the distinct skills of Brazilian "gaucho chefs" known as "churrasqueiros."[6] Because many legal cases turn on the meaning, context, impact, or integrity of a writing, numerous litigants have proffered writing experts to render opinions on a variety of issues. These include (1) the usage of language, phrasing, or typography in a particular industry, trade, or profession; (2) the substantive or technical quality of a piece of writing; (3) the methodology of drafting certain document genres; (4) the cultural context of writings; and (5) comparisons of the content and style of two writings. Often, such experts are qualified based on professional roles as professors of creative writing, legal writing, English, literature, linguistics, or rhetoric.

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1 Attributed to Gustave Flaubert. *See* https://www.goodreads.com/quotes/129938-one-day-i-shall-explode-like-an-artillery-shell-and.

2 *See, e.g.*, Rasmussen v. City of New York, No. 10 Civ. 1088(BMC), 2011 WL 744522, at *2 (E.D.N.Y. Feb. 23, 2011).

3 *See, e.g.*, Hughes v. The Ester C Co., 317 F.R.D. 333, 343 (E.D.N.Y. 2016).

4 *See, e.g.*, Fletcher v. Doig, 196 F. Supp. 3d 817, 824 (N.D. Ill. 2016).

5 *See, e.g.*, United States v. Garcia, 447 F. App'x 752 (8th Cir. 2011).

6 *See e.g.*, Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127, 1139 (D.C. Cir. 2014).

In fact, lawyers have retained *legal writing* professors and practitioners to serve as experts to analyze different types of documents, not all necessarily legal documents but which still have legal effect. A legal writing expert engaged for the first time might wonder, What exactly is the standard for admissibility of expert testimony regarding a writing? This article provides guidance regarding that standard so that lawyers[7] and writing experts can be better prepared to anticipate evidentiary challenges and avoid the dreaded phone call to the client. It is never pleasant to report that, after the client's financial outlay and the lawyer's and an expert's substantial exertion of labor, the court granted opposing counsel's motion *in limine* to exclude the expert from testifying at trial.

Part I of this article summarizes the current criteria for admissibility of expert testimony under Federal Rule of Evidence 702 (FRE 702) and the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[8] and its progeny. Part II surveys case law in which litigants have proffered experts in a variety of writing milieus to assist the trier-of-fact. This section is designed to give new legal writing experts a flavor of different contexts in which lawyers engage writing experts and to flag possible evidentiary pitfalls that may arise therein. Part III offers tangible guidance for legal writing experts (and the counsel who hire them) to develop expert opinions, reports, and testimony in a way that will appropriately satisfy the admissibility criteria of FRE 702 and *Daubert.* Legal writing experts can assist the trier-of-fact and the legal process by applying the concrete and reliable legal writing standards and analytical methodologies that are well-established in legal academia and law practice.

I. Federal Evidentiary Standards Regarding Expert Testimony

In a 1935 article, Lloyd Rosenthal, a graduate of Cornell Law School and a research assistant for the Law Revision Commission of the State of New York, analyzed the history of the development of expert testimony. He acknowledged that "the effective administration of justice requires aid

7 *See* Lyle Griffin Warshauer & Michael J. Warshauer, *Prepping Your Expert*, TRIAL, Sept. 2012, 15 ("Expert witnesses can be blindsided when their opinions are attacked in court. Advising them about the rigors of litigation is essential—it can be the difference between winning and losing your case." "If a *Daubert* challenge is to be defeated, it is up to the trial attorney to advise the expert about the decision. You must not only provide the expert with the relevant facts and records, but also explain how his or her opinion may be attacked in litigation."); W. William Hodes, *Navigating Some Deep and Troubled Jurisprudential Waters: Lawyer—Expert Witnesses and the Twin Dangers of Disguised Testimony and Disguised Advocacy*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 180, 183 (2016) (commenting on the problems with expert witnesses "exceeding the boundaries of proper expert testimony" and the reality that "too often, . . . these excesses are encouraged by the lawyers presenting the testimony of the experts").

8 509 U.S. 579 (1993).

from other branches of learning and science."[9] He cited a judge's notation in a 1553 case pending at the Court of Common Bench in the United Kingdom which stated that "we do not despise all sciences but our own, but we approve of them, and encourage them as things worthy of commendation."[10] The 1553 case specifically referred to the helpfulness of experts in written language. In particular, it referenced individuals skilled in the study of Latin to assist the court which was "in doubt about the meaning" of a word.[11]

Four hundred and forty years later, in 1993, the United States Supreme Court issued a decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[12] establishing an evolved modern standard governing the admissibility of expert-witness testimony at trial. *Daubert* involved a lawsuit by infants and their guardians *ad litem* against a pharmaceutical company. They sought to recover for limb-reduction birth defects allegedly resulting from their mothers' ingestion of an anti-nausea drug during pregnancy. The trial court had granted summary judgment in favor of the drug company based, in part, on an affidavit from the company's expert. The expert had opined that the drug posed no risk factor for human birth defects.[13] In response to the affidavit, the plaintiffs proffered testimony of eight other "well-credentialed experts." These experts linked the drug to birth defects by relying "on animal studies, chemical structure analyses, and the unpublished 'reanalysis' of . . . human statistical studies."[14] The trial court rejected the plaintiffs' experts, finding that their testimony failed to satisfy the "general acceptance" standard for admissibility of expert opinions. The Court of Appeals for the Ninth Circuit agreed, relying on the 1923 case of *Frye v. United States.*[15] Under *Frye*, expert opinion based on a scientific technique was inadmissible unless the technique was "generally accepted" as reliable in the relevant scientific community.[16]

As the *Daubert* Court noted, however, Congress had enacted the Federal Rules of Evidence in 1975. The rules represented the culmination of a long journey initially launched from a 1938 recommendation by former Attorney General William D. Mitchell. Mitchell had advocated for

9 Lloyd L. Rosenthal, *The Development of the Use of Expert Testimony*, 2 L. & CONTEMP. PROBS. 403, 405 (1935).

10 *Id.* (quoting Saunders, J., in Buckley v. Rice, I Plowd. 125 (1554)).

11 Rosenthal, *supra* note 9, at 408.

12 509 U.S. at 582.

13 *Id.* at 583.

14 *Id.* at 579.

15 *Id.* at 584 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

16 *Id.*

the appointment of an advisory committee to draft a new set of evidentiary rules.[17] The January 2, 1975, version of FRE 702 stated, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[18] The *Daubert* Court held that FRE 702 directly addressed the admissibility of expert testimony and thus superseded the *Frye* "general acceptance" standard.[19] The Supreme Court vacated the Ninth Circuit's decision (which had been based on *Frye*) and remanded the case for further proceedings.[20]

Building on the threshold consideration of a witness's qualifications to testify as an expert, the *Daubert* Court provided a new set of factors for courts to use in determining whether opinion testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue" as required in FRE 702. These factors include (1) whether the expert's theory or technique has been tested,[21] (2) whether the theory or technique has been subjected to peer review and publication,[22] (3) the technique's "known or potential rate of error" and "the existence and maintenance of standards controlling the technique's operation,"[23] and (4) the degree of acceptance of the theory or technique within the scientific community.[24] The Court was careful to assert that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."[25] Thus, the Court emphasized that this type of evaluation should be "flexible"[26] and attentive to "principles and methodology, not on the conclusions that they generate."[27] The Court reiterated that, to be admissible, expert testimony must be both reliable and relevant.[28]

In 1999, the Supreme Court revisited the standard for admissibility of expert testimony in *Kumho Tire Company, Ltd. v. Carmichael*.[29] *Kumho Tire* involved a products-liability action brought by a vehicle driver against a tire manufacturer and a distributor. The driver sued for damages related to injuries he sustained when a tire on his vehicle blew out and the car

17 Josh Camson, *History of the Federal Rules of Evidence*, American Bar Association, https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html (last visited Mar. 12, 2018).

18 Murrell v. Cargill Meat Logistics Solutions, Inc., No. 7:05–CV–80 (CDL), 2007 WL 7629012, at *2 (M.D. Ga. Feb. 8, 2007).

19 *Daubert*, 509 U.S. at 589.

20 *Id.* at 598.

21 *Id.* at 592.

22 *Id.* at 593.

23 *Id.* at 594.

24 *Id.*

25 *Id.* at 593.

26 *Id.* at 594.

27 *Id.* at 595.

28 *Id.* at 597.

29 526 U.S. 137 (1999).

flipped over.[30] The *Kumho Tire* Court explained that, while the *Daubert* Court had focused on admissibility of *scientific* expert testimony,[31] the same principles should apply to *all* expert testimony.[32] The Court emphasized that the judiciary's "gatekeeping function" with regard to experts is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[33] The Court reasserted the importance of judges having "leeway" and "latitude" when measuring the reliability of a particular expert's opinions.[34]

In 2000, Congress amended FRE 702 to incorporate the factors and principles identified in *Daubert* and *Kumho Tire*, settling on language that was modified slightly—in style only—in the 2011 Amendments. [35] The current version of FRE 702 states,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> - the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> - the testimony is based on sufficient facts or data;
> - the testimony is the product of reliable principles and methods; and
> - the expert has reliably applied the principles and methods to the facts of the case.

Thus, when evaluating the admissibility of expert testimony, federal courts today (and state courts that have adopted the *Daubert* standard)[36] are tasked with conducting a three-part analysis, assessing (1) the expert's qualifications, (2) the reliability of the expert's methodology and underlying data, and (3) the relevance of the expert's opinions to the case at hand (i.e., the helpfulness-to-the-trier-of-fact factor).[37] Notably, the Advisory Committee Notes in the 2000 Amendments to FRE 702 state

30 *Id.*

31 *Id.* at 141.

32 *Id.* at 147.

33 *Id.* at 152.

34 *Id.*

35 FED. R. EVID. 702, advisory committee's notes to 2011 amendment.

36 For a helpful chart listing which states use the *Frye* standard and which have adopted the *Daubert* standard, see https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/.

37 Stanacard, LLC v. Rubard LLC, No. 12 Civ. 5176 (CM), 2016 WL 6820741, at *1 (S.D.N.Y. Nov. 10, 2016).

that "rejection of expert testimony is the exception rather than the rule."[38] Nonetheless, federal courts will exclude expert testimony that is "speculative or conjectural."[39]

Litigants periodically attempt to exclude an opponent's expert from trial if the witness intends to render opinions that bear on the ultimate issue in the case. They argue that such evidence "invades the province" of the trier-of-fact.[40] FRE 704(a) clarifies that an expert opinion "is not objectionable just because it embraces an ultimate issue."[41] Instead, the rule is that though an expert "may opine on an issue of fact within the [trier of fact's] province, he may not give testimony stating ultimate legal conclusions based on those facts."[42] As stated in *Burrell v. Adkins*,[43] "[a]n expert's legal conclusion invades the court's province. . . . Expert testimony on issues of law, either giving a legal conclusion or discussing the legal implications of evidence, is inadmissible."[44]

Courts also have emphasized that admissible expert testimony must journey "beyond the general experience and common understanding of laypersons."[45] Federal courts acknowledge that experts who opine about topics or subjects that are well within the average factfinder's scope of knowledge or experience provide no value to the legal process.[46] Courts recognize the gamble that a factfinder may supplant his or her own good sense and sound judgment with the expert's assessments "simply because expert analysis is dressed in a cloak of science and inflated by the degrees

38 FED. R. EVID. 702, advisory committee's notes to 2000 amendment; *see also* Hilaire v. DeWalt Industrial Tool Co., 54 F. Supp. 3d 223 (E.D.N.Y. 2014) (granting a motion to preclude the testimony of an expert because his proposed testimony was not reliable); Anthony U. Battista et. al., *Reliability at the Gate: To Allow Expert Testimony or Not, A Comprehensive Overview*, 43 THE BRIEF 28, 29, 36 (2014) ("the exclusion of expert testimony still is rare"; "exclusion of expert testimony is always the last resort for a court"); Peter Durney & Julianne C. Fitzpatrick, *Retaining and Disclosing Expert Witnesses: A Global Perspective*, 83 DEF. COUNS. J. 17, 22 (2016) ("Generally, post-*Daubert*, and despite the now-routine challenges, rejection of expert testimony for lack of reliability has been the exception rather than the rule.").

39 New York v. United Parcel Serv., Inc., 15-CV-1136 (KBF), 2016 WL 4735368, at *4 (S.D.N.Y. Sept. 10, 2016); Bah v. City of New York, 13-CV-6690 (PKC), 2017 WL 435823, at *9 (S.D.N.Y. Jan. 31, 2017).

40 *See, e.g.,* Cameron v. Teeberry Logistics, LLC, No. 3:12–CV–181–TCB, 2013 WL 7874709, at *1 (N.D. Ga. May 21, 2013); Al-Turki v. Robinson, No. 10–CV–02404–WJM–CBS, 2013 WL 603109, at *5 (D. Colo. Feb. 15, 2013).

41 FED. R. EVID. 704(a).

42 *United Parcel Serv.*, 2016 WL 4735368, at *4; *see also* United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991); Hibbett Patient Care LLC v. Pharmacists Mut. Ins. Co., No. 16-0231-WS-C, 2017 WL 2062955, at *3 (S.D. Ala. May 12, 2017). For a helpful discussion of the permissibility of expert testimony about an "ultimate issue," see Hodes, *supra* note 7, at 187–88.

43 No. CV01-2679-M, 2007 WL 2771602 (W.D. La. Aug. 17, 2000).

44 *Id.* at *1.

45 Disalvatore v. Foretravel, Inc., No. 9:14-CV-150, 2016 WL 3951426, at *9 (E.D. Tex. June 30, 2016).

46 Fast v. Coastal Journeys Unlimited, Inc., No. 6:16–CV–00060–MC, 2016 WL 7331557, at *3 (D. Or. Dec. 16, 2016); *see, e.g.,* Godfrey v. Iverson, 559 F.3d 569, 573 (D.C. Cir. 2009) (holding that no expert was needed to determine the standard of care of an athlete who stood by while his bodyguard beat someone); Boucher v. CVS/Pharmacy, Inc., 822 F. Supp. 2d 98, 108 (D.N.H. 2011) (holding that expert testimony "as to whether a cane would have reduced the risk of a fall" was unnecessary, because the "beneficial effects of a cane are a matter of common knowledge").

and training of the witness."[47] Rather than exclude the testimony, though, courts also have stated that cross examination and rebuttal experts provide sufficient vehicles for managing such a risk.[48]

Some evidence scholars have noted an "extraordinary undercurrent of rebellion" by some federal judges who "apply significantly more lenient standards for expert testimony" than FRE 702 and *Daubert* permit.[49] No attempt is made here to resolve perceived inconsistencies in federal courts' application of FRE 702 and *Daubert* across jurisdictions, nor to propose a solution for enhancing consistency therein. Instead, the focus here is on how various courts have addressed the admissibility of writing experts in particular, to clarify for new writing experts how to appropriately withstand an opposing counsel's or a court's methodical adherence to the FRE 702 and *Daubert* standards as such rules are currently written. With proper forethought and respect for the purpose of expert testimony, writing experts can indeed play a helpful role in assisting the trier-of-fact. The following section describes a variety of types of engagements of writing experts, to give new experts a sense of how such opinions and testimony have been used in other cases.

II. Litigants Have Proffered Expert Opinions on Writings Across a Spectrum of Legal Matters

Against the foregoing backdrop of FRE 702, *Daubert*, and *Kumho Tire*, litigants have proffered experts in writing and written works to render opinions in a variety of legal matters and capacities. Some writing experts have provided affidavits, reports, or deposition testimony that assisted in settling legal matters without the need for trial,[50] and others have gone the distance and testified at trial.

47 *Fast*, 2016 WL 7331557, at *3.

48 Nielsen Audio, Inc. v. Clem, No. 8:15-CV-2435-T-27AAS, 2017 WL 1483353, at *3 (M.D. Fla. April 24, 2017); *see also* Battista et al., *supra* note 38, at 28 ("Although federal courts have great flexibility in their gatekeeping capacity, they would much rather rely on cross-examination to weed out evidence that might be premised on less than adequate methods than exclude an expert's opinion in its entirety.").

49 David Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 29, 30 (2013); *see also* David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 8 (2015) ("[A] number of courts have simply ignored the Rule 702 amendment . . ."); *see also* Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363, 374, 388 (2012) (noting that "circuit courts readily affirm district courts' qualification of law enforcement experts [in federal drug prosecutions] that do not apply" the *Daubert* factors, and that "the federal judiciary is largely ignoring the requirements of Rule 702").

50 Notably, a lawyer might alternatively engage an expert as a non-testifying expert; FRCP 26(a)(2)(A) does not require litigants to disclose the identity of non-testifying consultants, and such individuals are not required to submit written reports. Durney & Fitzpatrick, *supra* note 38, at 19–20.

A consideration of the role of a "writing expert" in litigation might prompt one first to assume we are referring to *handwriting* experts. Handwriting experts typically have educational qualifications in the study of forensic document analysis, or professional experience working in "questioned document" laboratories. They examine human penmanship to resolve issues of authenticity.[51] In contrast, the writing experts at issue here are retained by litigants to delve into the *methodology* of producing a written document. These experts might be tasked with analyzing the concepts, sources, language, vocabulary, and punctuation selected by the author in the synthesizing, drafting, editing, and revising process. Or such experts might focus on the *end product* of the writing process. Litigants might be disputing a document's substantive or technical quality, the context of the language therein, its sufficiency in scope, or its clarity. Alternatively, perhaps these types of experts will *compare* two writings: their content, context, structural framework, or style.

In the cases described in the following sections, many writing experts qualified as such by virtue of their professional roles as professors of creative writing, legal writing, English, literature, linguistics, or rhetoric. Others had significant professional or industry experience analyzing categories of documents such as contracts, police affidavits, white papers, patent applications, or music lyrics. The following case survey is intended to inform new writing experts (and lawyers) about the varieties of subject matter and scope in expert engagements involving writings, but also to clarify the standard for admissibility of expert testimony about a written work. In preparing to render expert opinions and ultimately testify at trial, writing experts must consider matters of reliability of methodology, relevance, limitations on the ability to opine on the ultimate issues in the case, and the provision of context beyond the range of knowledge or experience of the trier-of-fact.

A. Litigants Often Engage Writing Experts to Provide Opinions on the Grammatical Construction of a Writing

In today's arena of modern written communications, grammatically challenged Twitter "tweets"[52] and poorly punctuated Facebook postings

51 *See, e.g.*, In re Lawrence Michael O'Brien, 555 B.R. 771, 775 (D. Kan. 2016) (expert examined signatures on loan documents); Simone Ling Francini, *Expert Handwriting Testimony: Is The Writing Really On The Wall?*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 99, 108 n.78 (2006). For helpful articles about the practice of presenting and cross-examining handwriting experts in court, see Marcel B. Matley, *Using and Cross-Examining Handwriting Experts*, 13 PRAC. LITIGATOR 5, 21 (2002); Thomas W. Vastrick, *Forensic Handwriting Comparison Examination in the Courtroom*, 54 JUDGES J. 3, 32 (2015). For an article about the debate over the validity of handwriting experts see Paul Giannelli & Carin Cozza, *Forensic Science:* Daubert *Challenges to Handwriting Comparisons*, 42 No. 3 CRIM. L. BULL. 3, article 9 (2006).

52 *See generally,* Trump Grammar, Twitter, https://twitter.com/trumpgrammar?lang=en; Polly Higgins, *Donald Trump's grammar, syntax errors: Times when the English language took a hit*, *AMNEWYORK* (Mar. 10, 2017), http://www.amny.com/

are shrugged off by some as unimportant nit-picking. Others might argue that true *expertise* in and emphasis on proper grammar are needed now more than ever. Indeed, courts have recognized the unimpeachable qualifications of certain writing experts in the areas of grammar conventions and language construction. Judges will allow these experts to render opinions at trial about the meaning of words and punctuation that will assist the trier-of-fact. Judges will disallow testimony by experts whose opinions intrude upon the trier-of-fact's ability to read text and construe and interpret language and typography for themselves.

1. Grammar Experts Who Do Not Provide Insights Beyond the Capability of the Trier-of-Fact Risk Exclusion Under *Daubert* and FRE 702

When legal writers are asked to list names of experts in legal writing and other genres of written work, of course Professor Bryan A. Garner immediately springs to mind. He is the editor-in-chief of *Black's Law Dictionary* and the author of numerous widely used legal writing books including *The Redbook: A Manual on Legal Style*. Professor Garner is a well-known and highly regarded legal writing expert. Despite Professor Garner's unassailable qualifications as an expert on legal writing, drafting, editing, and style, a federal court excluded his opinion testimony in a 2013 case entitled, *Lind v. International Paper Co.*[53]

In *Lind*, a company and several of its terminated employees disputed the terms of Change in Control (CIC) agreements after a merger.[54] The company contended that the employees had received the full amount of their allocated compensation in accordance with the express language in the CIC agreements.[55] Alleging ambiguity in the phrasing of the agreements, the employees argued that the company owed them additional bonus payments and incentive awards. The employees designated Garner as their expert witness. He prepared an expert report opining that the language of the bonus provision in the CIC agreements was ambiguous.[56] He further provided a construction of the terms of the

news/donald-trump-grammar-syntax-errors-times-when-the-english-language-took-a-hit-1.124713 17; *see also* Caitlin Gibson, *The Trump administration has a spelling problem. But how bad is it really? We investigate.*, WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/ news/arts-and-entertainment/wp/2017/02/15/ the-trump-administration-has-a-spelling-problem-but-how-bad-is-it-really-we-investigate/?utm_term=.dae7366d5a30; Lee Moran, *Donald Trump's Tweet About GOP's 'Failed Obamacare Replacement' Backfires,* HUFFINGTON POST (July 14, 2017, 5:55 AM EST), http://www.huffingtonpost.com/ entry/donald-trump-failed-obamacare-replacement-tweet_us_ 59687b48e4b0 d6341fe7db82; Carla Herreria, *Merriam-Webster Steps In After Trump Tells America To 'Heel'*, (Aug. 19. 2017, 7:26 PM EST), http://www.huffingtonpost.com/entry/merrian-webster-trump-heel-heal_us_5998aeeee4b01f6e801ef6f9.

53 Mar. 12, 2014, Order, available in the docket of Lind v. Int'l Paper Co., No. A–13–CV–249–DAE, 2014 WL 4187128 (W.D. Tex. Aug. 21, 2014).

54 *See* Defendants' Opposed Motion to Exclude the Testimony of Plaintiffs' Expert Bryan A. Garner, *Lind*, No. 1:13-CV-00249-LY, 2013 WL 11089050, at *1 (W.D. Tex. Dec. 13, 2013).

55 *Id.* at *1.

56 *Id.*

agreements, based on grammatical rules.[57] The company filed a motion to exclude Garner's testimony, asserting that his opinions on ambiguity and grammatical interpretation represented legal conclusions that were neither relevant nor reliable.[58] In its brief in support of the motion, the company recited the principle that whether a contract term is ambiguous is a "pure question of law" for the court to decide and therefore outside the ambit of expert testimony.[59]

The company's lawyers further clarified the distinction between admissible and inadmissible expert testimony concerning interpretation or construction of a writing. They acknowledged a circumstance in which an expert could testify about trade usage of terms in an agreement:

> [W]hile in some limited situations expert testimony on the issue of "trade usage" has been allowed *after* a determination of ambiguity, here, Garner's opinions are not based on trade usage and not offered to explain specialized terms. . . . Garner offers his commentary on the language of the agreements solely in light of purported grammatical principles, based not on any experience in the industry but rather on his experience as an expert on legal writing. "In the absence of specialized trade usage, expert testimony regarding proper contract interpretation is inadmissible, as is expert testimony regarding the legal significance of the contract language."[60]

The company insisted that Garner's testimony would not aid the trier-of-fact, and therefore it fell short of the FRE 702 standard.[61]

In their opposition brief, the employees *conceded* that contractual ambiguity is a question of law within the court's province.[62] Instead, the employees emphasized that "[w]hen the fact finder interprets an ambiguous contract, the rules of grammar are to be followed."[63] Therefore, they argued that Garner's testimony would help the trier-of-fact by giving context to principles of grammatical construction. To lay the foundation for his expert testimony, the employees reiterated that Garner is "a well-recognized legal linguistic expert with special expertise in lexicography, drafting conventions, linguistics and the usage of the English language [who] has spent his entire professional life analyzing, writing about, and teaching drafting, and is nationally recognized as an expert in linguistics, lexicography, usage, and construction."[64]

57 *Id.*

58 *Id.* at *3.

59 *Id.*

60 *Id.* (internal citations omitted).

61 *Id.*

62 Response to Motion to Exclude Bryan A. Garner, *Lind*, No. 1:13-CV-00249, 2013 WL 11089057 (W.D. Tex. Dec. 23, 2013).

63 *Id.*

64 *Id.*

In its reply brief,[65] the company pointed out that the employees' opposition brief cited no cases in which a court permitted testimony by a grammar expert to help the trier-of-fact interpret phrasing within an agreement.[66]

The Texas federal court granted the company's motion to exclude Garner's testimony.[67] The court cited FRE 702, *Daubert*, and *Kumho Tire*, and held that Garner's opinions on ambiguous contract language constituted legal conclusions.[68] The court reiterated the rules that "[i]nterpretation of an unambiguous contract is a question of law for courts," and "[a] trial court cannot consider expert testimony in making the determination that the contract is ambiguous."[69] The court acknowledged the exception allowing expert opinions that provides context for contractual terms invoking "specialized trade usage." The scope of Garner's testimony did not include trade-usage opinions.[70] The court determined that Garner's opinions based solely on grammatical principles were "inadmissible as expert testimony regarding the legal significance of the contract language itself."[71]

Similarly, in *Coyote Portable Storage, LLC v. PODS Enterprises, Inc.*,[72] a litigant designated Professor Ross Guberman as an expert to render opinions regarding the meaning and interpretation of royalty provisions in a portable storage facility franchise agreement. [73] Professor Guberman is an "expert grammarian" and lawyer who has taught legal drafting at the George Washington University Law School.[74] Professor Guberman planned to give expert testimony regarding "the grammatical nuances of a sentence," "proper use of commas, the correct syntactic interpretation of the sentence, and the essential rules of contract drafting that compelled his conclusions."[75] The franchisee filed a motion *in limine* to exclude Professor Guberman from testifying at trial, arguing that "it is the Court's job alone to interpret and give meaning to the terms of a contract."[76] In granting the motion to exclude the expert testimony, the Georgia federal court noted that he was "not testifying about a technical term in the contract which needs explaining."[77]

65 Reply in Support of Defendants' Opposed Motion to Exclude the Testimony of Plaintiffs' Expert Bryan A. Garner, *Lind*, No. 1:13-CV-00249-LY, 2013 WL 11089053 (W.D. Tex. Dec. 27, 2013).

66 *Id.*

67 Mar. 12, 2014, Order, available in the docket of *Lind*, 2014 WL 4187128.

68 *Id.* at *4.

69 *Id.*

70 *Id.*

71 *Id.* at *5.

72 No. 1:09–CV–1152–AT, 2011 WL 1870593 (N.D. Ga. May 16, 2011).

73 *Id.* at *2.

74 *Id.* at *4, n.3.

75 *Id.* at *4.

76 *Id.*

77 *Id.* at *5.

Further, a New York federal court rejected grammar-interpretation assistance from a writing expert in *Sand v. Greenberg*.[78] In *Sand*, the litigants disputed the interpretation of one party's written $525,000 Offer of Judgment made pursuant to FRCP 68. The civil procedure rule allows a party to make an offer to permit the court to enter judgment against it on specified terms. If the opposing party rejects such offer and does not obtain a more favorable judgment, the offeror is entitled to recover its post-offer litigation costs. The plaintiff served a Notice of Acceptance of the offer and filed a Proposed Final Judgment. The original written Offer of Judgment contained this language: "inclusive of all damages, liquidated damages and/or interest plus reasonable attorneys' fees, costs and expenses actually incurred." Upon the filing of the Notice of Acceptance, the parties disagreed over whether the foregoing language meant that the dollar amount of the offer *included* attorneys' fees.[79]

The defendant who made the original Offer of Judgment proffered a legal writing professor from a Philadelphia law school as an expert to opine on the interpretation of the attorneys' fees phrasing.[80] Rejecting the expert, the court asserted that it "does not need the assistance of the expert to interpret this sentence."[81] Performing its own grammatical analysis, the court distinguished between the actual language of the offer, which included the words "and/or" and "plus," and possible alternative phrasing which could have stated the words "inclusive of" followed by a list of items linked by serial commas.[82] The court interpreted the actual language as limiting the scope of the word "inclusive" to the words that immediately followed: solely damages, liquidated damages, and interest.[83] The court applied grammar rules and dictionary definitions to analyze the absence of a comma and the presence of the word "plus." Ultimately, the court concluded that attorneys' fees constituted a separate item from the categories of damages included in the offer.[84]

In contrast, in *American Patent Development Corp. v. MovieLink, LLC*,[85] a trial judge adjudicating a patent claim considered the expert

78 No. 08-CIV-7840(PAC), 2010 WL 69359 (S.D.N.Y. Jan. 7, 2010).

79 *Id*. at *1.

80 *Id*. at *2.

81 *Id; see also* United States v. Stile, No. 1:11–CR–00185–JAW, 2013 WL 6448594 (D. Maine Dec. 9, 2013) (rejecting a *pro se* motion for funds to hire an English-language grammatical expert to analyze the grammar in a statute under which a defendant was charged; acknowledging that the defendant had a court-appointed lawyer "who possessed a Juris Doctor degree and who is fully capable of analyzing the grammatical structure").

82 *Sand,* 2010 WL 69359, at *3.

83 *Id.*

84 *Id.* at *3, *4.

85 604 F. Supp. 2d 704 (D. Del. 2009).

testimony of an English professor who provided opinions regarding "the function of a comma in English grammar" and its intentional use by authors of a patent claim.[86] Denying opposing counsel's motion to strike the expert's declaration, the court (without much analysis) held that the grammar expert was "qualified to testify as to the function of a comma in English grammar and . . . her methods of analysis were sufficiently reliable for her opinion to be admissible under Rule 702."[87]

Linguistics[88] scholar Professor Lawrence M. Solan helps shed light on circumstances in which language experts should be regarded as helpful to the trier-of-fact, even if at first glance, the interpretive activity seems like it might "usurp the role of the judge or the jury." Professor Solan and his co-author, Professor Peter Tiersma, explain,

> In cases involving complex language about which there is understandable disagreement between the parties, linguists can serve a role by acting as tour guides, walking the judge or jury through the disputed language, and explaining how the disputed language is an example of well-studied linguistic phenomena. The linguist's ultimate interpretation is not very important, and sometimes should not be given at all.[89]

In other words, if experts "act as guides through difficult passages," using their expertise "to explain how it is that various interpretations are available, their testimony is more likely to be accepted by courts than if they attempt to tell a court what a legal text means."[90]

2. Writing Experts Who Explain Terms of Art and the Usage of Grammar and Phrasing in the Context of a Particular Trade or Industry Should Withstand *Daubert* and FRE 702 Scrutiny

A federal district court in Maryland explained the difference between (1) an expert's focus on telling a trier-of-fact how to construe an agreement and (2) an expert's effort to place certain language and grammatical constructs within the context of a particular trade or industry. The

86 *Id*. at 708, 711.

87 *Id.* at 708; *see also* Central Elec. Co-op. v. U.S. West, Inc., No. Civ. 05–6017–AA, 2007 WL 4322577, at *5 (D. Or. Dec. 4, 2007) (considering the analysis of an "expert in English grammar, discourse analysis and the use of computer-assisted techniques for vocabulary and grammar analysis" in interpreting a public-utility regulation).

88 Professor Solan writes about the usefulness of linguistics experts at trial, which covers broader territory than the expert analysis on written works discussed here. For instance, Professor Solan describes experts in dialects, accents, phonetics, and discourse analysis, to name but a few categories of forensic linguistics. *See, e.g.*, Peter Tiersma & Lawrence M. Solan, *The Linguist on the Witness Stand: Forensic Linguistics in American Courts*, 78 LANGUAGE 221, 223 (2002) (noting "the presence of more than one hundred published judicial opinions that deal with linguistic expertise"); Lawrence M. Solan, *Linguistic Experts as Semantic Tour Guides*, 5 FORENSIC LINGUISTICS 87 (1998) [hereinafter Solan, *Linguistic Experts*]; Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?,* 66 TENN. L. REV. 1167 (1999) [hereinafter Solan, *Legal Systems*].

89 Tiersma & Solan, *supra* note 88, at 234–35.

90 *Id*. at 234.

former lies within the province of the trier-of-fact, while the latter brings information to the table that may be outside the common knowledge and experience of the factfinder. In 1859, in *Day v. Stellman,*[91] while interpreting the text of patents, assignments, and other written instruments, the court noted,

> while the interpretation and construction of all written instruments is for the court, it nevertheless will bring to its aid the testimony of witnesses to explain terms of art, and make itself acquainted with the material with which the contracts deal, and with the circumstances under which they were made; but neither the testimony of witnesses in general, nor of professors, experts or mechanics, can be received, to prove to the court, what is the proper or legal construction of any instrument of writing. Such evidence is inadmissible.[92]

Patents and insurance contracts are areas in which writing experts should be welcome at trial *if* they enlighten the trier-of-fact to context not otherwise discernable by a layperson.[93]

In 2013, in interpreting language of insurance contracts (a genre of writing which some courts have recognized as "confusing"[94]), the Maryland federal court in *Emcor Group, Inc. v. Great American Insurance Co.*[95] recited the trade-usage rule.[96] In *Emcor*, one party sought to offer opinion testimony of an expert in fidelity-insurance contracts to explain the meaning and scope of the policy's coverage language. The court deemed the proposed expert testimony "hardly illuminating,"[97] declaring that the expert could not opine on how the contracting parties understood the policies, nor on the construction of the insurance contract, unless a particular term carried "a peculiar meaning in a trade, business or profession."[98]

Also in the insurance context, however, Professor Susan Chesler of Arizona State University's Sandra Day O'Connor College of Law was retained as an expert to opine regarding the applicability of a policy exclusion in an insurance coverage dispute.[99] Professor Chesler teaches

91 7 F. Cas. 262 (D. Md. 1859).

92 *Id.* at 263–64.

93 *See, e.g.,* Tiersma & Solan, *supra* note 88, at 234.

94 Adamson v. Wadley Health Sys., No. 07-1081, 2008 WL 4649084, at *12 (W.D. Ark. Oct. 20, 2008); Quintana v. State Farm Mut. Automobile Ins. Co., No. 14CV00105 WJ/GBW, 2014 WL 11512633, at *7 (D.N.M. Dec. 4, 2014).

95 No. ELH-12-0142, 2013 WL 1315029 (D. Md. Mar. 27, 2013).

96 *Id.* at *9 (internal citations omitted).

97 *Id.* at *22, n.14.

98 *Id.* (internal citations omitted).

Legal Method and Writing, Legal Advocacy, Contracts, Contract Drafting and Negotiating, and Intensive Legal Research and Writing. In the federal lawsuit, she submitted an expert report containing her "opinion of the meaning and applicability of that exclusion based on contract interpretation principles generally, and most specifically on the plain meaning of the language used by the drafter."[100] Opposing counsel deposed Professor Chesler, but the matter ultimately settled before she could testify at trial.[101] Opposing counsel did not file a motion *in limine* to exclude her testimony.

Again, Professor Solan's work offers guidance regarding when an expert should be permitted to opine regarding "the meaning of texts." He refers to the usefulness of experts in parsing "tricky passages—passages about which the parties argue sensibly in favor of conflicting positions."[102] He posits that "if a party can give a juror more confidence in the rightness of her position by converting, at least in part, an intuitive sympathy into a structured understanding, then the Rules of Evidence say that the party should be allowed to do so."[103]

Further, a specific focus on *business usage* of language and punctuation rather than mere grammatical construction perhaps tilted the scale in favor of a tribunal's reliance on testimony from a writing expert in an ethics inquiry concerning a judicial candidate in Oregon. Professor Rebekah Hanley, a professor of legal research and writing at the University of Oregon School of Law, was retained to render expert opinions about the meaning of a comma in a judicial candidate's biographical statement. Professor Hanley's expert qualifications stemmed from her legal writing training, experience, and knowledge. She served in two federal clerkships, worked in a law firm, taught legal writing for over a decade, authored numerous publications, and delivered many presentations within the legal writing academy. She also held the role of Assistant Dean for Career Planning and Professional Development for four years, advising students on résumé-drafting.[104]

99 Email from Susan Chesler, Clinical Professor of Law, Ariz. State Univ., to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Research on Legal Writing Professors as Expert Witnesses* (June 7, 2017, 4:41 PM EST) (copy on file with author).

100 *Id.*

101 *Id.*

102 Tiersma & Solan, *supra* note 88, at 94.

103 *Id.* at 94, 97 (referring to the helpfulness of experts in putting a large or complicated "corpus" of text in context, or raising "to the jury's attention a range of possible interpretations that is available to everyone, but which might have gone unnoticed").

104 *Professor Rebekah Hanley Resume*, UNIV. OF OR. SCH. OF LAW, https://law.uoregon.edu/images/uploads/entries/RHanley_resume_March_2016_v2.pdf (last visited Mar. 23, 2018).

In Deschutes County, Oregon, a concerned party had filed an anonymous complaint against a circuit-court judge for allegedly misrepresenting his qualifications in a 2014 Voters' Pamphlet. The judge had included five words punctuated by a comma: "Trial Academy, Stanford Law School." The judge never had matriculated at, nor graduated from, Stanford. He had attended a weeklong insurance defense training program on Stanford's campus.[105]

At first glance, this matter seemed to turn on the grammatical construction of a single comma. On its face, applying the same principles as the *Lind* court did, a federal court (rather than the Oregon Commission on Judicial Fitness and Disability) might have assessed this dispute as not worthy of expert testimony. Of course, French writer, Flaubert, perhaps would object; there is some debate over whether he or Oscar Wilde was the original source of the quote, "I spent the morning putting in a comma and the afternoon removing it."[106] Professor Hanley did not prepare a written expert report, but provided testimony under oath at a judicial-fitness hearing before the Oregon Commission. This tribunal certainly has different evidentiary standards than federal courts applying FRE 702 and *Daubert*.[107] Nonetheless, the result in this case helps distinguish between basic grammar principles and punctuation in the context of trade usage. Rather than focusing solely on the grammatical impact of the comma, Professor Hanley opined about the common practice of résumé writers to use the comma format in describing educational and professional qualifications and experience. She indicated that, while the judicial candidate "could have used greater 'precision,'" the reference to Stanford was not "misleading."[108] Opposing counsel raised no objections regarding her testimony. The Commission unanimously voted to dismiss the complaint against the candidate.[109]

Based on the foregoing cases, writing experts should be cautious about rendering opinions that veer into the judicial lane of determining contract ambiguity, that state legal conclusions regarding the effect of

105 Scott Hammers, *Miller Ethics Complaint Heard*, BEND BULL., (Oct. 16, 2015 12:01 AM) http://www.bendbulletin.com/localstate/3600839-151/miller-ethics-complaint-heard.

106 *See* David Galef, Letter to the Editor, *Flaubert's Comma*, N.Y. TIMES (Oct. 20, 1991) http://www.nytimes.com/1991/10/20/books/ l-flaubert-s-comma-084991.html; https://quoteinvestigator.com/tag/gustave-flaubert/.

107 The Commission applies the following evidentiary standard: "Irrelevant, immaterial or unduly repetitious evidence shall be excluded. All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible." OR. COMM'N OF JUDICIAL FITNESS DISABILITY R. P. 13(d), http://www.courts.oregon.gov/rules/Other%20Rules/CJFDRulesOfProcedure.PDF (last visited Mar. 23, 2018).

108 Hammers, *supra* note 105.

109 Claire Withycombe, *Commission Recommends Dismissal of Complaint Against Deschutes Judge*, BEND BULL., (Jan. 7, 2016, 5:53 AM) http://www.bendbulletin.com/localstate/deschutescounty/3884128-151/commission-recommends-dismissal-of-complaint-against-deschutes-judge.

written language, or that merely apply fundamental grammar principles, which actions could be construed in their basic form as infringing on "institutional roles."[110] Instead, a court is more likely to accept the assistance of a writing expert who can shed light on words, phrases, and grammatical structures which (1) have particular usage, meaning, or significance in a trade, business, or profession, (2) fit within the larger context of a complex document, or (3) are subject to a range of multiple interpretations which are not necessarily apparent to the trier-of-fact.[111]

B. Lawyers Engage Writing Experts to Opine on the Substantive Quality of Writings

Assessing the *quality* of a piece of writing—perhaps in creative genres like poetry, literature, or memoir as contrasted with business, legal, or technical written works—may at first seem like a subjective endeavor. We might think that the positive attributes of a collection of an author's words are "in the eye of the beholder."[112] Yet courts have considered opinion testimony of experts about the merit or value of writings in both literary and business scenarios.

Litigants have offered writing experts in cases involving alleged "obscene" writings. This perhaps would have piqued Flaubert's interest, as he was the victor in his own 1857 obscenity trial involving *Madame Bovary*. For example, in *United States v. Whorley*,[113] the government charged a defendant with importing "obscene material" when he electronically obtained and transmitted sexually explicit anime cartoons and emails containing graphic images of children.[114] To challenge the government's allegation under 18 U.S.C. § 1462 (1996) that he had used a computer to transport "obscene" material, the defendant proffered an English teacher as an expert witness. The expert planned to render an opinion regarding "how juvenile sexual content often accompanies the educational experience of literature and creative writing."[115] The government objected to the introduction of any expert testimony concerning the history of juvenile nudity in art and filed a motion to exclude the expert's testimony.[116] In denying the motion, the court cited FRE 702 and the *Daubert* standard, noting courts' "wide discretion" to

110 Tiersma & Solan, *supra* note 88, at 237; Solan, *Linguistic Experts*, *supra* note 88, at 90.

111 Solan, *Linguistic Experts*, *supra* note 88, at 97.

112 Margaret Wolfe Hungerford, MOLLY BAWN (1878).

113 400 F. Supp. 2d 880 (E.D. Va. 2005).

114 *Id*. at 881.

115 *Id*. at 882.

116 *Id.*

admit or exclude expert testimony.[117] The *Whorley* court evaluated how the expert planned to compare the defendant's electronic correspondence "with works of literary value such as *Lolita*, *The Color Purple*, *Tender is the Night* and *A Diving Rock on the Hudson*,"[118] focusing on language and content. In the court's view, the proposed testimony satisfied FRE 702[119] by assisting the jury in understanding whether the defendant's emails "appeal to the prurient interest or lack serious literary value"[120]—the test for obscenity under the Supreme Court test in *Miller v. California*.[121]

Similarly, in a California state case, *In re Martinez*,[122] a prison inmate filed a habeas corpus petition claiming that prison personnel should not have confiscated a book in his possession on the grounds of obscenity. The prison officials deemed the book—*The Silver Crown*, by Mathilde Madden—to be contraband because it contained explicit sexual content and potentially could incite violence.[123] The court described the book as "involv[ing] werewolves, witches, a ghost, and magic spells. It is 262 pages long with 44 chapters. There is a fair amount of violence in it, but that is not dwelt upon and is not shocking or gory."[124] The court noted that the book contained "a great number of graphic sexual encounters" between consenting adults.[125] The prison's operational procedure banned "obscene material."[126] In his habeas petition, the prisoner contended that the book was no more violent than "recognized great works of literature, such as Homer's *Iliad* and Dostoyevsky's *Crime and Punishment*."[127] In support of his "traverse" (the document filed by the prisoner in response to the government's opposition to the habeas petition), the prisoner attached a declaration by a professor of creative writing. The professor rendered an expert opinion that the prisoner's book was not obscene, but instead possessed "literary merit."[128]

117 *Id.*

118 *Id.* at 884.

119 *Id*. at 885.

120 *Id.*

121 413 U.S. 15 (1973).

122 216 Cal. App. 4th 1141 (Cal. Ct. App. 2013). Scholars have indicated that California, which had long held out against adopting *Daubert*—"waded into the *Daubert* tide" in 2012 in *Sargon Enterprises, Inc. v. University of Southern California*, 288 P.3d 1237 (Cal. 2012). *See* David L. Faigman and Edward J. Imwinkelried, *Wading Into the Daubert Tide:* Sargon Enterprises, Inc. v. University Of Southern California, 64 HASTINGS L.J. 1665 (August 2013).

123 216 Cal. App. 4th at 1144.

124 *Id*. at 1145.

125 *Id.*

126 *Id*. at 1146.

127 *Id*. at 1148.

128 *Id*. at 1149.

Evaluating whether the book had "literary value," the court expressly considered the expert's declaration, first acknowledging the professor's credentials. He was a creative-writing professor at San Francisco State University who also taught at other institutions, wrote books, and had received literary awards.[129] The expert opined,

> [T]he book is about more than sex. . . . [I]t seems to me that the book is an exploration of the confines of a certain society, one that is in some ways similar to our own but that also contains magical elements. It's about freeing oneself from one's greatest fears, and in this way this is clearly a work of literature. It's not Tolstoy, fine, but this author knows how to move story, carry out a plot, with a theme, and how to give her characters a certain depth characteristic of literary fiction.[130]

The court pointed out that the prison proffered no opposing expert to explain that the book lacked "serious literary value."[131] Nodding to the prisoner's expert's opinion, the court credited the book's literary devices, plot, points of view, characters, dialogue, retrospective, and suspense.[132] Ultimately, the court held that the book did "not lack serious value and thus should not have been withheld" by the prison on the basis of obscenity.[133]

Further, in the business context, in *American Association for the Advancement of Science v. Hearst Corp.*,[134] the publisher of *Science* magazine sued the publisher of *Science Digest* magazine for trademark infringement after the latter produced a revised edition of its periodical that resembled its competitor. The court heard evidence and testimony at a five-day trial.[135] In ruling on the trademark-infringement claim and a motion for a preliminary injunction, the court referenced *Science* magazine's expert in the area of science writing who "acknowledged that the [*Science Digest*] magazine does contain some articles of good quality."[136]

Conversely, in *Parsi v. Daioleslam,*[137] the court rejected an expert proposed by plaintiffs who were asserting a defamation claim against a journalist. The proposed expert planned to offer opinions that the journalist's written work fell below the applicable standard of care for quality. The expert was an Associate Professor of Journalism and Mass Communication at the University of North Carolina.[138] In preparing his

129 *Id*. at 1161.

130 *Id*. at 1161–62.

131 *Id.*

132 *Id.*

133 *Id*. at 1163.

134 498 F. Supp. 244 (D.D.C. 1980).

135 *Id*. at 247.

136 *Id*. at 250.

137 852 F. Supp. 2d 82 (D.D.C. 2012).

138 *Id*. at 86.

expert report which was dubbed "terse" by the court, the professor had read merely a few English-language articles written by the journalist. He had examined none of the journalist's articles written in Farsi and had reviewed no discovery in the case.[139] The journalist filed a motion *in limine*.

In applying the FRE 702 standard, the court first determined that the facts and data upon which the expert based his opinions were "patently insufficient for the task he was given."[140] Further, the expert gave vague responses in his deposition when asked to describe his methodology. He could not convincingly explain why he chose a one-page 1996 Society of Professional Journalists' Code of Ethics as the applicable professional standard.[141] He failed to explain how he reliably applied any relevant professional standard to the journalist's writings. In fact, he testified that he did not systematically check the writer's sources to determine if assertions in his articles could or could not be substantiated.[142] He did not itemize any unfounded facts or deceptive statements in the journalist's work[143] that fell below the alleged standard of care. He could not identify any of the sources linked in the journalist's online articles that the expert purportedly had read or tried to verify.[144] The court granted the journalist's motion to exclude the expert from testifying at trial.[145]

The foregoing cases demonstrate that writing experts analyzing the *quality*[146] of a writing should withstand *Daubert* and FRE 702 scrutiny when they (1) identify recognized quality criteria within a given writing genre or industry, (2) provide examples of writing that meets such criteria, and (3) then use a reliable methodology to compare the written work in question against the genre or industry standard. In contrast, writing experts likely will be deemed unhelpful to the trier-of-fact and excluded

139 *Id.*

140 *Id.* at 89.

141 *Id.* at 86, 89.

142 *Id.* at 90.

143 *Id*. at 87.

144 *Id.*

145 *Id.* at 90.

146 Distinct from analyzing content-focused attributes of a piece of writing like the experts in the foregoing cases, a writing expert may be retained to provide insights on *technical* quality, focusing on standards of presentation and professionalism. In *Constant v. Mellon Bank, N.A.*, No. 02:03CV1706, 2006 WL 1851296 (W.D. Pa. July 3, 2006), a marketing specialist sued her employer for wrongful termination. A prior year-end evaluation had critiqued her "lack of attention to detail" in written documents she had produced in her marketing role, and encouraged her to "focus on self-editing and learning to proofread her own work." *Id*. at *3. The employee engaged an adjunct associate professor at a college to render an expert opinion that the edits and revisions by other personnel to her written work were "arbitrary" and not based on "lack of quality." *Id*. at *8, n.5. In a written report, the expert opined that the employee's writing "meets or exceeds the qualifications for a professional writer's post." *Id.* The trial court referenced the expert report, yet granted summary judgment in favor of the employer. *Id*. at *11.

from testifying at trial if they (1) review an insufficient body of facts or data relevant to the legal matter, (2) rely upon a flawed or unrecognized standard or methodology for evaluating writing quality, or (3) apply a recognized standard or methodology in an unreliable way.

C. Parties Engage Writing Experts to Opine on the Context of Language in a Writing

Experts also may be retained to provide opinions regarding the cultural, artistic, or professional context of a written work. For instance, in *United States v. Herron*,[147] the government charged an aspiring "gangsta rap" artist with numerous counts of racketeering, conspiracy, and firearms offenses. The government sought to present evidence at trial in the form of music videos showing the artist rapping lyrics referring to gangs, violence, and drug dealing.[148] The purpose of the government's video evidence was to prove the existence of the rapper's "criminal enterprise," his leadership thereof, his "unlawful possession and use of firearms," and related crimes.[149] In response, the rap artist proffered an expert to testify about the context of the rap lyrics. Specifically, the expert planned to render the opinion that, "based on the traditions, patterns, roots, and antecedents of hip-hop music, including gangsta rap, . . . song lyrics and expressions by artists in this medium which are designed to create or develop their image, and/or promote their work, may not be taken as expressions of truth by virtue of being stated or sung by the artist."[150] The government filed a motion to exclude the expert testimony. In evaluating the motion, the court first described the expert's qualifications:

> Dr. Peterson is the Director of Africana Studies and Associate Professor of English at Lehigh University and holds a Ph.D. in English from the University of Pennsylvania. . . . He has written extensively on hip-hop culture, themes, and narratives, including publications in peer-reviewed journals and contributions to encyclopedias and anthologies. . . . He has appeared as a commentator on these topics on national news media. . . . He has also conducted interviews of prominent rap artists such as Snoop Dogg and Nas.[151]

The court acknowledged the expert's specialized knowledge and corresponding qualifications under FRE 702 "[b]ased on his historical, ethnographic, and linguistic study of hip-hop."[152]

147 No. 10–CR–0615 (NGG), 2014 WL 1871909 (E.D.N.Y. May 8, 2014).

148 *Id*. at *1.

149 *Id.*

150 *Id.* at *7.

151 *Id*.

152 *Id.*

In its motion *in limine*, the government argued that the court should exclude the expert from trial because his testimony "(1) cannot be the product of reliable principles or methods, (2) would not be helpful to jurors, and (3) goes beyond the bounds of proper expert testimony."[153] The court rejected each argument, finding that the expert would provide useful context for the jury, especially jurors unfamiliar with hip-hop or rap, about the truthfulness or authenticity of statements made in gangsta rap lyrics.[154] To protect against the risk of invading the province of the trier-of-fact, the court indicated that it would limit the scope of the expert's testimony to "the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangsta rap."[155] Regarding his methodology, the expert could describe and compare examples of lyrics from the music genre, but he could not "opine on the truth or falsity of the lyrics or representations in the rap-related videos" or the artist's other lyrics. He also would not be permitted to decipher those statements for the jury.[156] The court also invited the government to proffer its own qualified counter-expert on this subject matter.[157]

The *Herron* case contrasts with *United States v. Wilson,*[158] in which the same federal court eight years earlier precluded an expert in the field of rap culture from testifying that rap lyrics routinely describe violent, sexual, and other provocative acts not necessarily "rooted in actual events."[159] In *Wilson*, the government charged a defendant with the murder of two undercover New York Police Department detectives.[160] During a search of the defendant's pockets during his arrest, police found handwritten rap lyrics containing violent references to the act of shooting individuals in the head. The language alluded to police equipment, such as protective vests and Glock firearms.[161] The defendant engaged a professor of Black American Studies at the University of Delaware[162] as a testifying expert to counter the government's contention that the lyrics found in the defendant's pocket constituted a handwritten confession. While noting that expert testimony about rap culture has been admitted in copyright and trademark cases,[163] the court rejected the expert's opinion that the handwritten lyrics were not a confession.[164] Regarding methodology, the

153 *Id.*

154 *Id.*

155 *Id.* at *8.

156 *Id.*

157 *Id.*

158 493 F. Supp. 2d 484 (E.D.N.Y. 2006).

159 *Id*. at 486.

160 *Id*. at 485.

161 *Id*. at 488–89.

162 *Id*. at 486.

163 *Id*. at 489–90 (citing BMS Entertainment/Heat Music LLC v. Bridges, No. 04 Civ. 2584 (PKC), 2005 WL 1593013, at *3 (S.D.N.Y. July 7, 2005) (professor who studies African-American culture and hip-hop music described "call-and-response format" of a song); Boone v. Jackson, No. 03 Civ. 8661 (GBD), 2005 WL 1560511, at *1–2 (S.D.N.Y. July 1, 2005) (experts analyzed lyrics and phrasing in two songs)).

164 *Id*. at 490.

court emphasized that the expert indicated no intention to compare the handwritten text to other lyrics in the rap industry.[165]

In a different vein, in *Betker v. City of Milwaukee*,[166] a homeowner offered testimony from an individual with expertise in the methodology of drafting police affidavits. The homeowner had filed an action against a police officer for allegedly violating the homeowner's rights in executing a no-knock search warrant. The homeowner alleged that the written affidavit supporting the warrant application contained misrepresentations.[167] At trial, the expert testified regarding the process of writing affidavits. The jury found in favor of the homeowner. The police officer filed a motion for a new trial alleging, *inter alia*, several erroneous evidentiary rulings including the admissibility of the expert.[168] In denying the motion for a new trial on several grounds, the court emphasized the expert's qualifications: he had served twenty-three years as a police officer, including seventeen years on the SWAT team; he had served as head of the Minneapolis Police Academy for four years; he had designed the police curriculum for the State of Minnesota; he had authored a book on police ethics; and he had experience writing (and in supervising and educating others in writing) affidavits and search warrants.[169] The court held that the expert's qualifications "were more than sufficient, and his testimony was reliable and relevant."[170]

If engaged to provide context about the cultural, artistic, or professional context of a written work, writing experts should be sure to employ a sound methodology and describe representative examples of the particular genre of writing as a benchmark against which to compare the writing at issue.

D. Litigants Retain Writing Experts to Render Opinions Regarding Editing Standards and Methodology

Writing experts may be retained to render opinions on the applicable standards and methodology for editing written works. For example, in *Lish v. Harper's Magazine Foundation*,[171] a fiction writer and teacher sued a magazine for publishing a copyrighted letter he wrote to his creative-writing students. The magazine cut the letter to half its size without marking deletions with ellipses.[172] At trial, each side called experts "to

165 *Id.* Further, the defendant ignored court rules regarding expert disclosures. *Id.* at 489.

166 22 F. Supp. 3d 915 (E.D. Wis. 2014).

167 *Id.* at 919.

168 *Id.*

169 *Id.* at 927–28.

170 *Id.* at 928.

171 807 F. Supp. 1090 (S.D.N.Y. 1993), *amended as to damages*, No. 91 CIV. 0782 (MEL), 1993 WL 7576 (S.D.N.Y. Jan. 7, 1993).

172 *Id.* at 1093.

testify about common practices in the industry with respect to editing, [the] use of ellipses, and other related topics."[173] First assessing the experts' qualifications, the court noted that the fiction writer's expert was a contributing editor to three magazines, an essayist, a creative-writing teacher, and the author of four books and numerous articles. He previously had served as a literary editor at other prominent magazines and as a professor of literature and writing at Harvard.[174] Likewise, the magazine's expert was the chief cultural correspondent for the *New York Times*, had served as an editor at several magazines, and had written two books and numerous articles.[175] The court allowed the experts to present competing testimony over whether the magazine's edits had "transformed the [fiction writer's] Letter from 'a serious and sometimes moving and impressive piece of work' to a piece that made [the author] look ridiculous."[176] The court ultimately held that the publication was not fair use, and thus the magazine violated the author's copyright.[177]

In the foregoing example, these writing experts provided industry context that likely was outside the common experience of the average trier-of-fact: magazine-editing standards, the grammatical role of an ellipsis in the specific setting of trimming words to fit within a publication, and the resulting effect on the tone and message of the content.

E. Attorneys Engage Writing Experts to Provide Opinions about Communication Techniques in a Writing

Litigants also might hire experts to provide opinions as to the *clarity* of writings by focusing on the use by authors (intentional or otherwise) of phrasing that misleads or confuses readers. Distinct from a determination of whether a document is ambiguous or unclear (which the *Lind* court stated was within the court's province), these experts focus on the effect of the drafter's language choices that potentially confuse a reader. For example, in a class-action consumer lawsuit against an insurance company in *Iorio v. Allianz Life Insurance Co. of North America,*[178] consumers alleged that an insurance company misrepresented information regarding annuity bonuses in its sales brochures and Statements of Understanding (SOU). The consumers engaged an expert to testify at a deposition regarding "the ability of the ordinary reader to understand the policies based on a review of the written materials alone."[179] The expert was a professor of legal writing and linguistics at the University of Southern

173 *Id*. at 1095.

174 *Id.*

175 *Id.*

176 *Id*. at 1096.

177 *Id*. at 1105.

178 No. 05CV633 JLS (CAB), 2008 WL 8929013 (S.D. Cal. July 8, 2008).

179 *Id*. at *25, n.19.

180 *Id*.

California.[180] The insurance company filed a motion *in limine* to exclude the expert's testimony on the grounds that (1) the jury was capable of determining whether the insurer's written materials were confusing or unclear,[181] (2) the proposed testimony had "no relationship to the facts of [the] case" because the consumers did not read the same documents the expert analyzed, and (3) the expert failed to "employ the academic or intellectual rigor one expects to find in scholarly work" because he did not read the consumers' deposition transcripts and examined only one of six of the insurer's brochures and SOUs.[182]

In their opposition brief, the consumers countered that their "renowned linguistics expert" was not "being offered to interpret the terms of the insurance policy—a function which is obviously reserved for the Court."[183] Instead, the consumers propounded the expert's testimony to highlight the insurance company's purposeful selections of "communication techniques" and "carefully chosen omissions" intended to deceive its insureds. [184] In ruling on the motion, the court acknowledged it was "unclear as to whether there is a discernable line between expert opinion of 'communicative techniques' and such an opinion invading the province of the jury, who are 'average readers' themselves."[185] The court granted the motion, but indicated it would invite an offer of proof at trial and address then whether to admit the expert testimony.[186] Ultimately, the consumers moved for final approval of a class-action settlement of the case.

For opinions regarding the "comprehensibility" of a writing to survive FRE 702–*Daubert* scrutiny, writing experts likely will need to go beyond stating what the "average reader" could or could not understand.[187]

181 Defendant Allianz Life Insurance Co. of North America's Memorandum of Points and Authorities in Support of its Motion *in Limine* No. 2 to Exclude Expert Testimony and Evidence from Vincent Gallagher, Edward Finegan, and Frank Caliri, at 14, available in the docket of *Iorio*, 2008 WL 8929013.

182 *Id*. at 15–16.

183 Plaintiffs' Opposition Brief to Defendant Allianz Life Insurance Co. of North America's Motion in Limine No. 2 to Exclude the Expert Testimony of Gallagher, Finnegan, and Caliri, *Iorio*, No. 305CV00633, 2009 WL 3500950, at *20 (S.D. Cal. Apr. 30, 2009).

184 *Id.*

185 Jan. 27, 2010 Order at 15, available in the docket of *Iorio*, 2008 WL 8929013.

186 *Id*. at 16. In a New York state class-action lawsuit, *Michels v. Phoenix Home Life Mutual Insurance Co.*, No. 95/5318, 1997 WL 1161145, at *22 (N.Y. Sup. Ct. Jan. 7, 1997), class members objected to a Class Notice as "confusing, misleading, vague, or missing certain necessary details." The court rejected the objections, stating, "[t]he notice clearly sets forth in plain English all information necessary to inform Class Members of their options." *Id.* The court noted that "a number of experts in legal writing and dispute resolution have provided the Court with favorable analyses regarding the clarity of the notice," citing two affidavits submitted in briefs in support of the approval of the class action settlement. *Id.* Notably, however, New York state courts apply the *Frye* standard. *See* In re New York City Asbestos Litigation, 148 A.D.3d 233, 241 (N.Y. App. Div. 2017) (Kahn, J., concurring) ("New York has consistently resisted adopting the *Daubert* standard.").

187 Professors Tiersma and Solan state that, for example, "the admissibility of linguistic expert testimony on the comprehensibility of jury instructions is uncertain at best." Tiersma & Solan, *supra* note 88, at 227.

Instead, they should focus on *how* the use of particular words, grammar, and syntax affect a reader's understanding.

F. Parties Have Engaged Writing Experts to Opine on the Propriety of White-Paper-Drafting Methodology

Litigants also may engage experts to render opinions on the integrity of the analytical methodology used in documents like "white papers" written by stakeholders in a particular industry, such as the pharmaceutical field. In *In re Prograf Antitrust Litigation*,[188] a drug manufacturer filed a citizen petition with the Food and Drug Administration (FDA) challenging the approval process of a generic alternative drug for organ transplant patients. Purchasers of the generic drug countered that the drug manufacturer's FDA petition was a sham designed solely to perpetuate the manufacturer's monopoly and interfere with the business interests of a generic drug competitor.[189] In support of the petition, the manufacturer had submitted white papers addressing the generic substitution of drugs designed for transplant patients, recommending "bioequivalence testing."[190] In response to the manufacturer's motion for summary judgment, the purchasers attacked the "reliability and credibility" of the manufacturer's analysis, citing expert testimony that the "white papers contained no scientific or medical data, but were instead premised on theoretical and unsupported physician concerns."[191] The court found material facts in dispute and denied the drug manufacturer's motion for summary judgment.[192]

In contrast, in *Rheinfrank v. Abbott Laboratories, Inc.*,[193] a consumer filed a products-liability action against a drug manufacturer, alleging that her baby had suffered injuries from an anti-epileptic drug the mother had ingested during pregnancy. Before promoting the sale of a new drug, manufacturers must submit a New Drug Application to the FDA proving that the medication is "efficacious."[194] The manufacturer had submitted letters to the FDA, with accompanying white papers.[195] The consumer argued that the drug company had "submitted misleading or incomplete information" in its correspondence with the FDA.[196] The consumer proffered testimony of four experts who reviewed and opined on the allegedly deceptive information contained in the white papers. The parties

188 No. 1:11-MD-02242-RWZ, 2014 WL 4745954 (D. Mass. June 10, 2014).

189 *Id*. at *1, *7.

190 *Id*. at *8.

191 *Id.*

192 *Id*. at *11.

193 119 F. Supp. 3d 749 (S.D. Ohio 2015), *reconsideration denied by* 137 F. Supp. 3d 1035 (S.D. Ohio 2015), *aff'd* 680 F. App'x 369 (6th Cir. 2017).

194 119 F. Supp. 3d at 762.

195 *Id.* at 763, 764.

196 *Id.* at 767.

submitted numerous *Daubert* cross-motions seeking to exclude or limit expert testimony and also filed cross-motions for summary judgment.

In determining whether to admit the consumers' experts' opinions at trial, the court decided that "an expert's opinion that the FDA would have reacted differently if the submissions to the FDA . . . had been supported by different evidence is speculative."[197] The court concluded that "[t]estimony about what [the drug company] could have and should have researched or stated to the FDA in its applications is speculative."[198] The court ultimately granted the manufacturer's motion for summary judgment, in part, on the consumers' claims of design defect, negligent misrepresentation, fraud, and unjust enrichment.[199]

The lesson from the foregoing cases is that the *Rheinfrank* experts went too far in trying to link the flawed methodology in the white papers' drafting process to the FDA's ultimate decision, which the court deemed speculative. The *Prograf* experts appeared to stick with attacking the white papers' drafting methodology, relaying that this genre of writing requires reliance on scientific or medical data, but the documents in question were merely "theoretical" and lacked substantiated support. While lawyers deposing or cross-examining an expert might try to push the witness to speculate, smart experts in this context will limit themselves to evaluating the methodology within the four corners of the document, and whether it is sound or flawed.

G. Litigants Retain Writing Experts to Compare Two Texts

Finally, litigants may engage experts to compare two separate writings, such as patent applications, copyrighted music, or screenplays. In a 1924 patent-infringement case, *Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co.*[200] (a case which obviously pre-dates FRE 702 and *Daubert* by several decades), an expert submitted an affidavit in support of a preliminary injunction describing his expertise in evaluating descriptions and disclosures in patent applications.[201] The lower court considered this expert's opinions and those of a competing expert who had twenty-five years of expertise in preparing and prosecuting patent applications, writing descriptions, and rendering opinions on patent matters.[202] Both experts analyzed the language and text of the descriptions and disclosures of types of beds in two separate patent applications. The lower court considered the experts' affidavits, in addition to exhibits and

197 *Id.* at 768.

198 *Id.*

199 *Id*. at 792.

200 1 F.2d 673 (9th Cir. 1924).

201 *Id*. at 674.

202 *Id*.

models, and conducted a full hearing before concluding that the defendant had infringed upon the plaintiff's patent.[203] The appellate court likewise relied upon the opinion of the plaintiff's expert about the description and disclosure of the beds in the two patent documents, yet reversed the lower court's finding of patent infringement.[204]

Similarly, in *MCA, Inc. v. Wilson*,[205] in a non-jury trial, the court admitted the testimony of opposing music plagiarism experts in a copyright infringement case relating to songs. The plaintiff's expert, who had twenty-six years of experience studying music plagiarism, presented comparison charts to highlight commonalities and similarities between the two songs in question. The court indicated it was "impressed to an exceptional degree" by the expert's methodology and presentation, referencing the "excellent charts"[206] linking the chord structure, harmony, rhythm, succession of notes, and lyrics of the two songs.[207]

In contrast, in *Durkin v. Platz*,[208] screenwriters filed an action against authors of an unpublished manuscript, seeking a declaratory judgment that the screenwriters owned the copyright in their work. The manuscript authors proffered an English professor at Clemson University as an expert to testify that the screenwriters "did not add any significant or original material in preparing the screenplay and are not entitled to any copyright interest in the screenplay as a derivative work."[209] The methodology of the proposed expert's opinion testimony was to compare the screenplay to the manuscript. He planned to discern whether the screenwriters added original material to the manuscript that was significant and, therefore copyrightable. The screenwriters filed a motion to exclude such expert testimony on the grounds that the expert was "not qualified, he base[d] his opinion on unreliable methodology, and his proffered testimony [was] irrelevant."[210] Regarding the expert's qualifications, the court acknowledged that the witness was (1) an English professor at Clemson University specializing in rhetoric, linguistics, and literature; (2) the founder and CEO of a scholarly publishing company; and (3) the author of "articles and books about the nature and teaching of writing and literature, the state of publishing, research methodology and ethics, film and literary analysis, copyright and plagiarism, and the adaptation of literary works into film."[211]

203 *Id*. at 675.

204 *Id*. at 678–79.

205 425 F. Supp. 443 (S.D.N.Y. 1976).

206 *Id*. at 449.

207 *Id*. at 449–50.

208 920 F. Supp. 2d 1316 (N.D. Ga. 2013).

209 *Id*. at 1326.

210 *Id.*

211 *Id*. at 1330.

The court first determined that, while the expert was qualified to opine about plagiarism, he was unqualified to render opinions about copyright law.[212] The court next concluded that the expert's proposed testimony failed both the reliability and relevance elements of the standard for admissibility. In comparing the screenplay and the manuscript, he used the wrong legal standard under the Copyright Act.[213] Further, his testimony was irrelevant because (1) he reached conclusions not in dispute, opining that the screenplay was not copyrightable as an *original* work when the parties were debating its protection as a *derivative* work, and (2) his opinions addressed pure issues of law.[214] Pointing out that that the manuscript authors' opposition brief was "essentially an essay on *Daubert* that does not relate the law to the specifics of this case,"[215] the court granted the motion to exclude the expert.[216]

The key takeaway from the foregoing expert's missteps, which resembled the journalism expert's fumblings in *Parsi*,[217] is for a writing expert to first identify the proper industry or legal *standard* against which to evaluate the written work, and then to apply such standard in a reliable manner. Further, when appropriate and relevant, writing experts might consider using charts or other visual aids, particularly when analyzing excerpts of a particular lengthy "corpus" of work, as Professor Solan describes,[218] or when comparing passages from more than one document.

III. A Legal Writing Expert's FRE 702–*Daubert* Framework for Success

In many cases, litigants use writing experts in a variety of pretrial capacities (i.e., affidavits, expert reports, depositions) without these witnesses' necessarily needing to "go the distance" and testify at trial. Nonetheless, writing experts, particularly *legal writing* experts here, are wise to keep FRE 702 and the *Daubert* factors in mind from the onset of their retention as expert witnesses. Being mindful of the FRE 702–*Daubert* standards, starting from the initial task of analyzing the

212 *Id.*

213 *Id*. at 1331-32.

214 *Id*. at 1332.

215 *Id.* at 1330, n.12.

216 *Id.* at 1333.

217 *Parsi*, 852 F. Supp. 2d at 86, 89 (the journalism expert could not convincingly explain why he chose a one-page 1996 Society of Professional Journalists' Code of Ethics as the applicable professional standard in analyzing another journalist's body of work).

218 Solan, *Linguistic Experts*, *supra* note 88, at 88.

client's facts and legal issues, and continuing throughout the process of drafting FRCP 26(a)(2)(B) reports, and while testifying in depositions,[219] will help ensure admissibility of such opinion testimony at trial if ultimately needed. The following sections provide guidance as to how legal writing experts engaged to analyze the substantive or technical integrity of a document can satisfy the FRE 702–*Daubert* criteria, through employing the concrete and reliable legal writing standards and analytical methodologies that are well established in legal academia and law practice.[220]

A. Qualifications of a Legal Writing Expert

The threshold step in every FRE 702–*Daubert* analysis is to establish the proposed witness's qualifications as an expert, focusing on the individual's relevant "knowledge, skill, experience, training, or education."[221] For a legal writing expert, this likely will include a law degree, plus some combination of these: summer law-clerk work; judicial-clerkship experience; years in law practice researching, writing, and editing legal documents; membership in a local, state, or federal bar; authorship of legal scholarship; presentations at legal writing conferences; membership in legal writing organizations such as the Legal Writing Institute, the Association of Legal Writing Directors, SCRIBES: The American Society of Legal Writers, or the Association of American Law Schools' Section on Legal Writing, Reasoning, and Research; membership in bar associations; and years of experience teaching legal writing. FRCP 26(a)(2)(B) specifically requires an expert's written report to describe "the witness's qualifications, including a list of all publications authored in the previous 10 years."[222] The expert also must identify "all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition."[223] Notably, a court will not deem an expert witness unqualified

219 Dr. Terri LeClercq, a legal writing scholar and language expert with a Ph.D. in English and who taught for twenty-three years at the University of Texas School of Law, reports that, over her many years of experience serving as a legal writing expert, "[o]nce the opposing side has taken my deposition, generally they do not fight my appearance [at trial]." Email from Dr. Terri LeClercq, President and Consultant, Legal Editor's Ink, to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Expert witness* (June 21, 2017, 9:02 AM EST) (copy on file with author).

220 The application of legal writing standards may arise in unexpected scenarios. Idaho Senator James Risch complimented former FBI Director James Comey on the quality of the written memorandum he submitted prior to his testimony before the Senate Intelligence Committee on June 8, 2017, stating, "I find it clear. I find it concise, uh, and having been a prosecutor for a number of years and handling hundreds, maybe thousands of cases and read police reports, investigative reports, this is as good as it gets." *See* C-SPAN, Risch & Comey on Legal Writing, https://www.c-span.org/video/?c4673000/risch-comey-legal-writing (last visited Apr. 16, 2018).

221 FED. R. EVID. 702.

222 FED. R. CIV. P. 26(a)(2)(B)(iv).

223 FED. R. CIV. P. 26(a)(2)(B)(v).

224 *See, e.g.,* Brand v. Comcast Corp., 302 F.R.D. 201, 209 (N.D. Ill. 2014); New York v. United Parcel Serv., Inc., No. 15-CV-1136 (KBF), 2016 WL 4735368, at *13 (S.D.N.Y. Sept. 10, 2016); Ford v. County of Hudson, No. 07–5002 (KM)(MCA), 2014 WL 2039987, at *15 (D.N.J. May 16, 2014).

simply because he or she has never previously published[224] on the specific issue at hand or testified as an expert.[225] Courts recognize that every testifying expert was a first-timer at some point.

Further, even if a legal writing expert has never personally drafted the specific type of document that is the subject of the expert engagement, this reality is not at all fatal to the expert's qualifications to render opinions regarding this genre of writing at trial. Courts readily acknowledge that they "will not exclude experts regarding industry standards generally at issue in a case merely because they do not have expertise in a sub-specialty."[226] An expert's limited experience "in a particular subject matter does not render him unqualified so long as his general knowledge in the field can assist the trier of fact."[227] Further, courts have stated that "an expert witness is not strictly confined to his area of practice, but may testify concerning related applications; a lack of specialization does not affect the admissibility of the opinion, but only its weight."[228] Interestingly, even if legal writing experts might honestly consider themselves *not* to be experts on a particular type of document, such a personal self-assessment is irrelevant. One court has noted,

> Just as an individual cannot simply declare himself to be an expert, a person cannot simply declare himself not to be an expert. Instead, the court must examine the individual's education, training, and experience, and decide if these credentials make the individual qualified to offer an expert opinion.[229]

While most of the writing experts involved in the cases discussed earlier unquestionably met the threshold qualification test, courts will not hesitate to reject experts who lack the requisite "knowledge, skill, experience, training, or education."[230] Legal writing experts may have the opposite problem, however, and should prepare for an attack by opposing

225 Clena Investments, Inc. v. XL Specialty Ins. *Co.*, 280 F.R.D. 653, 662 (S.D. Fla. 2002) ("Every expert found to be qualified by a court must be so designated a first time"); Kauffman v. Federal Exp. Corp., No. 02-4068, 2007 WL 1062591, at *2 (C.D. Ill. Apr. 5, 2007); Canamar v. McMillin Texas Mgmt. Servs., LLC, No. SA–08–CV–0516 FB, 2009 WL 2432012, at *2 (W.D. Tex. Aug. 4, 2009).

226 Kucharski v. Orbis Corp., No. 14-CV-05574, 2017 WL 1806581, at *5 (N.D. Ill. May 5, 2017); *see, e.g.,* Diaz v. Comm'r of Soc. Sec., No. 07-2276 (JLL), 2008 WL 2668812, at *5 (D.N.J. June 27, 2008) ("Properly qualified medical experts of different specialties can, and often do, offer opinions about medical conditions not within their specialties.").

227 Piskura v. Taser Int'l, Inc., No. 1:10–CV–248–HJW, 2013 WL 3967323, at *8 (S.D. Ohio July 31, 2013) (internal citations omitted).

228 United States v. Liu, 716 F.3d 159, 168-69 (5th Cir. 2013) (internal citations omitted).

229 Harvey v. Novartis Pharm. Corp., 895 F. Supp. 2d 1206, 1211 (N.D. Ala. 2012) (ultimately finding that a maxillofacial surgeon was not an expert in the cause of osteonecrosis of the jaw).

230 *See, e.g.,* Latham v. Edelbrock Corp., No. 07-713-GPM, 2009 WL 3156545, at *2 (S.D. Ill. Sept. 26, 2009). In this products-liability case involving a crash of an all-terrain vehicle, the manufacturer proffered witnesses who were not qualified as experts in technical writing to render opinions that carburetor manual instructions constituted sufficient warnings to consumers. On a motion *in limine*, the court further determined that non-expert or lay opinion testimony would not be

counsel for being *over*-qualified for the particular task at hand. Dr. Terri LeClercq, a legal writing scholar and language expert with a Ph.D. in English and who taught for 23 years at the University of Texas School of Law, indicates that "[o]pposing attorneys attack [her] Ph.D. in English and say [she is] not qualified to be a 'common reader and interpreter.'"[231]

B. Reliability of the Opinions and Methodology of Legal Writing Experts

The reliability prong is the next component of the FRE 702–*Daubert* analysis. FRCP 26(a)(2)(B) requires experts to describe in their written reports (1) a complete statement of all opinions the witness will express and the basis and reasons therefore, and (2) the facts or data considered by the expert in forming such opinions. Legal writing experts should bear in mind FRE 702 subsections (b), (c), and (d) when drafting the statements of opinions in their FRCP 26 reports. They must describe the underlying facts and data reviewed and lay the foundation for the reliability of their methodology.

1. FRE 702(b): Review of Sufficient Facts or Data

FRE 702(b) requires that expert testimony be "based on sufficient facts or data." Thus, to avoid being excluded from trial on a motion *in limine* (or embattled during cross-examination), legal writing experts first should ensure that they have reviewed "sufficient facts or data" from the client's case.[232] One court indicated that "the term 'data' encompasses the reliable opinions of other experts."[233] Litigation teams often select and prepare packets of case materials and send them to their experts for review. If experts feel they need additional material to conduct a "sufficient" review, they should request counsel to supply supplemental documentation or access to client personnel or witnesses.

Notably, a 2010 amendment to FRCP 26 changed the requirement that testifying experts must produce "data *and other information*"[234] and

helpful to the trier-of-fact and excluded the witnesses from testifying at trial. *See also* State v. Hilburn, 625 So. 2d 235, 237 (La. Ct. App. 1993). The defendant, appealing a murder conviction, proffered an expert witness in "writing patterns," with twenty years of experience grading junior-high and high-school essays, to opine that a "neatly folded[,] typed suicide letter" in the victim's lap was indeed a suicide note. In excluding the witness, the court emphasized that the witness, whose essay-grading career had concluded eight years earlier, had written no articles on writing-pattern analysis, could name no authors thereof, and was unaware of any such authors.

231 Email from Dr. Terri LeClercq, President and Consultant, Legal Editor's Ink, to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Expert witness* (June 21, 2017, 9:02 AM EST) (copy on file with author).

232 *See, e.g., Parsi,* 852 F. Supp. 2d at 89 (the facts and data the expert relied upon were "patently insufficient"); *see also* United States v. Mamah, 332 F.3d 475 (7th Cir. 2003); Newkirk v. ConAgra Foods, Inc., 727 F. Supp. 2d 1006, 1016-18 (E.D. Wash. 2010).

233 McLean v. Air Methods Corp., Inc., No. 1:12–CV–241–JGM, 2014 WL 280343, at *2 (D. Vt. Jan. 24, 2014).

234 FED. R. CIV. P. 26, advisory committee's notes to 2010 amendment (emphasis added).

instead limits disclosure to "facts or data considered by the witness in forming" the expert opinions. Under the prior rule, litigants argued for the production of *draft* expert reports and information that could reveal attorney work product: "theories or mental impressions of counsel."[235] Now, draft expert reports are protected from discovery.

2. FRE 702(c): Reliability of the Principles and Methods Employed

FRE 702(c) requires that an expert's testimony be "the product of reliable principles and methods." The non-exclusive *Daubert* factors provide guidance on how to evaluate reliability: (1) whether the expert's theory or technique has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the technique's "known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation," and (4) the degree of acceptance of the theory or technique within the scientific community. These factors certainly can be applied to theories, principles, and techniques used by experts in evaluating written expression and the substantive or technical quality of a piece of writing. Indeed, in providing opinions regarding the quality of a document that contains legal and factual analysis, or the integrity of the drafting, editing, and finalizing process, legal writing experts can implement the standards that have been developed, vetted, tested, applied, and widely (if not universally) accepted within legal academia and law practice. These principles are "grounded in an accepted body of learning or experience" in the legal writing academy and field.[236]

Legal writing scholars consistently write about the methodology of written legal analysis in which writers use logic formulas to (1) state the legal issues in question, (2) identify the elements or factors of the relevant legal rule(s), (3) synthesize rules or sub-rules from multiple sources of law, (4) illustrate such rules through carefully selected precedent on point, (5) apply the rule components to the facts of the client's case, and (6) predict an outcome (in a piece of objective legal writing) or assert a reasoned position (in a persuasive legal document). Legal writing scholars further emphasize that, to be credible and valuable to a reader, a written legal

235 FED. R. CIV. P. 26(b)(4), advisory committee's notes to 2010 amendment ("Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel."). The exceptions include (i) information about compensation for the expert's study or testimony, (ii) facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, and (iii) assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. FED. R. CIV. P. 26(b)(4)(C); *see also* Durney & Fitzpatrick, *supra* note 38, at 20; Warshauer & Warshauer, *supra* note 7, at 16 (draft expert reports are not discoverable); Battista et al., *supra* note 38, at 33–35.

236 FED. R. EVID. 702, advisory committee's notes to 2000 amendment.

analysis must be based on reliable legal-research methodology. The author must find and sift through statutes, regulations, or cases in the appropriate jurisdiction, assess their hierarchical authority, synthesize rules from these multiple sources, and ultimately provide the reader with the requisite information to discern whether the legal rules constitute mandatory or merely persuasive authority. A written analysis also must contain an appropriately thorough and ethical rendition of the pertinent facts bearing on the legal analysis. Beyond substance and depth, additional technical standards include proper citation to the factual record and the sources of law, in compliance with the legal-citation rules adopted in the governing jurisdiction. These typically include *The Bluebook: A Uniform System of Citation* or local-court style manuals.[237] Legal writing standards obviously also include adherence to sound principles of English grammar and punctuation. Using the *Daubert* vernacular, the tenets and techniques that legal writing experts use to create and evaluate written legal analyses have been tested, subjected to peer review, distilled into standards, and broadly accepted across the legal writing community. Legal writing professors and practitioners who are engaged as expert witnesses for the first time might call upon some of the sources cited below as references for these widely recognized benchmarks.[238]

Law professors Cathy Glaser, Jethro Lieberman, Robert A. Ruescher, and Lynn Boepple Su, in their book, *The Lawyer's Craft*,[239] define legal analysis as "a highly structured *approach* for making predictions about how courts will likely resolve legal questions."[240] While these professors characterize the thinking part of legal analysis as "an art, not a scientific or mathematical method," contending that "[t]he answer to a legal question is rarely definitive,"[241] this does not mean a written legal analysis cannot be subjected to *Daubert*-worthy reliability standards. Indeed, FRE 702 and *Kumho Tire* confirm that expert testimony can be based on "scientific, technical, or other specialized knowledge." Further, even if some scholars might argue that the process of researching, theorizing about, and crafting solutions to a legal conundrum is more artistic than scientific, the act of writing a cogent and well-reasoned legal analysis solidifies the legal

237 *See, e.g.,* NEW YORK LAW REPORTS STYLE MANUAL, https://www.nycourts.gov/reporter/files/2017-SM.pdf .

238 Just as Professors Tiersma and Solan note that "[l]inguistics is a robust field that relies on peer-reviewed journals for dissemination of new work," and "the [linguistics] expert has available a number of well-accepted instruments and a great deal of learning on which to base an analysis," so do legal writing experts—as evidenced by the multitude of legal writing resources cited herein. Tiersma & Solan, *supra* note 88, at 225.

239 CATHY GLASER ET AL., THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY (2002).

240 *Id.* at 8.

241 *Id*. at 15.

writer's creativity, intellectual processing, and trial-and-error into a structural framework analogous to a mathematical proof. In fact, Professor Robin Wellford Slocum, in her book, *Legal Reasoning, Writing, and Persuasive Argument*, compares written legal analysis to "a mathematical equation" that "logically build[s]."[242]

Professor Glaser and her coauthors use mathematical terminology—the concept of a "legal proof"—to describe how legal writers present logical legal analyses in writing.[243] Legal writers "identify the issue," "state the applicable rule," "validate [the] rule by citing and discussing the 'rule cases,'" "apply the rule to the facts of [the] case," "validate [the] application by showing that [the client's] case is analogous to the rule cases whose holdings match the predicted holding of [the client's] case, and distinguishable from the rule cases whose holdings do not match [the] predicted holding," and state the conclusion.[244] These authors describe this type of written legal reasoning as a "deductive syllogism."[245]

Professors Christine Coughlin, Joan Malmud Rocklin, and Sandy Patrick, coauthors of *A Lawyer Writes: A Practical Guide to Legal Analysis*,[246] corroborate that "[o]ver time, attorneys have established a common preference for how a legal argument is presented"[247] in writing. They reiterate that a clear written legal analysis states the legal issue, explains the law, applies the law to the client's facts, and asserts a conclusion.[248] These authors emphasize that, while law professors teaching novice legal writers may use different acronyms or mnemonics to visually frame a written legal analysis, each system follows the same logic flow: e.g., IRAC (Issue, Rule, Application, Conclusion); CREAC (Conclusion, Rule, Explanation of Rule, Application, Conclusion); CRRPAP (Conclusion, Rule, Rule Proof, Application, Prediction).[249] Within this logic structure, lawyers regularly employ alternative methods of reasoning: rule-based reasoning (applying a checklist of elements or a collection of factors from a legal rule to client facts);[250] analogical reasoning (engaging with the principle of *stare decisis*, comparing and

242 ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT, 113 (2d ed. 2006).

243 GLASER ET AL., *supra* 239, at 64.

244 *Id.*

245 *Id.*

246 CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS (3d ed. 2013).

247 *Id.* at 81.

248 *Id.; see also* LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS, 91 (3d ed. 2011) (explaining the basic paradigm of legal analysis).

249 COUGHLIN ET AL., *supra* note 246, at 82–83.

250 *Id.* at 131.

contrasting precedent with the client's facts);[251] integrating rule-based and analogical reasoning;[252] and incorporating public-policy considerations.[253] Of course, these authors affirm that "effective editing and polishing distinguish the professional from the unprofessional."[254]

Professor Charles R. Calleros, in his book, *Legal Method and Writing*,[255] likewise characterizes the IRAC formula as a method of deductive legal reasoning that "provides at least a rough organizational framework for most legal analyses in office memoranda, answers to essay examinations, and briefs."[256] Of course, after many years of experience drafting memoranda, briefs, mediation papers, etc., in law practice, expert legal writers might no longer consciously think in (or use the parlance of) IRAC terminology. However, Professor Calleros highlights the structural framework's usefulness in training novice legal writers to craft logical and thorough analyses.[257] Consistent with other legal writing scholars, Professor Calleros emphasizes that the legal writer's responsibility is to identify legal issues in play,[258] extract a legal rule from applicable sources of law (based on considerations of primary and secondary authority, jurisdiction, and weight of authority),[259] apply the rule components to the client's facts,[260] and state a conclusion.[261] He describes how legal writers often shift from deductive reasoning to inductive reasoning, comparing and contrasting case law to the client's facts "to reach a conclusion about either (1) the outcome of another specific case (analogical reasoning), or (2) the likelihood of the truth of a general proposition."[262] Professor Calleros indicates that, in addition to considering the most logical ways to organize multiple issues or sub-issues,[263] expert legal writers value clarity,[264] scope and depth of analysis,[265] and attentive revision.[266] Standards of "effective legal writing" mandate that writers properly cite to authority,[267] disclose directly adverse authority,[268] and refrain from advancing disingenuous positions.[269] Professor Calleros summarizes solid

251 *Id*. at 135.

252 *Id*. at 147.

253 *Id.* at 173; *see also* EDWARDS, *supra*, note 248, at 55–62.

254 COUGHLIN ET AL., *supra* note 246, at 247.

255 CHARLES R. CALLEROS, LEGAL METHOD AND WRITING (6th ed. 2011).

256 *Id*. at 82; *see also* SLOCUM, *supra* note 242, at 112 (explaining the "deductive analytical pattern" used by legal writers).

257 CALLEROS, at 83; *see also id*. at 219 (referencing various acronyms used in teaching legal writing methodology: IRAC, CRAC, CREAC, or CRuPAC).

258 *Id*. at 84.

259 *Id*. at 90–94.

260 *Id*. at 101.

261 *Id*. at 104.

262 *Id*. at 142.

263 *Id*. at 242.

264 *Id*. at 268.

265 *Id*. at 294.

266 *Id*. at 301.

267 *Id*. at 305.

268 *Id*. at 346.

269 *Id*. at 347.

written advocacy as reflecting "sound analysis, sensible organization, and effective writing style."[270]

The writing methodology espoused by Professor Laurel Currie Oates and Professor Anne Enquist in their book, *Just Memos*[271] reflects consistent principles. These scholars describe the benchmark of a predictive written analysis as a "well-organized, easy-to-read, concise document."[272] In step with other analysts of legal writing standards, Professors Oates and Enquist describe how legal writers must "set out the applicable tests, rules, or definitions and then apply them to the facts of [the] client's case."[273] These authors explain that, when reading a legal memorandum, attorneys anticipate seeing "the applicable rules, examples of how those rules have been applied in analogous cases, each side's arguments, and a conclusion. In addition, the attorney expects to see each of those types of information in specific places."[274] Professors Oates and Enquist reiterate that "[t]hese expectations are not born of whim. Instead, they reflect the way United States attorneys think about legal questions."[275]

These scholars indicate that expert legal writers must exercise judgment about "what are the legally significant facts," "what statute(s) or common law doctrine will govern," "which cases are the key analogous cases," "which arguments the court will find persuasive," and "how the case will turn out."[276] Authors of an objective written legal analysis must "present the facts accurately and objectively"; they must "not set out legal conclusions, misstate facts, leave out facts that are legally significant, or present the facts so that they favor one side over the other."[277] Legal writers must "cite authority to support each of the points" made to "show that [the writer has] the support of the law, other courts, and other legal minds."[278] Regarding proofreading and professionalism, Professors Oates and Enquist attest that even "small errors can have serious consequences" and "can make the difference between [a] client winning and losing, between competent lawyering and malpractice."[279] Finally, they describe how the editing process must focus on "sentence structure, conciseness, precision, grammar, and punctuation."[280]

By further example, *The Handbook for the New Legal Writer*, authored by Professors Jill Barton and Rachel H. Smith,[281] states that documents

270 *Id*. at 379.

271 Laurel Currie Oates & Anne Enquist, Just Memos (2d ed. 2007).

272 *Id.* at 9.

273 *Id.* at 215.

274 *Id*. at 175.

275 *Id*. at 176.

276 *Id*. at 10.

277 *Id*. at 160.

278 *Id.* at 11.

279 *Id*. at 272.

280 *Id*. at 282.

281 Jill Barton & Rachel H. Smith, The Handbook for the New Legal Writer (2014).

providing objective legal analysis are "expected to accurately advise the reader" and "must be scrupulous, balanced, and reliable."[282] Persuasive legal analyses likewise "must be logical, credible, and compelling."[283] "Both types of documents require a careful legal analysis."[284] Professors Barton and Smith advise that legal documents should be

> organized using a format known as "CREAC" . . . which requires the writer to identify and fully explain the relevant legal authorities before applying those authorities to the facts from the legal question. After doing so, the writer walks the reader through the law and analysis so that the reader understands the logical progression of the writer's thinking. CREAC thus helps guarantee that the writer's legal analysis is sound and meticulously supported.[285]

These scholars reiterate that "CREAC is the preferred structure for most analytical legal documents, including memos, motions, briefs, and judicial opinions. Judges, lawyers, and legal writing professors all expect these documents to follow the CREAC format."[286] As a starting point, "[e]very legal analysis depends on legal research. Before a memo, motion, brief, letter, email, or judicial opinion containing legal analysis can be prepared, [the writer] must first conduct accurate and thorough legal research."[287]As part of a reasoned legal analysis, legal writers must identify the applicable legal rule(s), either with "legally significant terms that need to be defined and interpreted," or with a checklist of elements that must be satisfied, or factors that the trier-of-fact must weigh or balance.[288] Additionally, legal writers must properly cite to the factual record and legal authority, or they risk undercutting the efficacy and integrity of the written document[289] and its underlying research.[290] Regarding writing style, "complicated legal doctrine is best explained and understood when presented in plain language."[291]

Additionally, Professor Richard K. Neumann, Jr., author of *Legal Reasoning and Legal Writing: Structure, Strategy, and Style*,[292] advocates the foregoing logic formula to support legal conclusions.[293] Professor

282 *Id*. at 3.

283 *Id*. at 4.

284 *Id.*

285 *Id*. at 27 (acknowledging other acronyms in footnote 1).

286 *Id.*

287 *Id*. at 263.

288 *Id.* at 42–43.

289 *Id*. at 45.

290 *Id*. at 281.

291 *Id*. at 91.

292 Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style (6th ed. 2009).

293 *Id*. at 93–94 (referencing the acronyms of CRAC and CRuPAC); *see also* Kamela Bridges & Wayne Schiess, Writing for Litigation, 99-100 (2011) (describing the "organizational structure typically used for legal analysis"); Helene S. Shapo et al., Writing and Analysis in the Law, 135, n.1 (6th ed. 2013) (referencing IRAC, TRAC, CRAC, and CREAC organizational methods).

Neumann further substantiates the importance of proper citation of authority; "[b]ad citation form, on the other hand, is instantly noticed and causes the reader to suspect that the writer is sloppy and therefore unreliable."[294]

Legal writing professors and practitioners engaged as expert witnesses for the first time can look to numerous additional scholarly resources, including a plethora of other legal writing books, plus articles in peer-edited academic journals and publications such as *The Journal of the Legal Writing Institute, Legal Communication & Rhetoric: Journal of the Association of Legal Writing Directors, The Scribes Journal of Legal Writing, The Second Draft*, and *Perspectives*. These sources describe standards of legal writing methodology in concordant terms. Further, these principles and frameworks routinely are discussed and analyzed by legal writing professors and practitioners at local, regional, national, and international conferences.

Additionally, courts consistently hold briefs submitted by counsel to corresponding legal writing quality standards. Judges often take the time to explain in written judicial opinions how lawyers have either failed to meet such benchmarks, or how, by satisfying such quality criteria, brief-writers enabled the court to adjudicate a case efficiently and soundly.[295] In these written opinions, courts commend analytical logic, language clarity, reliable research, proper citation to the factual record and applicable law, adherence to court procedural and technical formatting rules, plus proofreading, grammar, spelling, punctuation, and professionalism.

The foregoing scholarly and practice-oriented sources demonstrate that the principles and techniques of written legal analysis have been tested, subjected to peer review, distilled into standards, and broadly accepted within the legal writing community. Accordingly, a legal writing expert who relies on such methodologies in analyzing the substantive or technical quality of a piece of written legal analysis should withstand scrutiny under FRE 702(c) and the *Daubert* reliability factors.

294 NEUMANN, *supra* note 292, at 239; *see also* BRIDGES AND SCHIESS, *supra* note 293, at 103 ("Both the substance and the form of your legal citations affect your credibility with the judge . . . . Incorrect citation can hurt your credibility.").

295 For more information about courts' admonitions of lawyers who submit briefs that fall short of judges' expectations regarding quality legal writing (and appreciation of lawyers who do submit quality briefs), see Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL. PROF. 259 (Spring 2017); Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMM. & RHETORIC: JALWD 109 (2014).

3. FRE 702(d): Reliability of the Application of the Principles and Methodology to the Client's Facts

A legal writing expert also must satisfy subsection (d) of FRE 702 and reliably apply the pertinent principles and evaluative methods to the facts of the client's case. To do so, legal writing professors and practitioners serving as expert witnesses should consider conveying the extent of their personal experience in having applied the methodologies described above.

The typical 1L legal writing professor teaches an average of 37.5 legal writing students per semester, according to a survey conducted by the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) in 2015.[296] Many first-semester 1L legal writing curricula require students to write a draft of a closed-research memorandum and then meet with the legal writing professor one-on-one to discuss the teacher's critique of and feedback on the draft.[297] Students then submit a revised memorandum for a grade. In most legal writing programs, students repeat this process for an open-research memorandum assignment in the fall semester.[298] They then replicate the same process twice more in the spring semester when transitioning to persuasive legal writing. Students write drafts of two briefs, conference with their professors on both drafts, revise the drafts, and then submit the briefs for a grade. Thus, in each academic year, using the foregoing data and assignment progression, the typical legal writing professor applies his or her legal writing methodology—assessing and measuring the quality and integrity of a written legal analysis—a total of approximately 300 times: 8 papers per student (4 drafts and 4 revisions) for approximately 37.5 students. The 2015 ALWD-LWI survey reports that the typical legal writing professor reads an average of 1,540 pages of student work per term, and spends an average of 47.5 hours per semester in conferences with students evaluating written work.[299] Their analytical methodology is

296 Ass'n of Legal Writing Directors & Legal Writing Inst., Report of the Annual Legal Writing Survey 83 (2015), http://www.alwd.org/wp-content/uploads/2017/03/2015-survey.pdf [hereinafter 2015 ALWD-LWI Survey]. The 2015 survey had 194 respondents. A 2017 survey report updated the *institutional* data based on 182 responses to a subsequent 2016-2017 survey; data based on *individual* professor responses to the 2016-2017 survey has not yet been evaluated. In the 2017 report, 59 respondents reported teaching a mean of 37.5 students. *See* Ass'n of Legal Writing Directors & Legal Writing Inst., Report of the Annual Legal Writing Survey 90 (2017), https://www.lwionline.org/sites/default/files/Report%20of%20the%202016-2017%20Survey.pdf [hereinafter 2017 ALWD-LWI Survey].

297 In the 2015 ALWD-LWI Survey, with regard to professors' individual process of evaluating students' written work, 192 respondents reported providing "comments written on the paper itself and in the margins." *Id*. at 17. Further, 149 provide a "general feedback memo addressed to all students," 134 give a "feedback memo written specifically for the individual student," 175 write "short comments . . . at the end of the paper," 186 deliver "comments in person during [the] conference," and 149 provide "grading grids or score sheets." *Id*. at 17.

298 In the 2015 ALWD-LWI Survey, 154 respondents reported using "a combination of closed and open library research assignments" in the 1L program. *Id*. at 12.

299 *Id*. at 83.

applied across a wide range of skill sets and writing competency levels. Most professors also must numerically quantify the evaluative results to distinguish each student's paper from his or her fellow classmates' work, and eventually assign individual grades in compliance with the institution's mandate for assessments and grading distribution.[300] Of course, many legal writing professors also teach upper-level writing courses where they employ similar evaluative methodologies.[301]

Lawyers engaged to serve as expert witnesses can lay a similar foundation for describing their individual professional experience applying reliable legal writing methodology to different genres of written legal work. While this might seem like a time-consuming endeavor, practitioners serving as expert witnesses might provide context for the reliability of their evaluative methodologies by going back through their timesheets for a reasonable time period, and quantifying (if possible) the number of legal memoranda, motions, briefs, mediation papers, and other written legal analyses they have written, reviewed, edited, finalized, and submitted.

Overall, to withstand FRE 702–*Daubert* scrutiny as to the reliability of their application of particular methodologies, experts first can explain that the above-referenced analytical methodologies have been tested by professors and practitioners who have distilled the process of written legal analysis into the formulas and guidelines appearing in countless scholarly and practice-based works. Expert legal writers vet these methodologies in the classroom and law office in large volume every academic and billable year. After laying that foundation, experts then can describe how they applied the same methodology to the particular document or set of documents involved in the client's litigation.

C. Relevance of the Legal Writing Expert's Opinions

Circling back to the remaining component of FRE 702—subsection (a)—to be admissible at trial, the legal writing expert's specialized knowledge must "help the trier of fact to understand the evidence or to determine a fact in issue." In formulating written opinions and testimony that will assist the trier-of-fact, the expert should resist inching into the

300 *Id*. at 10. In the 2015 ALWD-LWI Survey, 178 respondents reported that the 1L course grade is included in the students' GPAs. Only five respondents reported grading on an "honors, pass, fail" basis, and three reported grading on a "purely pass/fail" basis. In the 2017 ALWD-LWI Survey, 164 respondents reported that the predictive legal writing course grade is included in the students' GPA, and 152 respondents reported that the persuasive legal writing course grade is included in the students' GPA. *Id*. at 30.

301 2015 ALWD-LWI Survey at 24, 27; 2017 ALWD-LWI Survey, *supra* note 296, at 53.

territory of rendering opinions on issues of law, asserting legal conclusions, or discussing the legal implications of evidence.

This restraint could present a challenge for some experts, either by virtue of the craftiness of opposing counsel or sheer human nature. Dr. LeClercq shared that, in her experience in depositions, once opposing counsel realizes they are not making headway in attacking her qualifications, "they spend hours attempting to get [her] to make a legal conclusion."[302] She cautions that "[s]ometimes they are successful and my attorney is horrified and I am mortified."[303] Legal writing experts should remain alert to subtle yet persistent attempts by opposing counsel to elevate an expert witness to the role of trier-of-fact through the conversational give-and-take of deposition questioning and the natural instinct for cooperative smart individuals to share what they know and think.[304] Many an expert has gotten caught in the trap of straying beyond the scope of the opinions rendered in their carefully crafted expert reports, much to the chagrin of the lawyer defending the deposition.[305] Experts swept up in the enthusiasm of answering a deposing attorney's series of questions, who opine on issues outside the bounds of their expert engagement, also run the risk of contradicting the opinions of other experts retained by the client. Legal writing experts must exercise vigilance, be intimately familiar with the breadth and limits of the four corners of their expert reports, and resist the ego's desire or the helpful teacher's instinct to expound further.

The FRE 702(a) relevance prong also tests whether the expert offers insights "beyond the general experience and common understanding of laypersons."[306] As the *Lind* and *Sand* cases indicated, some courts have considered basic grammatical principles to fall within the common understanding of the trier-of-fact, while others have permitted grammar expertise.[307] In today's arena of casual written communications peppered

302 Email from Dr. Terri LeClercq, President and Consultant, Legal Editor's Ink, to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Expert witness* (June 21, 2017, 9:02 AM EST) (copy on file with author).

303 *Id.*

304 In an International Association of Defense Counsel webinar, the attorney-presenter advised: "play off of the expert's confidence and teaching instincts to elicit as much substantive testimony as possible." John T. Lay, Deposing Your Opponent's Expert 21 (International Association of Defense Counsel, Mar. 19, 2014 Webinar), http://www.iadclaw.org/assets/1/7/Deposing_Your_Opponents_Expert_Presentation.pdf.

305 One article noted,

> As soon as an expert witness starts testifying to matters outside the scope of the question asked or the matter at hand, he or she is in dangerous waters, and risks making statements that would be to the detriment of your client's interest in the case. The importance of keeping statements within the scope of testimony must be stressed to the expert witness.

Megjabeen Rahman, *15 Attorneys Share Their Expert Witness Horror Stories*, THE EXPERT INSTITUTE, Jan. 11, 2016, https://www.theexpertinstitute.com/15-attorneys-share-their-expert-witness-horror-stories/.

306 *Disalvatore*, 2016 WL 3951426, at *9.

307 2014 WL 4187128; 2010 WL 69359.

with emojis instead of words, normalization of "covfefe" Tweets,[308] and the troubling abandonment of apostrophes by many users of electronic communications, courts may someday routinely recognize grammar expertise as "specialized knowledge" which satisfies the standards for admissibility of expert testimony at trial. But in the near future, to definitively satisfy the FRE 702(a) relevance prong, legal writing experts should endeavor to go beyond basic principles of grammar construction to provide helpful guidance to a trier-of-fact, for example, in how grammar constructs play a role in documents within certain trades or industries, or how grammatical choices open up a document to different interpretations.[309] Indeed, legal writing experts engaged to analyze written works who use the methodologies accepted in the legal writing community and described above likely offer insights "beyond the general experience and common understanding of laypersons," thereby satisfying FRE 702(a).

IV. Conclusion

On writing, Flaubert encouraged assiduous care: "Whatever the thing you wish to say, there is but one word to express it, but one verb to give it movement, but one adjective to qualify it; you must seek until you find this noun, this verb, this adjective." Legal writers who, based on their knowledge, skill, experience, training, and education, pay similar heed to precise and thoughtful selection of concepts, sources, language, vocabulary, and punctuation in the process of drafting, editing, and revising a written work are particularly well-suited to serve as expert witnesses. Armed with greater awareness of the FRE 702 and *Daubert* criteria from the outset of a lawyer-expert relationship, experts and the lawyers[310] who engage them can be better prepared to ensure admissibility of helpful expert testimony. Employing the reliable methodologies that have been tested, subjected to peer review, distilled into standards, and broadly accepted within the legal writing community, these experts can withstand FRE 702–*Daubert* scrutiny and provide helpful services to triers-of-fact, positively impacting the administration of justice.

308 Matt Flegenheimer, *What's a "Covfefe"? Trump Tweet Unites a Bewildered Nation,* N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html.

309 Solan, *Linguistic Experts*, *supra* note 88, at 97.

310 *See, e.g.,* Warshauer & Warshauer, *supra* note 7, at 20 (A trial lawyer's "task is to educate [experts] about the admissibility requirements and to prepare them to testify about their opinions. Litigation can be a lion's den for expert witnesses unfamiliar with the process. Don't send them out alone; prepare and protect them each step of the way"); *see also* Solan, *Legal Systems*, *supra* note 88, at 1193 (acknowledging that, in many cases in which courts have rejected linguistic expert testimony, "the problem appears to lie in the fact that lawyers at times ask linguists to do too much"); Solan, *Linguistic Experts*, *supra* note 88, at 102 ("Lawyers who ask linguists to testify must recognize just what it is that linguists do, and structure their requests accordingly. Linguists can help in this process by enquiring into the legal issues, and pointing out just when their opinions add little to what jurors already know as native speakers.")

ARTICLE

Standing (Near)by Things Decided

The Rhetorical and Cultural Identifications of Law

Lindsay Head*

I. Introduction

On August 22, 2009, officers stopped David Leon Riley because the tags on his vehicle had expired.[1] After learning of Riley's suspended license and preparing to impound the vehicle, the officers discovered two loaded weapons and arrested Riley for unlawfully possessing the firearms. Incident to the arrest, the officers found Riley's cell phone in his pocket and proceeded to search through its contents. They noticed that some of the names in the contacts or on text messages began with the letters "CK" and took this to indicate gang affiliation. Two hours later, another detective more thoroughly searched the cell phone's contents and, based on photographs stored there, the State of California conducted further investigations, ultimately convicting Riley of firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder; he was sentenced to fifteen years to life in prison.

Fifteen-to-life seems like quite a leap from expired tags and concealed weapons. But if we begin this story just twenty days earlier, when Riley, and other members of San Diego's Lincoln Park gang, noticed the vehicle of a rival gang approaching them and blatantly and unashamedly opened fire upon it as it drove by, we would likely find some support for his conviction and sentence. After all, he committed a crime, and the "rule of law" is predicated in "justice," meaning that—at some very basic level for most Americans—criminals should have to pay for the crimes they

* Instructor of Writing and Rhetoric, Florida International University.

1 These and the general facts that follow stem from the case of *Riley v. California*. 573 U.S. ___, 134 S. Ct. 2473 (2014).

2 Boyd v. United States, 116 U.S. 616, 630 (1886).

commit. Many would argue that "justice" demands that Riley not be allowed to get away with this crime and, more fundamentally, not be allowed to roam the streets, disturbing the peace and endangering the public at large.

But, in fact, when we think about protecting the public, at least if we ascribe to the American ideal that we are "endowed by [our] Creator with certain unalienable Rights," including the "right to privacy," or the right to be free from unreasonable intrusions into "the privacies of life,"[2] we know that this case has very little to do with David Leon Riley. From this vantage point, it makes little difference whether Riley was guilty or a gang affiliate, to say nothing of the race and class implications potentially underlying his arrest. In fact, it makes no difference at all whether Riley is a "good guy" in this story because "when the rights and freedoms of the worst among us are respected, then, too, the rights and freedoms of the best will also be observed."[3] Or, as Ira Glasser, an executive director of the ACLU once remarked, "Our fundamental civil rights often depend on defending some scuzzball you don't like."[4] Indeed, if there is any intent to uphold the integrity of the Constitution, many would say—and on June 25, 2014, the Supreme Court agreed—that this case is not about that scuzzball.

Rather, this case is about the Fourth Amendment and how our constitutional "right to privacy" is interpreted and reshaped to account for cultural changes in the United States and the ubiquitous presence of technology in our daily lives. The Fourth Amendment provides,

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[5]

This single sentence, which was first crafted through a burgeoning American culture, becomes increasingly significant over time, particularly with technological growth that affords ever-evolving opportunities for governmental intrusion and surveillance. In fact, the Supreme Court of the United States perpetually redefines important aspects of our privacy rights while interpreting an amendment drafted over two hundred years ago, long before many of these technologies left the realm of science

3 ADAM CARLYLE BRECKENRIDGE, THE RIGHT TO PRIVACY 130 (1970).

4 Tamar Lewin, *ACLU Boasts Wide Portfolio of Cases, but Conservatives See Partnership*, N.Y. TIMES, Oct. 2, 1988, at 24, *quoted in* JOHN DURHAM PETERS, COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION 6 (2005).

5 U.S. CONST. amend. IV.

fiction or were even conceived. Yet, the "right to privacy" does not even appear in the language of the Fourth Amendment. In fact, to the great surprise of many Americans, the "right to privacy" never even appears in the Constitution. Instead, the right has been extrapolated from the Constitution and from beliefs deeply rooted in American rhetorical culture.[6]

Lawyers and other legal professionals should not resist the sort of rhetorical and cultural analyses that expose these cultural roots. Although we know that "law and rhetoric have a common cultural and historical heritage," [7] we tend to look to seemingly finite paradigms (rules and precedents that purport to offer applicable standards) to understand and interpret the law—and for some very good reasons. Still, legal constructions like the "right to privacy" are first culturally made. Law, in fact, is first culturally and discursively derived, and while we often tend to overlook this fact, attention to the entanglements of legal discourse and rhetorical culture can equip the legal practitioner and scholar to better interpret, predict, and argue about the law. This sort of analysis is, of course, the subject of much rhetorical theory and criticism.

I am not the first to ask, "What does the field of rhetoric have to offer those who do law?"[8] The full answer to that question constitutes another project entirely, if not a lifetime of projects, but one of the goals of this piece is to shed light on a small part of the answer. For those who prefer the wide angle, Justice Stephen Breyer might offer an answer to the broader question. He writes, "Serious complex legal change is often made in the context of a national conversation . . . ."[9] Put another way, the law is first defended, abolished, or transformed, not by the legislator or the judiciary, but by cultural discourse. In her 2004 memoir, former Justice Sandra Day O'Connor agrees: "[T]he Constitution," she writes, "is interpreted first and last by people other than judges."[10] She goes on to describe the relationship between the public and the Supreme Court as "more of a

6 The concept of "rhetorical culture" derives from several works by Marouf Hasian Jr., Celeste Michelle Condit, and John Louis Lucaites, and is further unpacked later in this essay. It refers to the collection of discrete discourse communities—identifiable groups and subgroups characterized, in part, by the way in which they communicate among themselves and with others—that use language to address, identify, and situate themselves within the larger public sphere.

7 Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566, 566 (1994).

8 This journal, in fact, has housed many such inquiries before. *E.g.*, Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC: JALWD 229 (2012) (discussing aspects of persuasive rhetorical appeals related to ethos). Moreover, legal rhetoricians (lawyer and nonlawyer alike) often consider this question to be the very seat of their scholarship. I recently spent an invigorating collection of days dedicated to this question with a handful of legal rhetoricians at the Rhetoric Society of America's 2017 Summer Institute in Bloomington, Indiana.

9 STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 70 (2005).

10 SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 41 (Craig Joyce ed., 2003).

dialogue than a series of commands."[11] In fact, the law is first upended, upheld, or uprooted in our minds—and in our homes, our academic journals, the media, and other institutions. On the other hand, Marianne Constable describes law as "too discursive to leave to social scientists who have only limited use for language."[12] It is essential to the project of legal rhetoric to inquire into the language of those conversations, particularly ones with such a strong capacity to *move*. ("Move" here indicates the rhetoricity or affectability of language, particularly that of contested terms. The 'right to privacy' *moves* individual subjects by altering their existence, by categorizing and defining them (and the parameters of their privacy rights) and by imagining and correcting them (or suggesting when and where their privacy expectations are reasonable or not). When contested terms, or ideographs, affect us by producing something in, for, or about us, they *move* us rhetorically.)

And, whether we recognize it or not, we are all already doing law and rhetoric—we are already a part of the ongoing conversation that determines and describes the boundaries of law. We are already interrogating the rhetorical strategies of judges, clients, and other legal practitioners while engaging in the practice of law. We produce and ask questions about spaces of legal discourse every single day. Finally, being attentive to the power to effectuate legal, political, and social change through discourse has long been the calling of rhetoricians and lawyers alike, which ought to be reason enough to bracket distinctions between the two.

In this essay, I argue for greater attention to the many ways in which rhetoric affords legal practitioners and scholars the ability to critically engage legal texts and analyze their relationship to the rhetorical culture from which those texts emerge. Using the Fourth Amendment "right to privacy" as fodder, I outline two theories in particular—Michael Calvin McGee's ideographic approach and Kenneth Burke's theory of identification—to show how rhetorical methods can provide professionals engaged in the many facets of lawyering a way of seeing the law and its rhetorical constructs anew, through a lens capable of revealing the intricate liaison between law and culture so often overlooked by those so deeply and discursively entrenched in both.

Consequently, what follows can first be described as an endeavor in legal rhetoric, outlining the parameters for a rhetorical inquiry into the Fourth Amendment's "right to privacy" and considering, among other things, the "reasonableness" of its expectation in American rhetorical

11 *Id*. at 44.

12 Marianne Constable, *On Not Leaving Law to the Lawyers*, *in* LAW IN THE LIBERAL ARTS 69, 81 (Austin Sarat ed., 2004).

culture. I will unearth along the way some of the vertical and horizontal structures[13] of our "right to privacy" and uncover the utility in this approach. This analysis further reveals a pattern of dual identifications where these structures manifest in written opinions through citation to precedent as well as through legal dicta. In the first, the Court identifies with a People or public of the past—including the Framers, as judges often say—along with prior iterations of the "right to privacy" in the law. In the second, the Court identifies with its contemporary American rhetorical culture—a public and a discourse surrounding this "right to privacy" at the time the opinion is written.

How the "right to privacy" has been treated rhetorically permits inquiry into what appears to be the steady erosion of the discursive and material spaces in which one may reasonably expect privacy, particularly in the face of technological innovation. Simultaneously, it encourages a critique of who, precisely and increasingly, is afforded this expectation, understanding that "reasonableness" is always already[14] raced and gendered. In other words, examining "right to privacy" in this way highlights the critical role of legal discourse—and members of the legal discourse community—in the rhetorical management of subjects. The rhetorical methods and theories suggested and applied here are, however, applicable across a vast range of legal and social constructs; privacy is just one of the many dusty roads down which we might trot accompanied by rhetorical theorists. As the pages turn, I hope my reader will keep in mind that rhetoricians are uniquely positioned to investigate and interpret legal discourse and communication because of rhetoric's profound investment in—and the law's inescapable entanglement with—culture. Below, I outline just some of the critical rhetorical frameworks that illuminate how and why this is so.

II. An Ideographic Analysis of a Polysemic Rhetorical Construct

In 1980, Michael Calvin McGee promoted the idea that "ideology in practice is a political language, preserved in rhetorical documents, with the capacity to dictate decision and control public belief and behavior." What's more, this political language of ideology "seems characterized

13 Vertical structures refer generally to historical uses of a term—how it is employed throughout time. Horizontal structures refer to contemporary uses of a term—how it is employed across cultures today.

14 The adverbial construction "always already" (or "always-already") has a rich history in literary and philosophical discourse. In this context, it suggests a state of being that is in process and discoverable. For example, Louis Althusser maintained that "an individual is always-already a subject, even before he is born" because "it is certain in advance that it will bear its Father's Name, and will therefore have an identity and be irreplaceable." LOUIS ALTHUSSER, LENIN AND PHILOSOPHY AND OTHER ESSAYS 164 (Ben Brewster transl., 1971).

by. . . a vocabulary of 'ideographs.'"[15] Ideographs are terms that have disputable meanings depending upon how they are rhetorically situated. Their meanings are determined in relation to the history of their usage and in their relationship to other ideographs and the surrounding rhetorical culture. Ideographs are more than just words; they are contested terms—terms that vary in meaning depending upon how they are rooted and situated. Take the term, "marriage." The meaning of "marriage" is based in part upon its historical constructs and uses (its vertical structures) and partly based upon its contemporary constructs and uses (horizontal structures). While "marriage" was once (vertically) described as "between a man and a woman," and this meaning remains in use, the term's meaning has evolved in response to cultural change. The term is contested because its meaning is contestable. What's more, the meaning of "marriage" shifts even further when we examine its use in cultures outside the United States; wherever you may go, the meaning of the term shifts in response to its historical and actual, present use. McGee provides other examples of ideographs, such as "'property,' 'religion,' '*right of privacy*,' 'freedom of speech,' 'rule of law,' and 'liberty,'" which are "more pregnant than propositions ever could be."[16] McGee calls ideographs both "the building blocks[] of ideology" and "one-term sums of an orientation."[17] Both of these denotations will prove quite useful in unpacking the concept of the ideograph, and, as a result, I use each signification as a point of departure below, before delving into the notion of rhetorical culture and briefly assessing the value in this approach.

A. "Building Blocks of Ideology"

As a building block of ideology, the ideograph manifests as a link between ideology and rhetoric. We "behave and think differently" when we are in collectivity with others.[18] When contested terms, or ideographs, are deployed through collective discourse by the masses, they seem to reveal a mass consciousness and a system of beliefs. In other words, when an ideograph becomes common in society, it reveals to us what "we" as a collective public believe about that term and its role in the surrounding culture. When we say that we have a "right to privacy" when it comes to our cell phones, we demonstrate an ideology. Similarly, if we say, we do not have a "right to privacy" when it comes to information exposed to third-party vendors online, we, again, demonstrate an ideology. These examples

15 Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q. J. SPEECH 1, 5 (1980).

16 *Id.* at 6–7 (emphasis added).

17 *Id.* at 7.

18 *Id.* at 2.

expose our belief systems as they relate to our privacy rights. Whether these ideologies reflect a mass consciousness can be determined by examining how we use these contested terms—how we use ideographs. McGee maintains that "[i]f a mass consciousness exists at all, it must be empirically 'present,' itself a thing obvious to those who participate in it, or, at least, empirically manifested in the language which communicates it."[19] This emphasis on language as a sort of container for mass consciousness leads us, of course, to his exposition of the ideograph.

Within this exposition, McGee identifies a "rhetoric of control" or "a system of persuasion presumed to be effective on the whole community."[20] We are "'conditioned,' not directly to belief and behavior, but to a vocabulary of concepts that function as guides, warrants, reasons, or excuses for behavior and belief," so when a claim is warranted by a term, say the "reasonable expectation of privacy," we can presume that "human beings will react predictably and automatically."[21] If my "right to privacy" does not extend to my internet browsing history because I have no "reasonable expectation of privacy" online, then you can expect that I will not object when I find specific advertisements related to my search history periodically popping up on my computer's screen. Uncovering ideographs presently at work in American rhetorical culture would allow us, then, to predict shifts in the beliefs and behaviors of the public, which manifest in legal discourse through the identification patterns discussed below. Moreover, the impact is bidirectional. When we make a rhetoric of "reasonableness," for instance, to persuade the whole community as to what limits a "right to privacy" in the law, we often "forget that it is a rhetoric," and regard those who disagree as misguided or "unpatriotic."[22] We might find this persuasive effect when, for instance, our "right to privacy" is juxtaposed with "national security" interests. Indeed, when deployed by certain legal-discourse communities, the public is "[not] permitted to question the fundamental logic of ideographs," for "[e]veryone is conditioned to think of 'the rule of law' as a *logical* commitment."[23] The ideograph reveals the ways in which discourse regulates and governs society both inside and outside of legal contexts. As we consider the "right to privacy" under the Fourth Amendment ideographically and investigate its capacity to *move* and rhetorically manage subjects, we see this "rhetoric of control" reverberating.

19 *Id.* at 4.

20 *Id.* at 6 (emphasis omitted).

21 *Id.*

22 *Id.*

23 *Id.* at 7.

B. "One-term Sums of an Orientation"

As one-term sums of an orientation, ideographs relay a complex assembly of alignments, which expose "interpenetrating systems or 'structures' of public motives."[24] The structures are revealed in vertical and horizontal patterns of social or political consciousness which, as we have already seen, "have the capacity both to control 'power' and to influence (if not determine) the shape and texture of each individual's 'reality.'"[25] The vertical and horizontal structures reach back into history and out into the surrounding rhetorical culture. So, in reference to our "right to privacy," a vertical analysis might reveal the origins of the Castle Doctrine in *De Domo Sua*.[26] Or it might bring us to James Otis' now famous argument before the Massachusetts court in 1761 when, representing the interests of businessmen who wanted to limit the broad authority of the Crown to search private dwellings, he passionately argued in part: "A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[27] Along the way, we would be certain to find *The Right to Privacy* by Louis Brandeis and Samuel Warren,[28] which some consider "the most influential article ever published" in identifying privacy as a right.[29] And, of course, we have mountains of precedent in the law to consider as part of this vertical structure, as well.

Still, the more noteworthy account of vertical structures can be found "in what might be called 'popular' history."[30] Popular history includes the sort of texts we find in popular culture: songs, films, plays, and novels, in addition to "grammar school history," which can be described as "the truly influential manifestation."[31] These are the ideas that have been relayed to us through language since childhood. They have become so entrenched in

24 *Id.* at 5.

25 *Id.*

26 MARCUS TULLIUS CICERO, *De Domo Sua* xlii, 109, *in* THE SPEECHES OF CICERO 132, 263 (E. Capps, T.E. Page & W.H.D. Rouse eds., N.H. Watts trans., 1923) ("What is more sacred, what more inviolably hedged about by every kind of sanctity, than the home of every individual citizen?").

27 NAT'L HUMANITIES INST., *James Otis: Against Writs of Assistance (Feb. 1761)*, THE CENTER FOR CONSTITUTIONAL STUDIES: SOURCE DOCUMENTS (1998), http://www.nhinet.org/ccs/docs.htm. Otis lost this day in court, and the writs were renewed. Still, the heart of his argument lives on today. John Adams, who was present in court that day, would later mark this speech as the beginning of the Revolution, writing to William Tudor in 1817, "American Independence was then and there born." WILLIAM TUDOR, LIFE OF JAMES OTIS, OF MASSACHUSETTS (1823); *see also* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 253 (1978) (describing correspondence from John Adams to William Tudor). And according to most, so, too, was the Fourth Amendment.

28 *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). While this article concerns itself more with an individual's "right to privacy" in the domestic sphere, particularly from intrusions by the media and private individuals, it also reinforced the "right to privacy" as extolled by the Fourth Amendment.

29 BRECKENRIDGE, *supra* note 3, at 132.

30 McGee, *supra* note 15, at 11.

31 *Id.*

our vocabulary that they seem to depict only reality. Therefore, an ideographic inquiry into the Supreme Court decision in the case of David Leon Riley, for example, would necessarily entail viewing more than just Chief Justice Roberts' past and contemporary uses of the "right to privacy," looking also to popular history and recording the vertical structures of the contested terms found there as well.

The horizontal structures are just as many and, perhaps, even more complex than their vertical counterparts. McGee insists that "[b]oth of these structures must be understood and described before one can claim to have constructed a theoretically precise explanation of a society's ideology,"[32] and, consequently, a full ideographic analysis in our "right to privacy" example would take up an exploration of both the vertical and horizontal structures of that term as well as related terms, examining, for instance, among other contested notions, what has come to be understood as the "reasonable expectation of privacy" in Fourth Amendment jurisprudence. After we have examined both the historical and contemporary uses of the "right to privacy" and other related ideographs, we can better predict and describe when and where individuals and society as a whole—including both our courts and our clients—will reasonably expect privacy.

The horizontal analysis is essential because the vertical structure of the ideograph offers "no ideally precise explanation of how ideographs function *presently.*"[33] Rather, McGee identifies the horizontal structure of ideographs as necessary to account for their present function. We need both structures in order to fully understand the role the ideograph plays in forming beliefs and carrying those beliefs forward through society today, but the horizontal structure offers the most in terms of potential to predict contemporary interpretations of the law—a benefit for the legal practitioner who is in the business of evaluating how the law might evolve in the face of cultural and societal change. If we attend to how these contested terms presently function in society, as well as how they have evolved from their historical functions, we can begin to imagine how clients, judges, and other lawyers will interpret them in the future. According to McGee, some "structural changes in the relative standing of an ideograph are 'horizontal' because of the presumed consonance of an ideology . . . . But when we engage ideological argument, [causing] ideographs to *do work* in explaining, justifying, or guiding policy in specific situations, the relationship of ideographs changes."[34] This is often the case when we apply

32 *Id.* at 14.

33 *Id.* at 12.

34 *Id.* at 13.

this method in analyzing Supreme Court opinions in particular. Through identification, or the highlighting of a shared substance ("consubstantiality") with the surrounding rhetorical culture, the Court calls upon the ideograph to explain or justify the decision, changing its relationship, its horizontal structure, and, ultimately, the law. As, under this view, an ideograph is "always understood in its relation to another,"[35] our "right to privacy" example necessarily proceeds by inquiring into the ideographs that operate in relation to that term. These would include terms like "freedom" and "liberty" more generally, as well as specific or discrete terms like "reasonable expectation" or the "good faith" exception.

While the term "right to privacy" is certainly pregnant with meaning and constructed in relation to popular history, some ideographs are not likely to be found there. Rather, they are constructed within a specific community or discourse environment. Some scholars more closely consider ideographs in discrete discourse communities[36]—spaces that may be specific to certain environments, isolated locales, marginalized groups and identities, or highly individualized institutions, for instance, the Law. The discrete ideograph has the potential to, in turn, reveal formations constitutive of society and authority within that discrete community. The "reasonable expectation of privacy" emerging out of Fourth Amendment jurisprudence is an example of a discrete ideograph, and its relationship to the popular ideograph, "right to privacy," is rich with potential. Specific to the legal community, this discrete ideograph has vertical and horizontal structured relations, but they are mostly found within the law and not necessarily in popular history. Still the law can never break free from culture, so our analysis must consider the "reasonable expectation of privacy" as tangentially related to the popular ideograph—the "right to privacy" found in the layperson's general understanding of the term. That is, the "reasonable expectation of privacy," though a discrete ideograph, is structured horizontally in relation to the "right to privacy" as understood popularly and culturally. What's more, it emerged out of discourse within the legal community surrounding the "right to privacy," so interrogating the "reasonable expectation of privacy," along with similarly structured ideographs, such as a "good faith" exception and a "reasonable suspicion" standard, would constitute a vital current in any study of the "right to privacy" under the Fourth Amendment.

Contemporary discussions of other ideographs promise a potential to deepen this study as well. Apart from obvious connections to the

35 *Id.* at 14.

36 *E.g.,* Fernando Pedro Delgado, *Chicano Movement Rhetoric: An Ideographic Interpretation*, 43 COMM. Q. 446 (1995).

underlying terms "reasonable" and "privacy," we see the "right to privacy" connected to notions like "property," "beneficially," "the rule of law," "national security," and even "foreign influence." McGee sparked a litany of ideographic analyses since he published his work on ideographs nearly forty years ago. Consider Marouf Hasian's description of how "the 'elastic' nature of the concept of 'necessity' means the term 'can be stretched to include many things that aren't really necessary.'"[37] The relationship between ideographs, then, can be viewed as consubstantial with their production. When lawyers and judges start to see legal constructs ideographically, they uncover these structures and their capacity to effectuate changes in the law. We begin to see that the law is, in fact, culturally derived.

C. What is Rhetorical Culture? And Why Ideographs?

The vertical and the horizontal structures inherently link ideographs to rhetorical culture.[38] In fact, the connections between culture and law rest at the base of many rhetorical interventions similar to my own. James Boyd White, for instance, sees law "as a set of literary practices that at once create new possibilities for meaning and action in life and constitute human communities in distinctive ways."[39] As such, law constructs part of the vocabulary of a rhetorical culture. Celeste Michelle Condit and John Louis Lucaites, whose text influences Hasian's work as well, explain the concept of "rhetorical culture" in this way:

> By rhetorical culture we mean to draw attention to the range of linguistic usages available to . . . a group of potentially disparate individuals and subgroups who share a common interest in their collective life. In this rhetorical culture we find the full complement of commonly used allusions, aphorisms, characterizations, ideographs, images, metaphors, myths, narratives, and *topoi* or common argumentative forms that demarcate the symbolic boundaries within which public advocates find themselves constrained to operate.[40]

37 Marouf Hasian Jr., In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties 5 (2005) (footnote omitted). Hasian's project is similar to our example in that we can see our "right to privacy" under the Fourth Amendment as similarly "elastic." We might ask if, while the ideograph once stretched to include a wider scope, it has since contracted to account for, among other things, the "necessity" Hasian interrogates in his generative analysis.

38 McGee says that ideographs "are bound within the culture which they define," McGee, *supra* note 15, at 9, and he sets ideographs apart from "'Ultimate' or 'God' terms" because of ideographs' attention to "the social, rather than rational or ethical, functions of a particular vocabulary," *id.* at 8.

39 James Boyd White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 107 (1985).

40 Celeste Michelle Condit & John Louis Lucaites, Crafting Equality: America's Anglo-African Word xii (1993).

In a later publication, Hasian, Condit, and Lucaites together offer something more succinct: "By 'rhetorical culture' we mean to draw attention to the range of linguistic usages available to those who would address a historically particular audience as a public."[41] They further maintain that "the law exists as part of an evolving rhetorical culture"[42] and argue that significant changes in the rhetorical culture indicate that the legal system "must adhere to old vocabularies that inadequately encompass new situations."[43] This results in a sort of tension that is ultimately quite generative. David Zarefesky describes this tension as "productive," writing that "[s]ustaining these general tensions while reaching conclusions about specific matters enables culture to change while remaining cohesive."[44] This is the function or *work* of the ideograph. It holds fast to our roots while simultaneously clearing the way for evolution. Indeed, Hasian, Condit, and Lucaites find this tension to be productive as well, suggesting that it results in "the older, technical/legal vocabulary, [being] adapted simultaneously . . . to the new public vocabulary, and to the new rhetorical culture."[45] When we study the interaction between new and old vocabularies, we study the process of, and subsequent response to, cultural change; this, of course, remains true in legal-discourse environments. An ideographic inquiry not only reveals changes in the surrounding culture, but also in the predispositions of courts.

Ideographs "have either positive or negative valence, and they . . . gain their rhetoricity[46] when they are used with other political units in concrete situations."[47] For example, ideographs gain their rhetoricity—their affectability and capacity to *move*—when used discursively to determine a specific rule of law. As a consequence of a societal structure where the "rule of law" is developed by and through rhetorical culture, "any interest group dissatisfied with the public arrangement may work to change either the legal system or the rhetorical culture in which it

41 Marouf Hasian Jr., Celeste Michelle Condit & John Louis Lucaites, *The Rhetorical Boundaries of "the Law": A Consideration of the Rhetorical Culture of Legal Practice and the Case of the "Separate But Equal" Doctrine*, 82 Q. J. SPEECH 323, 326 (1996).

42 *Id.*

43 *Id.* at 336.

44 David Zarefsky, *Reflections on Making the Case*, *in* MAKING THE CASE: ADVOCACY AND JUDGMENT IN PUBLIC ARGUMENT 1, 13 (Kathryn M. Olson, Michael William Pfau, Benjamin Ponder & Kirt H. Wilson eds., 2012).

45 Hasian Jr. et al., *supra* note 41, at 336.

46 Given the proximity of this term to the word "valence" in Hasian's text, I take Hasian to mean something akin to affectability, or Diane Davis's notion of rhetoricity, which emphasizes the web of relations that create the conditions of affectability or state of persuasion. *See* Eric Detweiler, Rhetoricity: What Isn't Rhetoricity? (podcast Mar. 17, 2015), http://rhetoricity.libsyn.com/what-isnt-rhetoricity (transcript on file with author).

47 HASIAN JR., *supra* note 37, at 13.

operates."[48] The legal community is even better equipped to effectuate such a change. Being afforded the opportunity to explore, identify, and predict the development of ideographs that have a capacity to *move* American rhetorical culture is just one of the many advantages of taking an ideographic approach to, among other things, the "right to privacy" under the Fourth Amendment. Another advantage is that an ideographic approach "emphasizes the ways that speakers and communities make compromises when they interpret these various political units of analysis."[49] If we explore the vertical and horizontal structures of public motives in relation to our "right to privacy," along the way, we will begin to better understand the rhetoricity of that ideograph and the compromises judicial actors have made when interpreting and applying the law.

The objects of study in an ideographic analysis are many. Critics taking an "ideographic turn" engage in "genealogical investigations" that describe how universal concepts came to be and how they "recirculate as 'fragments' in other apparently finished texts," like judicial opinions.[50] Hasian is careful to point out that scholars who take this "turn" are not called to abandon "analyses that dissect arguments that appear in legislative documents or judicial opinions," but they must be considered only part of "much larger conversations."[51] Indeed, the opinions are only portions of the ideographic analysis, but they are hugely impactful because of their immediate power over subjects and because of their enduring capacity to influence later iterations of the law. Moreover, if examining the constitutive structures of privacy rights under the Fourth Amendment requires that we ask questions about "the motivations of the social agents who are making decisions"[52] about them, then legislative documents and judicial opinions undoubtedly embody a compelling point of departure.

An ideographic analysis in legal communication reveals terms or concepts, such as the Fourth Amendment's "right to privacy," as first and fundamentally rhetorical. When lawyers and judges examine these cases and make a call about when and where one might reasonably have an expectation of privacy, they are engaged in a similar analysis. They are looking to both precedential delineations of privacy rights in the United States—the vertical structure of the ideograph—and contemporary, social understandings of privacy rights in the surrounding rhetorical culture—the horizontal structure of the ideograph. This approach manifests specifically in the language of judicial opinions through a pattern of dual identifications which, of course, is eminently rhetorical.

48 Hasian Jr. et al., *supra* note 41, 338.

49 HASIAN JR., *supra* note 37, at 14.

50 *Id.* at 15.

51 *Id.*

52 *Id.* at 12.

III. Dual Identifications of Law

Identification, which Kenneth Burke suggests is more powerful than persuasion, is created in law through relational language and citation to precedent. When you employ identification to persuade someone you do so "only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his."[53] Lawyers and judges use identification in nearly all aspects of their professional (and personal) lives. When we meet with a client, we identify with her circumstance in her own terms, to persuade her that we are equipped to, and invested in, resolving her case. When we meet with opposing counsel, we identify with her through language that carries a tone and an attitude that demonstrates our professionalism and congeniality, as well as our similar goals in representing our individual client's best interests. Through identification, the court or counsel highlights a shared substance and, in doing so, brings legal discourse "to the edge of cunning."[54] When one identifies with another, it "does not deny their distinctness," but they are "at once a distinct substance and consubstantial with another."[55] This "consubstantiality" stems from "sensations, concepts, images, ideas, [and] attitudes" that people have in common.[56] It is generated in judicial opinions when courts identify these commonalities within vocabularies of a rhetorical culture, both past and present, producing a pattern of dual identifications that mimics the structures of public motives in McGee's ideographic approach.

Burke further suggests that identification is affirmed because there is division.[57] If we "put identification and division ambiguously together, so that you cannot know for certain just where one ends and the other begins, . . . you have the characteristic invitation to rhetoric."[58] McGee makes similar claims about the ideograph's capacity for unity and division: "Insofar as usages both unite and separate human beings, it seems reasonable to suggest that the functions of uniting and separating would be represented by specific vocabularies, actual words or terms . . . [which] would consist of ideographs."[59] That is, one can establish an identification while still highlighting a division. In fact, we can use identification to persuade our audience—client, counsel, or court—that division is necessary. By first identifying with our audience through a shared language of ideographs, we can better persuade it that a proposed change

53 KENNETH BURKE, A RHETORIC OF MOTIVES 55 (Univ. of Calif. Press California ed. 1969) (emphasis omitted).

54 *Id*. at 36.

55 *Id*. at 21.

56 *Id*.

57 *Id.*at 22.

58 *Id*. at 25.

59 McGee, *supra* note 15, at 8.

in the interpretation of a law is in tune with its own ideological predispositions. Whether or not the lawyer or judiciary is aware of this pattern of identification, division, and consubstantiality (highlighting a "shared substance") with the past and contemporary rhetorical culture may not matter. Burke says that "the rhetorical motive, through the resources of identification, can operate without conscious direction by any particular agent."[60] We are already employing identification to persuade whether we recognize it or not. These persuasive identifications depict human capacity to use words "to form attitudes or to induce action."[61] The dual identifications, both vertical and horizontal, found throughout legal discourse excel in these capacities.

Many would argue that the principle of *stare decisis* gives the law force, but there is more at work here than merely "standing by things decided."[62] It is through a pattern of identifications that the law is given force. One of these identifications occurs most persuasively when the Court effectively employs ethos when citing precedent and reshaping the law for its own kairotic moment.[63] The "rule of law" defines the rights and boundaries of citizens, and the language of law is centered on rule application. That is, in the most basic sense, we identify rules and apply those rules to a present set of facts. McGee also highlights the connections between ideographs and precedent: "Earlier usages become precedent, touchstones for judging the propriety of the ideograph in a current circumstance. The meaning [of the ideograph] does not rigidify because situations seeming to require its usage are never perfectly similar: As the situations vary, so the meaning . . . expands and contracts."[64] If we could close our eyes while reading this, we might think McGee is describing how one goes about practicing, interpreting, and applying law. Despite these expansions and contractions, the term retains "a constant reference to its history as an ideograph."[65] By citing precedent, the Court maintains this reference and, among other things, retains its credibility.

60 BURKE, *supra* note 53, at 35.

61 *Id.* at 41.

62 The principle of *stare decisis*, literally "to stand by things decided," has long been understood as the primary mechanism giving the law force. *Stare decisis* is, according to *Black's Law Dictionary*, "[t]he doctrine of precedent, under which a court *must* follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). I argue that courts often ignore this imperative, opting instead to establish dual identifications through which the courts' rhetorical power ultimately manifests.

63 In ancient Greece, the word "kairos" (καιρός) is generally denoted as "time," but it connotes, more specifically, the right or proper time or a fitness for a particular occasion. For example, Susan Jarratt simply defines the term as "timeliness" or "the moment of an oration." Susan C. Jarratt, REREADING THE SOPHISTS: CLASSICAL RHETORIC REFIGURED xv (timeliness), 11 (the moment of an oration) (S. Ill. Univ. paperback ed. 1998). When rhetoricians employ the term "kairotic moment," they do so with the intention of suggesting a specific moment in time that is "fit" for a particular rhetorical context, comprised of author, audience, text, and purpose.

64 McGee, *supra* note 15, at 10 (discussing the ideograph "equality").

65 *Id.*

This first identification functions as a general description of how most understand the process of doing law. It is also shamefully inept though it seems to suggest that the rules are stable and finite and implies that past precedent is directly applicable to present-day circumstances. As Stanley Fish writes, "The law . . . is always in the business of constructing the foundations on which it claims to rest and in the business too of effacing all signs of that construction so that its outcomes can be described as the end products of an inexorable and rule-based necessity."[66] The notion of law as finite and substantially lacking ambiguity is a myth constructed by the thing itself. In fact, the "rule of law" is perpetually in a state of flux, and it often more closely reflects the ideological predilections of the culture interpreting it than it does any original intention upon initial construction. For this reason we see (and need) another identification—with contemporary rhetorical culture—in any given case. By establishing this pattern of dual identifications through rhetorical vocabularies of the ideograph in past and contemporary American rhetorical culture, written opinions demonstrate the rhetoricity of the ideograph itself.

Consider ideographically, by way of example, the "good faith" exception to the exclusionary rule set forth in *United States v. Leon*.[67] We can think of this discrete ideograph as relationally connected to the "right to privacy" arising out of the Fourth Amendment. Writing for the majority, Justice White acknowledges that the Court had "not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule" prior to this case.[68] But he points to "the balancing approach that has evolved during the [Court's] years of experience" interpreting and applying that rule.[69] Here, White makes a vertical identification, which also occurs throughout the opinion in numerous references to prior decisions that identify previous iterations of "good faith" and other discrete ideographs, such as a "balancing approach" and an "appreciable deterrence."[70] Recall that ideographs come to meaning in their relationship to other ideographs; "good faith," then, gains its rhetoricity partly through these vertical identifications.

Ideographs also come to meaning in their relationship to the surrounding rhetorical culture. That culture produces a "situationally []defined" horizontal synchronic structure of "ideograph clusters," which,

66 STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 21 (1994) (emphasis omitted).

67 468 U.S. 897 (1984).

68 *Id.* at 913.

69 *Id.*

70 *See, e.g., id.* at 909, 911, 913.

as McGee proposes, is "constantly reorganizing itself to accommodate specific circumstances."[71] In *Leon*, White makes his horizontal identification with the Court's contemporary American rhetorical culture by determining that concerns over the "substantial social costs" of allowing that "some guilty defendants may go free or receive reduced sentences"[72] provide "strong support" for crafting the "good faith" exception.[73] In doing so, the Court "reframe[s] the Fourth Amendment into one that could best be understood through the lens of a jurisprudence of crime control."[74] At the time the opinion was written, American culture was particularly invested in ensuring that law enforcement officers possess all the necessary tools to combat growing crime rates.[75] Nixon had "campaigned on a law and order platform" and named four justices to the Court who would promote this purpose.[76] It would seem that, at least in the realm of criminal procedure, the Burger Court was "very successful in accomplishing" Nixon's resolve for law and order.[77] Through White's use of identification in *Leon*, the exclusionary rule lost the battle with the "substantial social costs" articulated throughout discrete and popular discourses of "law and order" and forever changed the shape of our "right to privacy" under the Fourth Amendment. This resulted in what some scholars have come to describe as a "well-meaning effort of the Court to dilute Fourth Amendment requirements in the interest of preventing major crime."[78] To be sure, all of this is accomplished, at the level of language itself, through identification.

This pattern of dual identifications can also be found in the case of David Leon Riley, with which we began our endeavor.[79] In *Riley*, the Court confronted a new need for division—for evolving the "right to privacy" to account for the ubiquitous use of modern smart phones in today's society. While courts might previously have permitted a search of one's person and belongings incident to lawful arrest, the search of the cell phone necessitated a dissection of sorts, a partitioning off of the search of one's

71 McGee, *supra* note 15, at 14.

72 468 U.S. at 907.

73 *Id.* at 913.

74 Michael C. Gizzi & R. Craig Curtis, The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy 11 (2016) (discussing the Burger Court's interpretation of the Fourth Amendment).

75 *See generally id.* at 59.

76 *Id.*

77 *Id.*

78 Samuel Dash, The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft 144 (2004).

79 Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014).

cell phone. Specifically, the Court determined that today's cell phones are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[80] Moreover, Chief Justice Roberts writes in the Court's opinion that cell phones "place vast quantities of personal information literally in the hands of individuals."[81] Because cell phones have the capacity to store "[t]he sum of an individual's private life,"[82] permitting their warrantless search, even incident to a lawful arrest, would result in "a significant diminution of privacy."[83]

To establish this new division in the law, the Court constructed persuasive identifications, with both precedent and the surrounding rhetorical culture. That is, the Court identifies, through relational language, with vertical and horizontal structures of the "right to privacy." For example, in response to the Government's proposition that "law enforcement agencies 'develop protocols to address' concerns raised by cloud computing," Roberts writes, "Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols."[84] This vertical identification with the Founders gives the opinion persuasive force. Roberts identifies with his legal audience, one that expects him to make historical connections to the Fourth Amendment itself, and, in doing so, he simultaneously establishes both his own and the Court's ethos, making the opinion even more persuasive. We can analyze similar instances throughout this (or any) opinion to better determine what the Court values—here, the Founders' original intent. We can utilize identifications within judicial opinions to better craft our own persuasive identifications within the broader legal discourse community, as well as when addressing courts directly.

Still, Roberts does more than merely identify with the Founders or cite to existing precedent in *Riley*. In order for the opinion to reach its full persuasive potential, it needs the second identification—the horizontal identification with the surrounding rhetorical culture. We find these identifications littered throughout: when Roberts speaks of "frequent visits to WebMD,"[85] or when he asks, "Is an e-mail equivalent to a letter?"[86] or when he pens, "[T]here's an app for that."[87] These are horizontal, cultural identifications, without which the opinion loses its rhetorical effect. The recitation of time-honored rules of law is never enough because the Court must also establish division in order to produce some intended alteration

80 *Id.* at 2484.
81 *Id.* at 2485.
82 *Id.* at 2489.
83 *Id.* at 2493.
84 *Id.* at 2491.
85 *Id.* at 2490.
86 *Id.* at 2493.
87 *Id.* at 2490.

in its interpretation of the law. The law, after all, is in motion, expanding and contracting in response to changes in our rhetorical culture.

IV. Conclusion

The "right to privacy" persists in a state of constant flux. It expands and contracts in response to social, political, and technological change. As a principle of law, the "right to privacy" moves us through its own discursive movements, although it presents itself as unmovable and inviolable. The foundations of our legal system, however, often require that we view laws as finite, stable, and unmoving. Otherwise, how could we be expected to abide by them—to let them imagine and punish us? Our legal system also necessitates that laws be seen as intrinsically correct or otherwise justified by longstanding, universally accepted moral foundations and traditions. The "rule of law," then, as passed down through the generations, is stripped of those moral or ethical justifications and replaced with precedential case law and statutory law, in many ways operating as artificially constructed casings for imagined foundations detached from their true discursive relations.

In the end, teachers, writers, and doers of law—all those invested in "[t]he art of practicing law well"[88]—participate in this process. We participate in the formation of ideographs. We engage in the process of dual identification. And we perpetuate productive tensions in legal and social discourse communities. Throughout this piece, I have intimated what others have stated quite directly, that "rhetoric provides a strong counter to the constrained view of the life of lawyers offered by popular depictions of formalism or realism."[89] If we search for a "rhetorical place to stand, between reason and power,"[90] in however we choose to take part in legal communication and practice, we disentangle ourselves from formalism's chokehold and are better—advocates, counselors, teachers, writers, and scholars—for it.

88 Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules,* 11 LEGAL COMM. & RHETORIC: JALWD 51, 81 (2014).

89 Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 1, 4 (2010).

90 *Id.* at 4.

ARTICLE

Four-Finger Exercises*

Practicing The Violin For Legal Writers

Ian Gallacher**

For violinists,[1] it's the Kreutzer exercise number two.[2] It's a simple piece in C major lasting slightly under a minute if it's played quickly[3] and about a minute and three quarters if it's played slowly.[4] It's not especially difficult to play, although playing it perfectly in tune can be challenging. Compared to other exercises, though, and especially when compared to the exercise's big brother—the étude (especially those by Paganini)—Kreutzer number two is simplicity itself.

And yet violinists the world over are intimately familiar with this simple exercise. There's no empirical evidence to support this, but it's

***** The thumb plays a limited role in violin (and viola) playing, and it is the other four fingers that press down the strings and help to produce the sound, except in highly unusual circumstances. So violinists exercise only those four fingers, hence the title.

****** Professor of Law and Director, Legal Communication and Research program at Syracuse University College of Law. My thanks to Dean Boise of the Syracuse University College of Law for his support, and to my four violin teachers—David Hume, Mary Williamson, Edmond Jones, and, especially, Roger Raphael—for their wisdom and guidance: I apologize to them for the level of my playing now, because it's definitely not their fault. As always, this is for Julie McKinstry.

1 Viola players as well. Although there are some differences in the way these two instruments are played, the fundamental techniques explored by the Kreutzer exercises are sufficiently close that viola players use them (transposed down a fifth and using the alto clef rather than the treble) as often as violinists.

2 RODOLPHE KREUTZER, 40 ÉTUDES OU CAPRICES POUR LE VIOLON (1796), *available at* http://ks.petruccimusiclibrary.org/files/imglnks/usimg/9/9d/IMSLP407296-PMLP04613-kreutzer_40_etudes_1805_bsb.pdf. If the URL for this edition is accurate, then it was published in 1805. Contemporary violinists might be puzzled by the title, since the exercises are known now as the 42 Studies for Violin (to give them their English title). *See, e.g.*, KREUTZER, 42 STUDIES FOR THE VIOLIN (Ivan Galamian ed., 1963). Two exercises—numbers 13 and 21 in the modern numbering—were added later and might not be by Kreutzer. David Charlton, *Rodolphe Kreutzer*, *in* 10 NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 260 (Stanley Sadie ed., 13th ed., 1994). The second exercise in the series, though, certainly was written by Kreutzer, and I'll refer to that exercise here as Kreutzer number two for sake of convenience.

3 *See, e.g.*, Matthew Zerweck, *Kreutzer #2, Fast Performance*, YOUTUBE (July 4, 2015), https://www.youtube.com/watch?v=dj194Zh4bMc.

4 *See, e.g.*, Matthew Zerweck, *Kreutzer Etude #2, Slower Example, 60 = Quarter*, YOUTUBE (July 4, 2015), https://www.youtube.com/watch?v=9Fp8t1YWYMg. These two YouTube examples are offered to show the contrast between fast and slow versions of the study, not as exemplars of perfect playing. In particular, the violinist's habit of leaning into the first note of a phrase—more apparent in the slower version of the study but audible in both examples—would be an affectation disfavored by some teachers.

likely that every current or former conservatory student, every professional violinist, and every accomplished amateur, could play this exercise from memory without a second thought. It's difficult to imagine a more ubiquitous piece of music written for the violin.

Why this might be, and why this is of relevance to legal writers who have moved past law school and are in practice or on the bench, is the subject of this article. After a brief introduction to the composer, Rodolphe Kreutzer, and a discussion of the role Kreutzer number two, and other technical exercises, play in the development and maintenance of violin technique (and if you're not interested in a little music history, please feel free to skip past this), we'll move on to a consideration of how legal writers can use a similar approach to maintain and improve their writing techniques. And the article will propose that spending a brief amount of time each day—significantly less time than violinists spend, as we'll see—can help lawyers become more reflective, intentional, and more technically assured, writers.

I. Rodolphe Kreutzer

Perhaps no one in history is better known for his relationship with one of the most profound pieces of music ever written—Beethoven's Kreutzer Sonata—in which he played no apparent role, and few, if any, are as well known (to a small group of musicians, at least) for a short piece of music—the exercise—that has virtually no musical merit and which is hardly ever heard in public, as Rodolphe Kreutzer. And yet for someone about whom such remarkable claims can be made, Kreutzer had a relatively uneventful life.

He was born in Versailles in 1766, and studied violin with Anton Stamitz.[5] He developed quickly as both a violinist and composer, and by 1789 he was considered "a leading virtuoso" and had moved to Paris. As a young man he became known as an opera composer and in later life, one of his operas was praised by Berlioz. Today, though, his operas are unknown and his composing career is remembered only for his *40 Etudes ou Caprices Pour le Violon*, published in 1796 by the Paris Conservatoire, where he was Professor of Violin until 1826.[6]

As with most musicians of note, Kreutzer toured various European countries, and a letter by Beethoven dated October 4, 1804, shows that Beethoven had heard his playing.[7] Spohr wrote of Kreutzer that "of all the

5 Charlton, *supra* note 2, at 260.

6 *Id.*

7 *Id.*

Parisian violinists, they [Kreutzer and his brother] are the most cultivated," and of Rodolphe, Beethoven said that "I prefer his modesty and natural behaviour to *all the exterior* without *any interior*, which is characteristic of most virtuosos."[8]

Kreutzer broke his arm while on holiday in 1810, bringing his solo career to an end.[9] He continued to play in ensembles and to compose and teach, although his compositions began to fall from favor. His health began to decline in 1826, and he died in Geneva in 1831.[10]

Impressive though the praise from Beethoven is, it was another mark of approval from the composer that immortalized Kreutzer's name. It's a short, although complicated, tale. In 1803, the year before he heard Kreutzer, Beethoven met another violin virtuoso: George Polgreen Bridgetower.[11] Bridgetower was a fascinating man, the son of an African father and European mother who was born in Poland, perhaps in 1779.[12] He made his debut as a soloist at the age of nine in Paris in 1789,[13] and quickly became a prominent musician in Britain, becoming "the Prince of Wales's leading violinist at the Brighton Pavilion."[14]

As with Kreutzer, Bridgetower travelled and played throughout Europe, and in 1803 he played in Vienna where he met Beethoven.[15] Beethoven was so impressed by Bridgetower's playing that he took two movements of a violin sonata he had started work on earlier in the year, added a previously composed movement as the third movement, and performed the three-movement sonata with Bridgetower at a concert on May 24. The piece was so new that there was no time to have the violin part for the second movement copied before the performance, and Bridgetower played it directly from Beethoven's manuscript. Despite the difficulty Bridgetower must have had in reading Beethoven's notoriously poor writing, the *Grove Dictionary* entry for Bridgetower notes that the work was "a brilliant success" and that "the audience unanimously call[ed] for an encore of the second movement," something that must have been a distinctly mixed blessing for the manuscript-reading Bridgetower.[16]

8 *Id.* Playing well enough for Beethoven to praise you is a noteworthy event and is the reason for my qualification of Kreutzer's "reasonably" uneventful life.

9 *Id.*

10 *Id.*

11 George Grove, *Bridgetower, George, in* 3 NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS, *supra* note 2, at 282.

12 *Id.* at 281.

13 *Id.* There's no evidence that Kreutzer heard him at this concert, but it would be remarkable if he had not.

14 *Id.* at 282.

15 *Id.*

16 *Id.*

Beethoven praised Bridgetower's playing as both a soloist and a quartet player, and it seems certain that he intended to dedicate the sonata to him.[17] But the two men quarreled—Grove speculates that the dispute was over a woman[18]—and Beethoven dedicated the work instead to Rodolphe Kreutzer when it was published in 1805 as his opus 47.[19] Kreutzer apparently knew about none of this, and likely had not even played the sonata—indeed he probably didn't even know of its existence—before it was published. But so it was that his name became indelibly linked to the "Kreutzer" sonata, arguably the greatest violin sonata composed.[20]

Kreutzer's unwitting association with Beethoven carried even wider implications. At the end of the nineteenth century, Leo Tolstoy published a novella called *The Kreutzer Sonata*, in which a character, Pozdnischeff, narrates the shocking tale of his marriage.[21] A violinist, a former friend of Pozdnischeff who reintroduces himself to him, meets Pozdnischeff's wife, an amateur pianist, and together they play the Beethoven sonata. Pozdnischeff, who has a tentative grip on sanity, leaves on a work trip and, returning home early after, finds his wife and the violinist sitting together. Nothing in the text, other than Pozdnischeff's imagination, suggests that anything untoward has happened between the two, but in a jealous rage, and believing that the passionate nature of the performance indicates a physical relationship between the two, Pozdnischeff stabs his wife to death.[22] The novella was banned in Russia by the censor, and in 1890 the United States Post Office barred the mailing of newspapers containing its serialization.[23] Commenting on all of this, Theodore Roosevelt called Tolstoy a "sexual moral pervert."[24]

The novella has been turned into numerous plays and other theatre works, and has been filmed "well over a dozen times."[25] It also inspired a

17 *Id.*

18 The *Grove* entry, written in a different time, actually speculates that the dispute was over a "girl." *Id.*

19 Grove, *supra* note 11, at 282.

20 Bridgetower's name, by contrast, has dropped almost completely from history. He returned to England for a while after his time in Vienna, then lived abroad in Rome and Paris. He died in London in 1860. *Id.* at 281–82.

21 LEO TOLSTOY, *The Kreutzer Sonata*, *in* THE KREUTZER SONATA AND OTHER SHORT STORIES (Dover Publ'ns, Inc. 1993).

22 *Id.* Pozdnischeff says that he "was on the point of running out in pursuit of him, when it occurred to me that it would be ridiculous to rush off in my stockings after the lover of my wife, and I did not wish to be ridiculous, but to be terrible." *Id.* at 134.

23 *The Kreutzer Sonata*, WIKIPEDIA (last modified Mar. 21, 2018, 5:34 AM), https://en.wikipedia.org/wiki/The_Kreutzer_Sonata.

24 *Id.* The ban was reversed by the courts. *Id.* One can only assume that all the fuss, and (from a marketing perspective) the dream quote from Theodore Roosevelt, did wonders for the novella's sales when it was finally published.

25 *Id.*

famous painting by René François Xavier Prinet.[26] Most importantly for musicians, though, the novella inspired Leoš Janáček's first string quartet, written in 1923.[27] The quartet makes one heavily disguised reference to the Beethoven sonata,[28] but its inspiration is the novella, and its musical narrative is a representation of the emotional state of Pozdnischeff's wife throughout the tale.[29]

II. The Kreutzer Studies

All told, this is a lot of immortality for a very obscure French violinist. And yet while all accomplished violinists associate Kreutzer's name with both the sonata and the quartet, almost all violinists who have played for more than a couple of years[30] associate his name more directly with his 42 Studies.

Moving from the Kreutzer sonata to the Kreutzer studies is making the musical trip from the sublime to the ridiculous: the sonata is one of the highpoints in Western culture and the studies are barely music at all. But while some violin studies, like those by Paganini,[31] make claims to artistic merit, the Kreutzer studies are purely functional, and they perform their limited function brilliantly. Each study explores a distinct element of violin technique and allows the violinist to practice and refine that element without worrying about musical expressivity. And of the 42 studies, none does its job more effectively than the second study.

The key to the study's value to violinists can be seen in the incipits that appear before the study in the first edition of the studies: fifteen versions of the first measure of the exercise, each with different bowings.[32]

26 *Kreutzer Sonata*, FINEARTAMERICA.COM (uploaded Mar. 19, 2015), https://fineartamerica.com/featured/kreutzer-sonata-rene-francois-xavier-prinet.html. An impressive painting it might be, but Prinet's violinist is holding his bow in a way that would be unthinkable for anyone capable of playing the Beethoven sonata. It's also impressive, although hardly believable, that the pianist appears to be gamely attempting to continue to play, despite what must be one of the most uncomfortable kisses in art. And it's worth noting that the kiss exists only in the narrator's imagination: the novella makes clear that the narrator has no physical evidence of the imagined affair.

27 IAN HORSBRUGH, LEOŠ JANÁČEK: THE FIELD THAT PROSPERED 171 (1981).

28 *Id.* at 172–74. It is clear, though, that it was the Tolstoy story, not Beethoven's music, that inspired Janáček. Beethoven, he admitted, "left me cold." *Id.* at 174.

29 *Id.* at 172.

30 The exception might be students who came to the violin through the Suzuki method. They likely encountered the Kreutzer studies a little later.

31 N. PAGANINI, 24 CAPRICES POUR LE VIOLON, OPUS 1 (1818), *available at* http://ks.imslp.info/files/imglnks/usimg/7/7d/IMSLP363858-PMLP03645-paganini_24_caprices_op1_breitkopf.pdf. Someone has loaded a recording of Itzhak Perlman playing them. *See* javiergme, *Niccolo Paganini – 24 Caprices Op. 1*, YOUTUBE (Nov. 20, 2012), https://www.youtube.com/watch?v=x8j1x3pTOyo. If you don't know the caprices, but do know something about the violin, there is a startling surprise awaiting you.

32 *See* KREUTZER, *supra*, note 2.

In my copy of the studies, edited by the distinguished violin teacher Ivan Galamian and first published in 1963, the fifteen incipits have increased to sixty-six, with an additional fifteen different ways of playing the exercise.[33] In fact, this study is a complete laboratory for bowing, allowing the violinist a place to work on every conceivable style of bow stroke and configuration.[34] The notes themselves are simple and easily remembered, allowing the violinist to concentrate completely on bowings that range from simple to complicated.

A violinist studying to be a professional instrumentalist practices between four and six hours a day.[35] Although practice regimens vary, a reasonable schedule would be to spend the first hour practicing scales,[36] a second hour working on studies like the Kreutzer studies,[37] another hour working on a Bach solo sonata or partita or an Ysaÿe[38] sonata, and then two hours working on the piece, or pieces, currently set by the student's teacher. Later in life, the violinist might eliminate (or curtail) the amount

33 *Id.*

34 This is not the place for a detailed discussion of the subtle art of bowing. In short, a violin's sound is typically activated by drawing a bow, usually made primarily of pernambuco wood and horsehair, over the violin's four strings. There are many different ways of drawing the bow across the strings, some requiring long and full bowstrokes, some requiring short strokes with the bow bouncing from the string, some requiring one note per bow, some requiring multiple notes. Violinists have to learn and practice all of these permutations and be able to deploy them almost instinctively when the music or a conductor requires them.

35 Itzhak Perlman, who should know, is emphatic that violinists should practice no more than five hours a day, made up of fifty minutes of practice and ten minutes of rest each hour. ITZHAK PERLMAN, *Itzhak on Practicing*, YOUTUBE (June 28, 2010), https://www.youtube.com/watch?v=h3xEHigWShM. But the amount of time devoted to practice each day is in addition to lessons, classes, rehearsals for orchestras and chamber groups, homework, and day-to-day activities. Lawyers are not the only ones who work long, hard hours.

36 Non-musicians might imagine that scales are simple, transitional, exercises that beginners work on but that are discarded once an instrumentalist gains some proficiency on the instrument. But it is not so. Scales are the foundation of any solid technique, and musicians—violinists, anyway—practice them throughout their careers. Indeed, the word "scale," and the simple pattern of notes learned by the beginning student, fails to conjure up the complexity of the scales worked on by advanced players. The entry for the C major scale in Carl Flesch's Scale System, the scale Bible for violinists, is five pages long, and includes multiple octave scales, arpeggios, chromatic scales, scales in thirds, octaves, and tenths, and scales in single and double harmonics. CARL FLESCH, SCALE SYSTEM: SCALE EXERCISES IN ALL MAJOR AND MINOR KEYS FOR DAILY STUDY (Max Rostal ed., 1987). For a rare glimpse into the lesson room, with an accomplished violinist playing a scale for a teacher, see, e.g., kamngaty, *Heifetz Masterclass 2 – Violin*, YOUTUBE (Mar. 17, 2011), https://www.youtube.com/watch?v=d3pLwVhm7xY. In the first lesson, before she plays anything else, Carol Hodgkins—displaying courage even Mr. Heifetz comments on—plays a G# minor scale for Jascha Heifetz, who taught violin students at the University of Southern California, and the other students in his class. This is not the full sequence of G# minor scales, but it gives you a sense of what violinists at this level can be expected to do at the drop of a hat.

37 It's noteworthy that in both the Heifetz lessons, *id.*, and the companion YouTube clip, kamngaty, *Heifetz Masterclass 1 – Violin*, YOUTUBE (Mar. 17, 2011), https://www.youtube.com/watch?v=szXaTRE3tL0, the students come with studies prepared, either a couple of studies by Kreutzer or some by Jakob Dont, an Austrian teacher and pedagogue. *Jakob Dont*, WIKIPEDIA (last modified Sept. 28, 2016, 6:01 AM), https://en.wikipedia.org/wiki/Jakob_Dont. These are students who are on the brink of substantial careers, and their virtuosity—especially while playing in front of Mr. Heifetz—is staggering, but neither he nor they shun the simple Kreutzer exercises.

38 Eugène Ysaÿe was a Belgian violinist and composer. *Eugène Ysaÿe*, WIKIPEDIA (last modified Dec. 9, 2017, 7:41 AM), https://en.wikipedia.org/wiki/Eugène_Ysaÿe. His solo sonatas for violin are, with the unaccompanied Bach sonatas and partitas, the pinnacle of music for the instrument that combine virtuosity with artistry.

of time spent working on Bach and might spend less time on the solo repertoire, but would likely spend at least an hour on scales and exercises. Just as with athletes, time spent stretching and concentrating on technical exercises is vital to keeping the body toned and conditioned and ready to perform at peak efficiency.

The same should be true of legal writers, but most take a very different approach. They work on legal writing during the intense first year of law school and, if they are fortunate, during at least one more semester after the first year. After graduation, though, most lawyers don't practice writing technique, but rather write the documents required of them by work. In other words, they perform writing, but don't practice it.[39]

Given the time demands placed on lawyers, this is hardly surprising. With minimum billable expectations that require them to be productive for large portions of the day, seven days a week, it is completely understandable that lawyers feel they have no time left to devote to writing exercises, even if they had access to such exercises. Just coping with the flood of words they are expected to produce on a daily, weekly, monthly, and yearly schedule likely seems more than enough.

And yet. Exercises can be helpful, especially for those who had a limited amount of time in school to think critically about their writing, and who have learned post-graduation that writing continues to be a challenging activity. It might be simple enough to produce uncomplicated documents that place few creative or technical demands on the writer, but anyone who seeks to persuade, or attempts to summarize complex information in simple, well-structured, and easily read portions knows that writing is hard no matter how much writing training one has had and is harder still for those whose training is limited. And time spent working on writing now might be a time-saver in the future, when a more refined technique produces "better" writing (however "better" is defined) faster than before.

These exercises are intended to help the legal writer explore ways to improve the writer's technique. They are offered in the spirit of Kreutzer's famous studies, if not with the same sureness of touch and certainty of outcome: Kreutzer was, after all, a master of his art and his exercises have never been out of the violinist's studio since they were first published in the late eighteenth century. But if they act as a spur to legal writers to

39 Some might, if they have the chance, attend continuing-legal-education sessions that concentrate on legal writing. But these are, at best, a few hours each year, and while they are undoubtedly helpful, they cannot substitute for continuous writing exercise.

spend just a few minutes a day[40] practicing, not performing, their writing, then they will have accomplished all that I hope for them.

III. Suggestions

These are suggestions, not rules. There are no rules. This is your practice time and you should structure it, and the exercises you work on, as you see fit. These are just suggestions for ways in which you might proceed.

In truth, when it comes to writing, and especially *your* writing, be highly suspicious of anyone who says there are rules you have to follow. As it turns out, almost none of the writing "rules" you were likely taught in middle school, high school, college, or law school are, in fact, rules. They're likely conventions, suggestions, or practices that have been codified down the years and are taught as rules to make their transmission simpler for the transmitter. Statements like "never begin a sentence with a conjunction," "never finish a sentence with a preposition," or "never ask a rhetorical question in a piece of formal writing" are not rules of the English language. Rather, they're suggestions—and sometimes not particularly good ones—about what people thought was good writing. It's difficult to break even quasi-rules: our training tells us to do everything we've been taught about English and there's always the concern that our readers might not know that the rules aren't rules. But sometimes the demands of flow and word order require a walk on the grammatical wild side, and starting a sentence with "but" really isn't that egregious, is it?

A. Non-Legal Writing

None of these exercises describes writing a legal document or a document in which the law plays any role. This might seem odd: we're all lawyers, after all, and writing about the law is what we do every day. But that's why I'd like you to step away from the law when you work on these exercises. The idea is to give you an opportunity to concentrate on writing for a few minutes, not on being a legal writer. It's up to you, of course, but I'd suggest stepping completely away from the law when you work on these exercises, and try to concentrate just on your writing. I think—hope—that you'll find your legal writing improves when you take a short, focused, break from it every so often.

40 My suggestion is that legal writers spend a maximum of fifteen minutes a day on these exercises, or similar ones. Certainly nothing remotely like the hour or more violinists work on their exercises.

B. Typography

Although you shouldn't make typographical changes in your document while you write, in order to focus just on writing technique, once the documents are written and you're reviewing them later, try reading the document in different typefaces: Times New Roman, Century Schoolbook, Goudy Old Style, Calibri, and so on.[41] Read the document on your computer screen and also printed out. What differences do you note? Is a document easier to read in one font and less easy in another? If you find the reading experience to be different, do the differences surprise you? Might you consider changing the font and size you use to present your work to others?[42]

C. Practice for Short Periods

You should work on an exercise for only a short amount of time: no fewer than ten minutes but no more than twenty. Fifteen minutes is the perfect amount of time. In a lawyer's crowded schedule, it's difficult to find any time to do anything other than work, but you might find fifteen minutes, ideally at the start of the day before everything else is crowding your mind, for work on a writing exercise. If you view it as a stretching regimen before you begin the activity of the day, it might even save you some time by getting the writing muscles limber and ready for the day's activities.

D. Try to Exercise Daily

Just as with any training regimen, writing exercises are most effective when you work on them regularly and often: once a day is the best plan. That said, life intrudes and sometimes it's not possible to maintain a schedule that incorporates fifteen minutes a day for writing exercises. That's not a problem, as long as working on the exercises doesn't become sporadic and occasional. As with all types of training, infrequent activity will not produce positive results.

41 There is a body of research on typography and legal writing. *See, e.g.*, MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS (2d ed., 2015); Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ALWD 87 (2010); Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).

42 Of course, to the extent a particular typeface or size is mandated by a court, lawyers have no choice but to follow the rules for documents filed in that court. But exercises like these—studio practice instead of performance writing—aren't bound by such restrictions and you can use them to reveal several possibly unsuspected possibilities in your documents.

E. Change Your Writing Medium

You shouldn't do this all the time, but occasionally consider changing your writing medium: if you write for work typing at a keyboard, consider writing with a pen and paper, and vice versa. You might feel uncomfortable at first, but stick with it for a few sessions and reflect on whether the change in medium has affected the way you write. Is your writing more fluent? Less? Do you connect more readily with your vocabulary or do you find the words come harder? Do you edit your work as you write more often using one medium or the other? Do you notice any differences in your style of writing when using an unfamiliar medium? If not, then you are probably a fluent writer and the medium makes no difference to that fluency. It can happen, though, that one medium—for whatever reason—is more conducive to a creative activity like writing. If that's pen and paper for you, and you feel that time pressure won't allow you to handwrite your drafts, consider starting your work in pen and transferring over to the computer once things are well underway. The loss of time will likely be minimal and the increase in quality of work might be worth the investment of time.

F. Change Your Writing Conditions

As with the writing medium, consider making a change to your usual writing conditions. If you write with music playing in the background, for example, consider writing in silence, or vice versa. If you always write in one place in a room, is it possible for you to move somewhere else for fifteen minutes? Being conscious about your writing regimen, rather than reflexive, can be instructive, and at worst it does no harm. As always, when you make a change about anything to do with how, what, where, or when you write, reflect afterwards on the results of that change, consider whether those changes improved the quality of your writing and, if they did, think about how you might make those changes when you write professionally. The goal of this entire exercise, after all, is to make you a better legal writer.

G. Identify Your Writing Routine

I've danced around this with the two previous suggestions, so let's just say it explicitly: most writers have a writing routine and you should identify yours. If you don't have a conscious routine, you probably have a subconscious one, so reflect on what it is you do when you write, especially when you write most effectively, and think about how to recreate those conditions whenever you're about to write.

Some novelists have complex routines. Kent Haruf literally pulls a stocking cap down over his eyes and types the first draft of his work completely blind, so as not to be distracted by anything from the outside world.[43] Mary Gordon writes with a black enamel, gold trimmed, Waterman pen, using Waterman's black ink.[44] The notebook she uses depends on the type of writing she is doing.[45] There are countless other examples: it can be a mildly diverting parlor game, if you know enough people who think the same way, to identify the writing routine and have the guests guess the writer's identity.

The point of the writing routine, of course, is to provide a trigger to creativity, a signal to the writer's brain that it has now moved into writing mode and is expected to produce words that fit, one after the other, into well-crafted sentences and paragraphs. Equally obvious is that the legal writer has no opportunity to engage in any of this. But legal writers can have triggers also, and identifying them can be helpful in making writing a conscious activity rather than a subconscious result of outside necessity: the memorandum to support a summary judgment motion has to be written today in order to go to the client for review before filing in a few days, a client's will has to be drafted and finalized by the end of the week, and so on. When their calendars demand that a document be written, lawyers—typically—sit at their desks and write it. But what if you write better standing (something you might discover when you explore changes to your writing medium)? Or what if a notepad and a pen, while sitting in a soft and comfortable chair, make you more productive and creative than sitting hunched over a keyboard at your desk?

You might have very little leeway on developing a writing routine in the middle of a busy law practice, but identifying what things you do regularly that trigger the writer in you to produce written work might be helpful information. At best, it might prompt you to buy (or better still, get your employer to buy you) a standing desk. And at worst, thinking about your writing routine will make you feel more like a writer, which you certainly are.

H. Save Your Work, But Don't Show It to Anyone. At First.

When you work on these exercises your time will be limited, and you will likely spend the complete amount of time you've allocated to the

43 Kent Haruf, *To See Your Story Clearly, Start by Pulling the Wool over Your Own Eyes, in* WRITERS ON WRITING: COLLECTED ESSAYS FROM THE NEW YORK TIMES 87 (2001).

44 Mary Gordon, *Putting Pen to Paper, but Not Just Any Pen or Just Any Paper*, WRITERS ON WRITING: COLLECTED ESSAYS FROM THE NEW YORK TIMES, at 79.

45 *Id.* at 80–81.

activity writing rather than reviewing. So once you're done, put the completed exercise (or unfinished exercise, if you plan to work on it again later) in a physical or electronic file with an innocuous name and move on with your day. At some point soon after you're done, though—say Friday, after four days spent writing for fifteen minutes—spend the session reviewing your work rather than writing another exercise. Reflect on what went well and what went less well, and consider what lessons you learned from working on this exercise. At first, those might not amount to much more than a general sense that you're happy, or not happy, with your writing skills. If you persevere, though, you might start to see trends in your writing that encourage or discourage you, and you might recognize those trends in your professional work as well. If you find things you like, consider how to reinforce and enhance them, and if you find things you don't like, consider how to recognize and eliminate them. Improvement in writing skill is incremental at best, and, like violinists, writers work on their techniques throughout their professional lives.

Over time, you might consider joining with some other lawyers who want to work on their writing as well. Forming a writers' circle can be hazardous: we're rarely more vulnerable than we are when we're submitting something we've written for public review. But if all members of the group handle the review appropriately, there are few better ways to get an honest, helpful, review of our work. Hierarchy is a problem in such a group, of course. It is impossible for an associate at a law firm to critique the writing of a partner at the same firm without fearing some form of retribution, no matter how accurate or well-meaning that critique might be. There are ways to preserve the anonymity of both the writer and the reviewer, of course, but it might be safer and more productive for all if lawyers work with other lawyers who are outside of their professional control. Needless to say, no work generated for professional purposes should ever be shared outside the confines of an office, lest questions of confidentiality and work product arise, another reason to practice on subjects unrelated to the law.

I. Be Honest, But Be Kind

Regardless of whether you're reviewing your own work or that of someone else, you have two guiding principles: be honest about the work and its good and bad points, and be kind to the writer, whether yourself or someone else. Professional writers are well known for the savagery of their critiques, and for them that might be an effective form of learning. For lawyers, though, the honesty of the critique is enough and if the criticism

is negative and destructive, rather than positive and helpful, the value of the exercise is gone.

That is just as true when the criticism is directed internally, about our own work. It is all too easy to become distressed with the flaws one perceives in one's own writing and to allow that self-criticism to develop into a form of inertia, making it almost impossible for us to put any words on paper. That is not the purpose of these exercises, and you should guard against the possibility of that tendency. If you find yourself feeling negative about your review of these exercises rather than positive, stop immediately and don't engage in the review of your work for a while. And even at the best of times, avoid psychological triggers of negative criticism like using red pen to mark up your work.[46]

J. Make Up Your Own Exercises

The most helpful exercise for your writing is one that is designed to work on the writing weaknesses you perceive in your own work. So since you're the one reviewing your work, it's reasonable to assume that you're the one best situated to identify those weaknesses and to suggest ways to work on them. That means that the best exercises to improve your writing are the ones you develop.

The danger, of course, is that you're too kind to yourself and you give yourself exercises that play to your strengths, not your weaknesses. Try to avoid that and to be honest with yourself about where your weaknesses lie—narrative flow, reader engagement, manipulation of voice, overuse of adverbs or some other part of speech, and so on—and work on exercises designed to cure you of that problem. You might find it easier to adapt some of the following exercises for that purpose, but it's likely that an exercise you design yourself will have more meaning for you and you'll work more effectively on that exercise than on one of mine.

K. Don't Worry About Performance

This is implicit in most of the other suggestions, but it should be explicit. Performance, as far as these exercises are concerned, is irrelevant. No violinist except one who consciously intends to bore an audience to tears will ever program a Kreutzer exercise: they're almost completely devoid of musical merit and were never intended to be heard outside of

46 Actually, it would be good if you could get away from using red to markup anyone's work, even the lowest associate or law clerk who submits to you. The red pen is a familiar symbol of the editor who makes negative changes in work, and is unhelpful as a learning aid. And because you want that associate or law clerk to improve, and to not turn in work that is as flawed in the future, using a more neutral color like blue or green will likely make it easier for those whose work you review to learn from your comments.

the practice or lesson room. They're exercises that help develop technique and that, in turn, makes the sonatas and concertos the violinist *will* program sound better and more secure to the audience.

The same principle applies to these exercises. They're intended to be unseen by anyone other than yourself and anyone else you designate as a reader for the specific purpose of identifying and improving weaknesses in your writing. If you revise what you write enough, and if it has enough skill and relevance to fill a particular need, you might choose to expand your readership of a particular exercise, but by that point it has become something different. When you work on these exercises, the point of them is to be exercises, not art.

IV. Exercises

Here are ten proposed exercises that you can do to help you fine-tune your writing technique. As you go through them, you'll see that in addition to the exercise itself, and in the tradition of Kreutzer number two, I've included some alternative ways of writing most of these exercises so you can work on them in a number of different ways to explore different facets of your writing. I've also included some suggestions for things you might want to reflect on after you've finished the exercise. These are just my suggestions, written without knowing you or your writing style. You should discard my thoughts and substitute your own ideas for them in order to get a better idea of where you think your writing is strong and where it's weak.

A. Freewrite

Freewrite for four minutes without any deliberation or planning. Stop for a minute, then write for another four minutes. For this second part of the exercise, either begin again without any planning or forethought, or consider a topic about which you would like to write and then write about that.

Freewriting is one of the most straightforward and effective exercises to stretch out writing muscles and prepare you for a day's writing. The only guiding principle of freewriting is that once you start, you shouldn't stop—for even a second—until the exercise time is up. So if you write at a keyboard, your fingers should never stop typing letters, and if you handwrite, your pen should never leave the page. Don't stop to correct, re-read to make sure a passage makes sense, or worry about grammatical niceties. In fact, one of the things to do when you go back and look at freewriting exercises again is to reflect on how technically accurate your

writing is when it's unconscious. Do you find that it's more accurate than it is when you write more deliberately? Or less accurate? Or about the same? How coherent is your freewriting? What changes do you notice? Do you use more personal pronouns, passive voice, adverbs, or other grammatical or punctuation elements more, less, or about the same? Think back on the day you worked on this exercise. Was your writing more fluent, less fluent, or did you notice no difference in your writing fluency?

B. Biography

Take an event from your life: it doesn't matter if it's a recent event or something from long ago. As you write about it, use every technique at your disposal—word choice, word placement, punctuation, length of sentence, and so on—to take your reader through this event as slowly as possible. Next day, write about the same event, and include all the details you included in the previous exercise, but this time use your writing technique to move the reader through the event as quickly as possible: don't eliminate important facts, but use your writing skills to move the reader along.

This exercise is designed to cause you to reflect on the various elements of writing technique at your disposal and how you can deploy them to control the reader during the reading of what you write. The content isn't as important as the way you write about the event in your life, and if you don't want to write about your life, pick another topic that you know well enough that you don't have to stop and think about the details but rather can focus on the writing technique.

As legal writers, we're often told that we should keep our sentences short and to make everything as tight and terse as possible. And that's often, and even usually, good advice. But it's not always true that short everything is best, and in any case, we should have enough vocabulary and technique at our disposal that we can slow a reader down or speed a reader up whenever we decide: the reader is under our control if we can assert that control effectively enough. So we need to practice. In this exercise, you should take the chance to explore your vocabulary, finding synonyms that slow down a sentence and speed it up. And we should have enough command over punctuation that we can shorten or lengthen a sentence at will, and we should have the sensitivity to know when a shorter sentence is preferable to a long one, and vice versa. As you review what you wrote for this exercise, reflect on whether your technique draws attention to itself (Are you using words that are correct, but would not be appropriate for a legal document? Do your attempts to lengthen or shorten your narrative change your voice so significantly that they convey

a different person than you would prefer?) or whether it retreats into the background.

C. Something You Know

Write a description of something you know how to do well. That might be hitting a tennis ball or golf ball or baseball, making an omelet, stripping and making a bed, playing the violin, and so on. Try to go through every step in the process, from the preparation necessary to perform the action to everything you need to do, in order, as you perform the action.

As you reflect on this exercise later, did you do a good job of getting everything in order? Did you leave something out? Go through the action in your mind and compare it to what you wrote. How did you do? Can you identify any rituals, or habitual behaviors, you take every time you perform this action (bouncing the tennis ball before service, a pre-shot routine you engage in for golf, getting the ingredients out of the fridge in a particular order before making the omelet, and so on)? Next day, try describing the same activity, only backwards: start with the ace and work backwards to bouncing the tennis ball, and so on. This is a good way to test how securely you have all the steps in an action organized in your mind. It's a technique that works well when organizing the facts section of a complex brief.

D. Synopsis

Write a synopsis of a book or movie you know well. Try not to use any language from the work you're synopsizing. If you try this exercise and it feels too easy for you, try it again another day but this time omit any mention of any character, location, or detail that would allow someone reading your synopsis to identify the work you chose (if you need names or locations, substitute your own for those in the original).

As you reflect on this exercise, consider how easy it was for you to recall the details of the work you chose and how successful you were in generating a synopsis. As you think about it now, did you take account of every significant plot point or did you omit something that now strikes you as important? If so, why do you think you omitted it? If you didn't omit anything, what was it about the work that you chose, do you think, that made its narrative so compelling that you remembered it so well? How successful is your narrative? If you attempted the revised version of this exercise, how successful do you think you were? Would someone who knows the work you chose recognize it from your synopsis? Consider your word choice. Did it capture the mood and tone of the work you chose or

have you so obscured the original that you've changed the nature of the original? Of the two synopses you wrote, what are the differences between the two? Is one longer than the other? What differences do you see in word choice or sentence construction? Which is better? Why?

E. Write a Poem

Write a poem.[47] Any form you chose is fine, although the simple limerick is often a good starting point. If you follow the convention of limericks being bawdy, probably best to keep your work to yourself. Here are a few very rough meter and rhyme scheme options:

Limerick	four lines: a (nine syllables), a, b (five or six syllables), b, a[48]
Clerihew	two non-metrical couplets, with the first line of the first couplet containing only a proper name[49]
Blank Verse	unrhymed iambic pentameter[50]
Haiku	three lines of five, seven, and five syllables[51]

Poems can be daunting. They carry all sorts of associations of high art, dense and impenetrable language, and the general confusion associated with high school. You should free yourself from all of those concerns. What you're looking to do here is to write a technical exercise,

47 If you're thinking of working on this exercise, it might be helpful to find a book on poetry form and construction to read through before you start. My personal favorite, and the one I'll refer to here, is STEPHEN FRY, THE ODE LESS TRAVELLED: UNLOCKING THE POET WITHIN (Gotham Books 2007). It's a practical but light-hearted guide to writing poetry that has effective examples of the principal poetic forms. One caution though: if you are not a fan of vulgar language or content, do not read the examples Fry offers for the limerick. They go far beyond the standard definition of "bawdy."

48 Limericks have the reputation as being bawdy in content and vocabulary, but they don't have to be. An example: A law school's curricular dance card/is packed full with doctrine that's so hard/but for real brain biting/just try legal writing/thereafter no law course will seem hard. Limericks have never been confused for high art.

49 FRY, *supra* note 47, at 263. An odd form, named for Edmund Clerihew Bentley. The idea of the Clerihew is that it summarizes some characteristic or detail of a person. A famous one: "Christopher Wren/Said 'I am going to dine with some men,/' If anyone calls/Say I am designing St. Paul's.'" *Id.* at 264. As Fry notes, metrical clumsiness is to be desired in a clerihew, and "it is considered extremely bad form for a clerihew to scan." *Id.* This makes it a perfect form for an exercise like this. The person described in the clerihew need not be famous, making co-workers good subjects (as long as you show your work to no one, although remember that clerihews need not be critical). An example from my time in practice: Charles Goodell/was as smart as hell/as a lawyer, he never would fall/when his clients stood tall. The genesis of this was a vigorous debate between myself and a name partner in the firm where I worked. He wanted to use the image of our client standing tall and taking responsibility for its actions. I liked the idea, but thought the image was too redolent of Gary Cooper and John Wayne, and wouldn't be effective with contemporary juries. Mr. Goodell was absolutely correct, and I was absolutely wrong.

50 An iamb is a metrical foot, or unit, containing an unaccented syllable followed by an accented syllable. FRY, *supra* note 47, at 10–11. A metrical unit of five iambs in a line is iambic pentameter. *Id.* at 11. Working on iambic pentameter allows you to release your inner Shakespeare, but the form doesn't require genius in order to function. A short example of blank verse, proving that art is not the goal here: A life in law rewards the soul and mind/we work to help our clients meet their goals. Remember that blank verse is unrhymed.

51 *Id.* at 274. As Fry notes, there's more to the haiku than the syllable count. In the classical form, a season of the year should be, if not mentioned, than at least alluded to, and there should be "[a] reverence for life and the natural world." *Id.* An example from life in Syracuse: Precipitation./Cold, white blanket shows signs of/fresh snowblower tracks.

not to liberate some soulful inner yearning. The four poetic forms I've suggested—and there are many, many more to explore if you enjoy this exercise—have tight requirements of length and rhyme, and the key to achieving the purpose of this exercise is to meet those technical requirements with language that makes sense: you can't just pick a word because it rhymes, it has to be a word that connects logically to the other words in the poem. Because of that, this exercise might take longer than the time you've set aside to do these exercises. That's fine. Set it aside when your time is up and come back to it tomorrow, or when you next plan to work on these exercises.

There's actually a benefit to doing that. Gauge how quickly and easily you come back into the exercise, and consider how much your brain has been thinking about this exercise subconsciously since you stopped. It's often the case that it's better to stop a piece of writing a few words, sentences, or even paragraphs before you have to, because it makes re-entry into the document easier: you know what you were going to write, so you can write those words with little effort, and that can prime the pump sufficiently that continuing into new material is easier than it otherwise would have been.

As you write, consider the ease or difficulty you're having following the technical requirements of the poetic form you've chosen. Are you surprised by how easy or difficult this is? Are you using a dictionary (regular or rhyming) or thesaurus to help you? Don't feel bad if you are using one: many professionals use these tools to help them. If you're not using a dictionary or thesaurus, why not? If you are using one, how helpful do you find it? Once you've finished one exercise, put it away for a few weeks and then review it. Can you improve what you've written? What changes would improve it, and why? If you feel it can't be improved, try changing a few words anyway and consider why you believe the changes don't improve the exercise. Try another poem exercise and see if this one comes easier. If it does, why do you think that might be? If it is not easier, why do you think that is? Can you identify any emotional or physical responses you're feeling to writing this exercise? If so, what are they? Why do you think you're experiencing these responses? If you feel no different, consider whether this is usually your state when you write during your professional life or whether something is different when you work on this exercise.

F. Art

Write about your favorite piece of music or painting, describing what it is about the work of art that engages you and how that engagement affects you. In your description, avoid adverbs or adjectives.

The challenge here, of course, is to write objectively about something that is inherently subjective and emotional in nature. As you review what you've written, do you find your language disengaged or distant? What is it about your writing that makes you react this way? If you do not have this reaction, what about your writing allowed you to avoid that danger? Were the restriction on adverbs and adjectives to be lifted, how would that affect your writing? Draft a version of your exercise with no restrictions and compare the two versions. Which do you find more effective? Why? In either version, do you believe you have captured the emotional connection you feel with the work of art? As you review your language, how much technical language are you using? Is this more technical language than you would expect, or is your writing what you would expect? Try writing about music or painting with which you are less familiar or that you actively dislike. Does your approach to language change?

G. Relationship

Write about your first long-term romantic (not physical: this isn't that kind of writing exercise) relationship. Avoid sentimentality, and write as objectively as possible. Next day, write about the same relationship but from your romantic partner's perspective. The day after, write about your relationship from your parent's perspective. Next, write about the relationship from the perspective of your partner's parents. And for the last day of this set of exercises, write about your relationship from the perspective of your best friend.

The point here is to find a way to use language to convey intense emotions that is not itself emotional, and to enhance the control you have over voice and tone while not sacrificing the ability to involve your reader in the narrative. The *Rashomon*-like approach[52] aids in helping you locate your narrative in different perspectives, which helps you to practice an empathetic approach to writing and allows you to find the strongest narrative pull through the story. Another way of approaching this exercise would be to write about the relationship from various time perspectives: the first time you and your partner met, the last time you met, starting at the end of the relationship (assuming it ended) and working back through

52 *Rashomon* is a 1950 movie, directed by Akiro Kurosawa and starring, among others, Toshiro Mifune, in which the various characters recount "subjective, alternative, self-serving, and contradictory versions of the same incident." RASHOMON, WIKIPEDIA (last modified Feb. 16, 2018, 3:36 PM), https://en.wikipedia.org/wiki/Rashomon.

time to the beginning, and how the relationship seems to you now—presumably some years after it's over. This allows you to experience writing a narrative in other-than-chronological order, a useful technique to have at your disposal if you want to describe a particular event from a different perspective from that of your opponent in litigation.

As you review your work on this exercise, in all the various forms it took, reflect on which approach seems strongest to you and why. The natural reaction would be to consider the perspective you know best to be the strongest one, so try to overcome that natural instinct and give as objective a review of the exercises as possible. Can you imagine writing a legal document from the perspective of someone other than your client? Would it be helpful to imagine, as you are writing your version of events, how someone else might write about them? Can you predict possible weaknesses in your approach if you put yourself in the other party's shoes and think of the events from that party's perspective?

H. Not "To Be"

Write a description of an event that occurred in the past year without using any of the "to be" verb forms: be, being, been, am, is, is not, are, are not, was, was not, were not, I am, you are, we are, they are, he is, she is, it is, there is, here is, where is, how is, what is, who is, and that is.

This style of writing, known as E-Prime[53]—short for English Prime—can seem austere and surprisingly difficult to accomplish, but it is a valuable technique to have at your disposal. For one thing, one almost cannot write in the passive voice this way, and E-Prime also promotes a clean, clear style of prose that is particularly appropriate in legal writing. This style also encourages shorter sentences with greater connectivity between the sentences to make a stronger narrative thread that runs throughout a document.

As you review your work on this exercise, consider whether your fifteen minutes spent in this style were completely successful. Were you able to eliminate all forms of the "to be" verb, except perhaps for quotes, or did a few examples of the verb creep in? Do you notice the absence of the verb forms? Is your writing noticeably different? If so, what has changed? Do you prefer this style of your writing or would you prefer not to worry about losing "to be" verbs? Can you see a place for this approach to writing in your day-to-day writing or do you think writing this way would be more

53 *E-Prime*, WIKIPEDIA (last modified Mar. 1, 2018, 10:19 PM), https://en.wikipedia.org/wiki/E-Prime. For a description of the application of E-Prime principles to legal writing, see, e.g., Christopher G. Wren, *E-Prime, Briefly: A Lawyer Writes in E-Prime*, MICH. BAR. J., July 2007, at 52, *available at* https://www.michbar.org/file/barjournal/article/documents/pdf4article1187.pdf.

trouble than valuable? Look at the writing of others you have to read during the course of your day. Would their writing be improved by elimination of "to be" verbs? If your writing and arguments will be compared to theirs, would you gain an advantage over them by adopting this style?

I. Voice

Write a letter to a person from history whom you greatly admire.[54] In your letter, explain what it is about them that you admire and why it was that you selected this person. Next day, write a letter to a person from history whom you detest, and in your letter explain what it is about them you so dislike and why it was that you selected this person.

This exercise, of course, is designed to make you more alert to the tone you use in your writing and how you can manipulate that tone. Writers need to have the capacity to sound happy, sad, angry, untroubled, agitated, neutral, and so on without themselves feeling those emotions at the time they write. Indeed, you can be agitated but have your writing appear calm, happy and relaxed but have your writing appear cold and angry, under great stress but have your writing appear carefree: technique liberates your writing from your actual emotional state. So as you review your responses to this exercise, reflect on the tone of your writing and how it differs from one letter to the other. What technical resources did you call upon to write the letter to the person you liked and how, if at all, did they differ from the resources you used to write the negative letter? Do you sound unduly laudatory in the first letter and unreasonably angry in the second letter? Can you write either letter in an entirely objective style? If so, how does your objective writing differ from your subjective writing? Look at the length of your sentences in the two letters, the lengths of the words you use, and your word placement. Can you see differences between the two letters in terms of these technical details or are they both comparable? Is one letter more effective than the other? If so, what is it about that letter that makes it more effective? If both letters are similarly effective, can you make one letter more powerful than the other—either the positive or the negative letter? What changes did you make?

J. Rewriting

Take a passage from a book you admire. Write that passage word-for-word, punctuation mark for punctuation mark, into a document. Analyze

54 You could write a letter to a living person whom you greatly admire as well, but the temptation to actually send it might be great and that would change the way you approach the exercise. Better to stick to someone who can never, no matter the circumstances, read the words you're writing.

what the writer did to create the effect you admired. Next day, rewrite the passage in your own words,[55] but maintaining all the principal narrative twists and turns. Compare the two passages. Try this for several days with different passages from different types of book.

It seems like a cheat, but one of the simplest ways to learn how a writer you admire writes is to copy that writer's writing. Not the writer, but the actual writing. As long as you don't attempt to pass someone else's work off as your own, you're not committing plagiarism. And once you've written the word-for-word passage, and analyzed it for how it creates the effects you like, attempting to reproduce the effects using your own writing style, and then comparing the two passages, gives you an insight into the way writers put vocabulary, grammar, structure, and punctuation together to create a successful passage, whether it be fiction or nonfiction.

As you reflect on both the original passage and your paraphrase of it, look closely at how the original creates its effects and how you've attempted to reproduce them. Why is the original better than yours? Is the original better than yours? Have you learned something about the writer's style that has allowed you to surpass it? If not, why not? Try writing something original, but in the same style as the passage you selected. Can you adapt the techniques you have observed the original writer using to your own work? What techniques work well and what are less effective in your writing? If you work on refining those techniques, does your work improve?

V. Conclusion

Violinists understand that scales, studies, and exercises are all means to the ultimate end of playing the music they love as well as possible. But they are valuable ways of refining and enhancing their technique, and they can work on them in the privacy of the practice room without worrying about letting anyone else hear what they do. They practice slowly[56] and carefully before they start to work on the real music they have to practice that day, and they work on the exercises daily. Over the years, the exercises become intimately familiar, but they retain their value right the way through an instrumentalist's career.

55 "In your own words" is, of course, shorthand for a long-winded discussion about selecting words of your choosing, as opposed to those someone else chose for you, to express an idea or narrative. It is impossible to use this phrase without thinking of the comic genius of George Carlin, who has spoiled this phrase for all time. PAULTRIAL, *George Carlin—In Your Own Words*, YOUTUBE (Feb. 18, 2011), https://www.youtube.com/watch?v=BoJI1p7cHhc. As a bonus, it's one of the few Carlin clips that is watchable in front of your parents and your children. Of course, it's only twenty-nine seconds long. I use it here in full knowledge of the fun George Carlin would have with anyone for writing it and I apologize to his memory.

56 *See, e.g.*, Itzhak Perlman's advice, ITZHAK PERLMAN, *supra* note 35.

Legal writers would be well-advised to adapt a similar approach to their writing. Rather than simply write every day, if they could find a short segment of time to work on technique—without worrying about performance, or how a court or partner or opponent will react to the writing—their writing would slowly but steadily improve as they gained control over their writing technique. The confidence that comes from being able to change one's voice at will, or from knowing that one can guide a reader through a passage slowly or quickly, using the techniques available to all writers, or from being able to switch perspectives to tell a story from the perspective most appropriate for the result one is seeking, is priceless, and being able to write that well is a marketable skill.

It's also not a skill that comes easily or quickly. The very fortunate few will graduate from law school fully formed as writers, but most will require many years of careful work before they reach a point of full technical fluency. But only careful work will help a writer get to that point: simple repetition of performative writing is not enough.

These exercises are an attempt to suggest one possible approach for the legal writer who wants to improve. Many things are missing. I could, for example, have asked you to write a passage and insure that no sexist language or implications intrude. There's no place for sexism in contemporary legal writing, and all legal writers should be sufficiently conscious of their writing that they can eliminate any trace of sexist thought from everything they write. I could also have suggested that you begin a passage of writing half-way through the narrative, filling in whatever is necessary as you go through the rest of the passage. That can be an effective way of getting the reader to engage quickly in the document when used occasionally.[57]

In truth, this article only scratches the surface of writing techniques available to legal writers, and that's all it was ever intended to do. Its real purpose was to stimulate you to think closely about writing—yours and that of others—and to think about how you might take a small portion of your day to improve your writing technique. If you exercise the four fingers, or however many you use, to type as carefully as violinists practice their four finger exercises, you might not make it to Carnegie Hall, but your writing is almost certain to improve.

57 I used a form of this technique at the start of this article, where the first sentence—"For violinists, it's the Kreutzer Exercise number two"—implies a lot more knowledge than I really expected you to have. I hoped you would be sufficiently engaged to stick with me while I filled in the details of who Kreutzer was, what his exercises were for, and why violin technique would be useful for a legal reader to know about. If you're still with me, I have reason to hope I was successful, although it certainly might not have been the writing that got you here.

ESSAY

What Lawyers Can Learn from Edgar Allan Poe

Julie A. Oseid*

> *The brilliance of his finest short stories is nowhere denied, and they were not only brilliant themselves but the cause of brilliance in other men, for he established principles and ideals which have endured into our own time.*[1]

Recently, I had a spine-tingling Edgar Allan Poe sensation, but it wasn't because I was reading one of his suspenseful short stories. Instead, I was reading Poe's critique of Nathaniel Hawthorne's *Twice-Told Tales*.[2] I felt the hairs on the back of my neck standing up because I realized that Poe, by describing the qualities that make a short story effective, was providing excellent advice for lawyers writing persuasive briefs. My professional and personal passions were intersecting, leading to an electrifying recognition that Poe's advice about writing should be shared with lawyers.

Poe named four qualities—brevity, unity, focus, and brilliant style—as critical for short stories. These exact same four qualities are familiar to lawyers because they are just as critical for persuasive briefs. So, my response to Poe's advice was not a thrill of seeing writing advice for the first time, but instead an appreciation that studying these essential

* Julie A. Oseid, Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota. As is always true, several people helped with this essay. Meagan McNevin, thanks for your help finding sources about Edgar Allan Poe. Henry Bishop, thanks for all your help with both the big and little details. Steve Johansen, thanks for inviting me to present at the LWI one-day conference. Thanks to all my colleagues in the Legal Writing discipline for attending my presentations and making helpful suggestions. Thanks to all my editors from *Legal Communication & Rhetoric: JALWD*, especially Jessica Wherry, Margaret Hannon, and Ruth Anne Robbins. You all significantly improved this essay.

1 EDWARD WAGENKNECHT, EDGAR ALLAN POE: THE MAN BEHIND THE LEGEND 141 (1963) (describing Poe's success as a short-story writer and his influence on the short story as a unique literary genre).

2 Poe's often-reproduced critique was first published in *Graham's Magazine* in May 1842. GREAT AMERICAN SHORT STORIES: FROM HAWTHORNE TO HEMINGWAY 523–29 (Corrine Demas ed., 2004).

qualities in the context of the short story could help me and other legal writers.

Like many lawyers, I have been a voracious reader my whole life. But the law has restricted my free reading time. It isn't that I'm not spending the majority of each day reading because, as every lawyer knows, we read a lot. But time to devour great literature decreases the minute law school starts. And frankly, a lot of what we read as lawyers does not qualify as great writing.

Just recently, I found a solution to my problem of not having enough time to read literature by returning to a genre that is regaining popularity—the short story. A year ago, I started a new reading club, the Short Story Book Club.[3] We read one short story every month, and we discuss all the same things I discussed in my previous book clubs including theme, character, dialogue, imagery, metaphor, tone, and pacing. The Short Story Book Club has been wildly successful. In contrast to my former book club experiences, every member reads the full text every month.

Enter Edgar Allan Poe. Anyone who has purchased or read short story collections can't help but notice how often the people who write the Introductions to these collections mention Poe. Of course this is in part because he is recognized as a great writer, so he gets a lot of ink for his success as a short story author. But Poe is also remembered for his essential role in defining and developing America's one unique contribution to literature—the short story.

It was Poe who first recognized that the short story was a different kind of fiction from the novel. Short stories were not simply just shorter novels. Instead, they were a new literary genre with unique qualities. Poe was not the first American to write a short story. Washington Irving and Nathaniel Hawthorne had been writing short stories "of the modern type" since the 1820s.[4] But Poe was the first to define a short-story technique and then to demonstrate how the technique could form a system. In effect, Poe discovered the short story: "Poe was the first to make an accurate chart of the new regions and to demonstrate how this chart might best be used."[5]

Poe came to his revelation that short stories were a unique literary form in large part because of a quirk in the law. In Poe's lifetime, copyright laws were so lax that English novels were easily accessible and cheap to reproduce.[6] American authors writing novels simply could not compete

3 We call ourselves "The Shorties."

4 Fred Lewis Pattee, The Development of the American Short Story: An Historical Survey 141 (1923).

5 *Id.*

6 *See id.* at 130.

for readers. In fact, Poe was so upset about international copyright problems and so enthusiastic about improving these laws that he even entered law school for a short time.[7]

Luckily for us, Poe didn't stick with law school. As a result, he left a legacy of American literature that we lawyers can learn from. And in a twist of irony that will forever bind him to the law, Poe is buried in the Westminster Hall graveyard in Baltimore adjacent to the University of Maryland Law School.[8]

Poe recognized that American authors could remain competitive by writing a new kind of fiction and publishing that fiction in a new format. He led the charge by using American periodicals (magazines) as the channel through which he could reach readers.[9] Short stories were the perfect genre for periodicals. Poe helped to make magazines, and the short story, part of the literary culture of the United States and eventually part of the world's literature.

Poe worked for magazines for several years as an author, editor, and critic.[10] Poe put his stamp on the short story by envisioning and then explaining the ideal qualities of a short story in his critique of Nathaniel Hawthorne's *Twice-Told Tales* first published in *Graham's Magazine* in 1842.[11] Poe's analysis of the "prose tale"—what we now call the "short story"—remains the ultimate piece about the short story as a distinct literary form.

Poe's "universally quoted review of Hawthorne's *Twice-Told Tales*" has been called the "leading document in the history of the form."[12] Some point out that no study of the American short story is complete without an examination of Poe's critique.[13] Poe's list of the ideal qualities of a short

7 WOLF MANKOWITZ, THE EXTRAORDINARY MR. POE 137 (1978). Lawyer Henry Beck Hirst was Poe's walking and drinking companion. Hirst and Poe were both interested in revising international copyright laws. *Id.* Poe's father had also briefly studied law, but then "had thrown down his law books" and joined a company of actors. PATTEE, *supra* note 4, at 115.

8 Francine Schwadel, *A Night with the Master of Terror; And We Don't Mean Stephen King*, WALL ST. J., Oct. 31, 1986, at 35.

9 Poe wrote during the golden age of the magazine in America. Jeffrey Andrew Weinstock, *Magazines*, *in* EDGAR ALLAN POE IN CONTEXT 169 (Kevin J. Hayes ed., 2013) ("Among the most significant forces molding Poe's experience was the dramatic expansion of magazine publishing that coincided with his adult years . . . .").

10 Dawn B. Sova, *Introduction*, *in* EDGAR ALLAN POE COMPLETE TALES AND POEMS x (2012). Poe worked as an editor at *Burton's Gentleman's Magazine*, *Graham's Magazine*, *Alexander's Weekly Messenger*, and *Godey's Magazine and Lady's Book*, among others, plus he wrote criticism and numerous poems and short stories. *Id.*

11 PATTEE, *supra* note 4, at 134. Poe had written about the differences between the short story and the novel as early as 1836. *Id.*; *see also* KENNETH SILVERMAN, EDGAR A. POE: MOURNFUL AND NEVER-ENDING REMEMBRANCE 166 (1991) (noting that "Poe had touched on the idea [unity of effect or impression] in several earlier reviews" and drew on August Wilhelm Schlegel's ideas of "unity of interest" and "totality of impression").

12 PATTEE, *supra* note 4, at 134.

13 *See id.*

story apply with equal force to brief writing, so perhaps every study of persuasive legal writing also should include a review of Poe's critique.[14]

Poe advised that a short story has four essential qualities: unity, brevity, focus, and brilliant style. In addition to providing four qualities that are also essential for briefs, Poe's advice to short story writers, like the best advice provided to brief writers, is given not as a "rigid formula" but instead as a "prototype for success."[15]

I. Unity and Brevity

Unity and brevity were inextricably intertwined for Poe, so these two qualities will be discussed together. Poe recognized the necessary connection between the two. Indeed, it is the combination of unity and brevity that forms the essence of a short story. Brief writers should also recognize that the combination of unity and brevity forms the essence of a successful brief.

Poe explained it this way: "[I]n almost all classes of composition, the unity of effect or impression is a point of the greatest importance. It is clear, moreover, that this unity cannot be thoroughly preserved in productions whose perusal cannot be completed at one sitting."[16] Poe further clarified that a short length was needed to achieve "unity of impression," and he used poetry as an example of another brief literary form that "induces an exaltation of the soul which cannot be long sustained."[17] When Poe said brevity was essential he meant it: "Extreme brevity will degenerate into epigrammatism; but the sin of extreme length is even more unpardonable."[18]

Poe thought the rhymed poem was "how the highest genius could be most advantageously employed for the best display of its own powers."[19] But the next best form that "should best [fulfill] the demands of high

14 Asking lawyers to read about Poe is not a tough sell. Americans like Poe. I have experienced the allure of Poe when giving talks about him—the house is always full. J.W. Ocker explained Poe's popularity:

> And yet [Poe] is just as much a part of pop culture as the latest dance song or Internet meme or reality television show. Everybody knows Poe . . . . From the teenagers who have barely existed long enough to have sampled anything in life to the elder librarians who have read every word printed on silverfish food, an astounding number of people of an astounding variety of tastes and lifestyles love Poe. Or identify with him. Or recognize him as some kind of symbol.

J.W. OCKER, POE-LAND: THE HALLOWED HAUNTS OF EDGAR ALLAN POE 10 (2015). Ocker wrote his travelogue after visiting many of Poe's geographical haunts. *Id.* at 12–13.

15 Corrine Demas, *Introduction*, *in* GREAT AMERICAN SHORT STORIES, *supra* note 2, at vii.

16 GREAT AMERICAN SHORT STORIES, *supra* note 2, at 524–25.

17 *Id.* at 525.

18 *Id.*

genius" could be found in prose—specifically the short story.[20] Poe was very specific in defining the parameters of a short story:

> We allude to the short prose narrative, requiring from a half-hour to one or two hours in its perusal. The ordinary novel is objectionable, from its length . . . . As it cannot be read at one sitting, it deprives itself, of course, of the immense force derivable from *totality*. Worldly interests intervening during the pauses of perusal, modify, annul, or counteract, in a greater or less degree, the impressions of the book. But simple cessation in reading, would, of itself, be sufficient to destroy the true unity. In the brief tale, however the author is enabled to carry out the fullness of his intention, be it what it may.[21]

The combination of unity and brevity gives the writer control over the reader. Poe concluded: "During the hour of perusal the soul of the reader is at the writer's control. There are no external or extrinsic influences—resulting from weariness or interruption."[22]

The key to a successful short story is this concision and selection. As Professor Corinne Demas noted, "Writing is an intellectual pursuit, and the mind of the short-story writer is engaged in a kind of contest: Given the limitations of the genre—which in the case of the short story is its length—what can be accomplished?"[23]

Poe's focus on the critical importance of unity and brevity gave me goosebumps. His advice could easily transfer from a text on effective short story writing to a text on persuasive legal writing. Yet, as is so often true with Poe, he offered a slight new twist on the conventional wisdom. His emphasis on the absolute interconnectedness between unity and brevity was new. And lawyers could benefit from seeing the two qualities as conjoined instead of as two separate qualities. By joining the two qualities of unity and brevity, a lawyer is more likely to achieve the ultimate purpose of persuading the audience.

Brevity and unity, individually, are well known as important persuasive writing qualities. Lawyers know that judges constantly plead for brevity. Brevity is routinely listed by judges as the quality they consider most essential for brief writers.[24] Not surprisingly, lawyers also want brevity in judicial opinions. Unity is also essential. Lawyers are taught to select a unifying theory of their case as the guiding force for a persuasive

19 *Id.* at 524.

20 *Id.* at 525.

21 *Id.*

22 *Id.*

23 Demas, *supra* note 15, at viii.

24 Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 98 (2008); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Legal Writing 257, 279 (2002).

brief. The "theory is an idea on which a decision can be based—a way of looking at the controversy."[25] A persuasive theory will convince a judge to rule in your client's favor. And of course, persuasion is the unifying effect for all briefs.

Ross Guberman used brevity and unity to show how Paula Jones's brief could be revised to support a strong, cohesive theme in her claim against President Bill Clinton. Guberman captured Jones's theme in a heading: "As a Section 1983 Plaintiff, Jones Need Not Prove Tangible Job Detriment."[26] A successful claim required Jones to prove intentional discrimination, but she was not required to show that Clinton adversely affected her job status.[27] Thus, the question under section 1983 was whether sexual harassment was intentional discrimination, not like the question under Title VII which was whether sexual harassment altered the conditions of her employment.[28] Again focusing on the theme, Guberman revised the brief to point out, "Here, then, the 'relevant context' is what the President did to Jones, not, as the President suggests, Jones's 'entire work experience.'"[29] Guberman's revised brief succinctly noted that Jones could defeat summary judgment by proffering evidence "that the President intentionally discriminated against her because of her gender."[30]

Unity and brevity together create a synergy—by combining the two qualities the writer produces a total effect that is greater than simply the sum of the individual qualities because the effectiveness of each quality increases due to its joint action with the other quality.[31] This is what Poe meant when he said the two qualities were intertwined. A successful legal writer recognizes that not only are unity and brevity important individually, but each will have a positive synergistic effect on the other.

Just like a short story, the length of a persuasive brief is one of its limitations. Too many lawyers push against that limitation and see brevity as a constraint. Instead, lawyers should recognize the power of brevity. Brevity makes the unity of effect—persuasion—possible.

Judge Harry Pregerson, Ninth Circuit Court of Appeals, emphasized that brevity and unity of effect combine to persuade:

> But aside from the burden placed on the reader, unnecessarily long briefs are counterproductive. They clog a good argument with excess verbiage. They tend to lose their persuasive edge as well as their credibility.

25 Richard K. Neumann, Jr. & Kristen Konrad Tiscione, Legal Reasoning and Legal Writing 255 (7th ed. 2013).

26 Ross Guberman, Point Made: How to Write Like the Nation's Top Advocates 338 (2d ed. 2014).

27 *Id.*

28 *Id.* at 339 (citations omitted).

29 *Id.* at 342 (citations omitted).

30 *Id.*

31 *See* Webster's American Dictionary 799 (2d College ed. 2000) (defining "synergy").

> Although the rules allow a fifty-page maximum length for briefs, in my view, an appeal that merits fifty pages is a rare bird.[32]

Not only do lawyers risk losing their persuasive edge, but they also risk frustrating the judges who don't want to read any more than is needed.[33]

Poe was practical and very concrete in his definition of brevity. Brevity means that the writing can be read "at one sitting," which would last about an hour. Most briefs are probably read in less than an hour; the legal writer will increase the chances of a reading "at one sitting" if he commits to persuading with brevity.[34] The unity of effect will also help make each brief self-contained. No reader need interrupt reading to review a source or clarify a point made in the brief. The successful brief writer will have anticipated and addressed all the reader's needs.

Maybe lawyers should, like Poe, also dare to believe that we have "the soul of the reader" in our hands during the fleeting time that the judge will be reading our briefs. Certainly the most successful persuasive briefs include both justifying arguments, which show how the law requires or permits a result in favor of your client, and motivating arguments, which make a judge want to rule in favor of your client.[35]

One familiar example where lawyers made both justifying and motivating arguments to persuade is *Brown v. Board of Education*.[36] The plaintiff's brief included social science and psychological studies that found "black children preferred white to brown-colored dolls."[37] An amicus brief, filed on behalf of the American Federation of Teachers, alleged that segregated schools violated the Fourteenth Amendment, but

32 Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 434 (1986).

33 *Id.* Kenneth Chestek advises,

> I contend that a persuasive appellate brief should bring people—the client (whether human or institutional)—more conspicuously into the picture. I am not suggesting that brief writers can, or should, disregard the law or abandon the logic of their case in favor of making a purely emotional appeal. But I am suggesting that when we write about our client's conflicts, in an effort to resolve them, we need to keep the clients in the story. We can do this by weaving a thread of narrative reasoning into the logical, or legal, argument.

Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 130–31 (2008).

34 Poe, of course, was referencing reading for pleasure when he praised the advantages of a reader being able to read a short story in an hour. As we know, judges are not reading briefs for pleasure—although many will concede that reading a well-crafted brief provides some modicum of pleasure. Still, the totality effect that Poe recognized when "worldly interests" cannot intervene during an hour apply with equal force even if the reader is reading for work.

35 NEUMANN & TISCIONE, *supra* note 25, at 270–71.

36 347 U.S. 483 (1954).

37 Jesse Greenspan, *10 Things You Should Know About* Brown v. Board of Education, HISTORY (May 16, 2004), http://www.history.com/news/10-things-you-should-know-about-brown-v-board-of-education; *see also* LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 361 (2012). Dean John Valery White notes in his chapter on the case that the Supreme Court unanimously held that "separate but equal" was "out of line with contemporary social scientific and policy thinking." *Id.*

also argued, "Segregation in public schools inevitably results in inferior educational opportunities for Negroes."[38] As part of the lawyer's appeal to the heart, the brief quoted the personal experience of Edwin Brook:

> "Consider, for example, my own community, a small town in Northern Louisiana. It has a fine brick school plant for white, with grammar and high school departments well equipped for an enrollment of about 250 pupils. It has a gymnasium, lunch room, home economics building and agricultural building. On the outskirts of town there is a Negro school consisting of wood-frame buildings which are over-crowded and inadequately equipped. There is no gymnasium and the facilities on all levels cannot compare with those of the white school. Yet even as it is, the Negro school represents a tremendous advance over previous conditions. It was not many years ago that the students were meeting in a tent in a near-by Negro churchyard."[39]

The United States Supreme Court unanimously held that separate, but equal, schools were unconstitutional because they were "inherently unequal."[40]

II. Focus

Poe underscores that this unity of the "unique or single *effect* to be wrought out" requires an absolute focus on "this preconceived effect."[41] A "skillful literary artist"[42] must be deliberate in choosing the effect, but then equally deliberate in including only those "events"[43] that help establish the effect.

Lest a reader think this deliberation is simply an aspirational goal, Poe drives home his point that every sentence and every word must count. The following two lines are the most famous lines in Poe's critique: "If his very initial sentence tend not to the outbringing of this effect, then he has failed in his first step. In the whole composition there should be no word written, of which the tendency, direct or indirect, is not to the one preestablished design."[44]

38 Brief for The American Federation of Teachers as Amicus Curiae at 4, Brown v. Bd. of Educ., http://www.reuther.wayne.edu/ex/Brown/Brownbrief.pdf (U.S. Oct. 1953) (No. 1).

39 *Id.* at 19–20.

40 347 U.S. at 495. This is such an important case with such a compelling story that it begins the seminal book about storytelling in legal representation. Ruth Anne Robbins, Steve Johansen & Ken Chestek, Your Client's Story: Persuasive Legal Writing 1–2 (2012).

41 Great American Short Stories, *supra* note 2, at 526.

42 *Id.* at 525.

43 *Id.* at 526.

In his own short stories, Poe provides outstanding examples of first sentences that count:

"The thousand injuries of Fortunato I had borne as I best could; but when he ventured upon insult I vowed revenge."[45]

"True,—nervous—very, very dreadfully nervous I had been and am; but why *will* you say that I am mad?"[46]

In the first example from *The Cask of Amontillado*, Poe uses the "v" sound for emphasis in "ventured," "vowed," and "revenge." The sentence builds toward an ominous ending. The reader is not sure exactly what the "thousand injuries" are, but they have incited such contempt in the narrator that he not just wants, but instead vows, to get even. In the second example from *The Tell-Tale Heart*, Poe effectively uses the em dash for emphasis around the word "nervous." Poe contrasts "nervous" with "mad." The narrator protests that he is not mad, but Poe forces the reader to disagree and take the very position that the narrator is insane. The words in both sentences are short, concrete, and powerful.[47]

The prior two examples show Poe's genius with brevity, but even a long first sentence achieves his preconceived effect of suspense:

> During the whole of a dull, dark, and soundless day in the autumn of the year, when the clouds hung oppressively low in the heavens, I had been passing alone, on horseback, through a singularly dreary tract of country; and at length found myself, as the shades of the evening drew on, within view of the melancholy House of Usher.[48]

Poe carefully selected every word in the prior sentence to begin *The Fall of the House of Usher*. He gives a visual description, but also uses alliteration to work upon our ears in his choice of the words "during," "dull," "dark," and "day" to create a sense of the "oppressively low" clouds.[49]

Poe's mastery and absolute focus on a preconceived effect shine in his first three sentences of another short story, *The Masque of the Red Death*:

44 *Id*. Some short-story collections include an index with the first line from each story. *See e.g.*, BRUCE L. WEAVER, NOVEL OPENERS: FIRST SENTENCES OF 11,000 FICTIONAL WORKS, TOPICALLY ARRANGED WITH SUBJECT, KEYWORD, AUTHOR, AND TITLE INDEXING (1995).

45 Edgar Allan Poe, *The Cask of Amontillado*, *in* EDGAR ALLAN POE COMPLETE TALES AND POEMS, *supra* note 10, at 733.

46 Edgar Allan Poe, *The Tell-Tale Heart*, *in* EDGAR ALLAN POE COMPLETE TALES AND POEMS, *supra* note 10, at 498.

47 Poe is not the only writer who labors over his first sentences. *See* Doug McLean, *Why Stephen King Spends 'Months and Even Years' Writing Opening Sentences*, THE ATLANTIC (July 23, 2013), *available at* https://www.theatlantic.com/entertainment/archive/2013/07/why-stephen-king-spends-months-and-even-years-writing-opening-sentences/278043/.

48 Edgar Allan Poe, *The Fall of the House of Usher*, *in* EDGAR ALLAN POE COMPLETE TALES AND POEMS, *supra* note 10, at 299.

49 Demas, *supra* note 15, at xi.

> "The 'Red Death' had long devastated the country. No pestilence had ever been so fatal, or so hideous. Blood was its Avatar and its seal—the redness and the horror of blood."[50]

Again, Poe is deliberate with every word. He repeats the words "red" and "blood" to evoke both the visual sense of blood and the foreboding horror of an uncontrolled and bloody disease. Anyone who doubts Poe's prowess in choosing the exact right word should memorize some of his first lines, repeating them aloud to hear and thus experience his mastery of every single word.[51]

Focus is also essential in persuasive briefs. Judges value a focused brief; they are frustrated by a "Velcro" approach when a lawyer tosses out several different theories in the hope that one will stick.[52] Thus, lawyers must make a tightly controlled selection of arguments, discarding those arguments that are not likely to persuade the judge. As Justice Antonin Scalia and Bryan Garner emphasize, "Take pains to select your best arguments. Concentrate your fire."[53]

Poe sets an exacting standard by requiring that not only every sentence, but every *word* must contribute. If it doesn't, then it must be axed. That kind of brutal excision will only happen during editing. And we must be brutal.[54]

Poe sets a very high bar for first sentences. After reading Poe's forewarning that we can fail by writing one weak first sentence, we lawyers may want to think more about our opening sentences and paragraphs.

Strength and focus are present in the first two sentences from this brief arguing that the automobile exception does not allow police to walk up a private driveway to search a vehicle parked a few feet from the house:

> Forty-six years ago, a plurality of this Court thought it "abundantly clear that there is a significant constitutional difference between stopping,

50 Edgar Allan Poe, *The Masque of the Red Death*, *in* EDGAR ALLAN POE COMPLETE TALES AND POEMS, *supra* note 10, at 438.

51 I experienced this phenomenon when preparing for a TED-style presentation about Poe. I often remembered almost the right words, but not Poe's precise words. In all cases, his choice was exponentially better than the words I substituted. For example, in the first line of *The Cask of Amontillado*, I remembered the second phrase as "when he insulted me, I vowed my revenge." Poe's "when he ventured upon insult, I vowed revenge" obviously makes much better use of the repeating and ominous sound of the letter "v." The two conferences were the Sixth Biennial Conference on Applied Storytelling, held on July 11–13, 2017 at the American University Washington College of Law, Washington, D.C., and the Legal Writing Institute One-Day Workshop, held on December 10, 2016 at Lewis & Clark Law School in Portland, Oregon.

52 This is also called the "kitchen-sink approach." Judge Ruth Bader Ginsberg noted, "A kitchen-sink presentation may confound and annoy the reader more than it enlightens her." Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 SCRIBES J. LEGAL WRITING 1, 10 (2001–02).

53 SCALIA & GARNER, *supra* note 24, at 22.

54 We can't let ourselves "fall in love with a particular phrase or sentence." LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK 572 (5th ed. 2010).

> seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." The *Coolidge* plurality was right.[55]

And here are the first three sentences from an amicus brief in the wedding cake case where First Amendment free speech and religion rights clash with anti-discrimination laws:

> Designing and preparing custom cakes is an art. The images of *amici's* cakes in the following pages amply justify the cliché that a picture is worth a thousand words. If this brief did nothing beyond showcasing this small sample of creative work, it would surely convey that these unique projects involve artistic talent and communicate emotions and messages at least as clearly as other forms of art.[56]

We should review great first sentences from persuasive legal narratives.[57] A reflective approach would also help. Maybe once a year every lawyer should look at the first sentences of every brief he wrote during the previous year. Not all our first sentences will be as memorable as Poe's, but we should strive to confirm that all our first sentences contribute to our overall effect of persuasion.

III. Brilliant Style

Poe noted in his essay,

> Mr. Hawthorne's distinctive trait is invention, creation, imagination, originality—a trait which, in the literature of fiction, is positively worth all the rest. But the nature of originality, so far as regards its manifestation in letters, is but imperfectly understood. The inventive or original mind as frequently displays itself in novelty of *tone* as in novelty of manner. Mr. Hawthorne is original at *all* points.[58]

55 Brief for Petitioner at 1, Collins v. Virginia, https://www.supremecourt.gov/DocketPDF/16/16-1027/19622/20171113123532932_16-1027%20Brief%20for%20Petitioner.pdf (U.S. Nov. 13, 2017) (No. 16-1027) (citation omitted).

56 Brief for Cake Artists as Amici Curiae in Support of Neither Party at 3, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-2017-2018/16-111-amicus-np-cake-artists.authcheckdam.pdf (U.S. Sept. 2017) (No. 16-111).

57 *See* Cathren Page, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers about Beginning a Persuasive Legal Narrative Before a Court*, 86 MISS. L.J. 315, 343–64 (2017).

58 GREAT AMERICAN SHORT STORIES, *supra* note 2, at 527. Poe later slightly revised his opinion about Hawthorne's originality. In 1844, Poe wrote that Hawthorne's "'handling' of a theme is 'always thoroughly original' even if the theme itself is not," suggesting that Hawthorne's themes were not always original. Meghan A. Freeman, *Nathaniel Hawthorne and the Art of the Tale*, *in* EDGAR ALLAN POE IN CONTEXT, *supra* note 9, at 288, 293–94. Even so, Poe believed "Hawthorne to be the most skilled American craftsman of the tale." *Id.* at 296.

Poe was pointing out that he valued originality in both the selection of subject matter and in writing style. We lawyers are limited in our selection of subject matter because the situations our clients face often dictate what subject we will write about. Still, lawyers can sometimes be original in their approach to a legal problem.[59] And for lawyers, a brilliant style is one that is precise, accurate, and clear.

Precise. Deliberate. Clear. Analytical. One might assume that these are words describing great legal writing. But these are descriptions of Poe's writing. Poe himself wrote with the originality and brilliant style that he admired in Hawthorne, but Poe's writing was distinct from Hawthorne's—and instead unnervingly like a lawyer's—in its tight use of analytical reasoning.[60] One biographer wrote that Poe's originality "proceeded from cold intellect rather than from any spontaneous improvisations of genius."[61] It isn't clear if the "cold" refers just to Poe's intellect, or to all intellect, but lawyers certainly don't think of intellect in a negative, cold, or calculating way.

Perhaps Poe is a kindred spirit for lawyers. He wrote with all the qualities highly valued in the legal profession. Even though he lived in romantic times, "fundamentally he was not romantic: he was scientific."[62] Poe was analytical and "an observer of microscopically minute differences."[63] He was also deliberate and a careful planner. One adoring biographer wrote that Poe's mind "developed a strange and lucid power of analytical reasoning, like a sixth sense suddenly superadded to a brain already abnormally developed."[64] Lawyers don't consider analytical reasoning to be a "strange and lucid power," but simply one of the essential tools needed to solve problems and thus persuade others about the rightness of our proposed solutions.

Poe was "the rock star of American literature in the 1830s and 1840s."[65] Unfortunately, a negative obituary written by Poe's former friend and the executor of his estate, Rufus Griswold, damaged Poe's reputation for several decades after his death.[66] Notably, Poe was excluded from the

59 *See* NEUMANN & TISCIONE, *supra* note 25, at 254 (explaining that one part of writing a persuasive brief is brainstorming by identifying goals and then "generating a list of possible methods for achieving each goal").

60 *See* PATTEE, *supra* note 4, at 139. Hawthorne was introspective; Poe was circumspective and "worked ever in a world of his own creation in materials drawn from his reading and imagining rather than from his observation." *Id.*

61 *Id.*

62 *Id.* at 130.

63 *Id.* at 140.

64 JAMES A. HARRISON, LIFE OF EDGAR ALLAN POE 173 (1970).

65 Sova, *supra* note 10, at ix.

66 *Id.*

Hall of Fame of Great Americans when it was set up at New York University in 1900. He was excluded yet again in 1905 before finally being admitted in 1910.[67] Poe biographer Edward Wagenknecht commented on Poe's shocking rejection and wryly noted,

> At one point his exclusion was justified on the ground that "he wrote like a drunkard and a man who is not accustomed to pay his debts." Just what kind of a literary style is peculiar to men not accustomed to pay their debts I have no idea, but I cannot think of anyone who wrote less like a drunkard than the precise and carefully chiseled Poe.[68]

Every lawyer would consider it the highest compliment to hear her writing described as "precise and carefully chiseled." For lawyers, "carefully chiseled" writing is accurate and clear writing.[69] Of course, legal writers have an ethical obligation to be truthful; that honesty also requires precision and accuracy.[70] When the written words accurately reflect the ideas or arguments of the author then the writer has achieved the needed precision and clarity.[71] Essentially, clarity means that there can be no misunderstanding by the reader. A persuasive writer must work hard to clarify the law for the reader. In fact, the more complicated the law is, the more important it is for the writer to be clear.[72] Lawyers should emulate the way that Poe wrote with a brilliant style which was first and most importantly precise, clear, and accurate.

Many lawyers remember their own spine-tingling sensations as they read Poe's creepy, but memorable, short stories. Anyone rereading Poe's short stories will find that they wear well. Poe was a master of the genre. But lawyers also would benefit from recognizing that the qualities Poe emphasized as the hallmarks of great short stories—brevity, unity, focus, and brilliant style—are the same qualities that are the hallmarks of great briefs. Poe's insights have influenced all short story writers who followed him,[73] and those same insights have much to teach lawyers writing persuasive briefs.

67 WAGENKNECHT, *supra* note 1, at 11.

68 *Id.*

69 Precision and accuracy are essential in legal writing. MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 186 (3d ed. 2013) (explaining that readers trust writers who are precise).

70 MODEL RULES OF PROF'L CONDUCT R. 4.1 (2015).

71 Robbins, *supra* note 24, at 283.

72 SMITH, *supra* note 69, at 182.

73 Demas, *supra* note 15, at vii ("When Edgar Allan Poe first described his conception of an ideal 'prose tale' he could hardly have imagined that his vision would be guiding the genre of the short story for the next century and a half.").

ESSAY

The Rule of Three

Patrick Barry*

> *I am simmering, simmering, simmering; Emerson brought me to a boil.*[1]
>
> —Walt Whitman

> *Our top priority was, is and always will be education, education, education.*[2]
>
> —British Prime Minister Tony Blair

> *You do affirm that all the testimony you are about to give in the case now before the court will be the truth, the whole truth, and nothing but the truth.*[3]
>
> — Oath administered in U.S. District Court

Judges use the Rule of Three. Practitioners use the Rule of Three. And so do all manner of legal academics. Yet although many people seem to have an intuitive feel for how useful this rhetorical move is, no extended explanation of its mechanics and variety of forms exists. This essay offers that explanation. It begins with an introduction to the more straightforward form of the rule of three, which simply involves arranging information not in twos or fours or any other set of numbers—but rather in the trusty, melodic structure of threes. It then moves on to a closer look at some of the Rule of Three's more-subtle forms. And finally, it concludes

* Clinical Assistant Professor, University of Michigan Law School. I would like to thank Ramzi Abboud, Dave Babbe, Dan Dalton, Shai Dothan, Samir Hanna, Eva Fotí Pagan, Tim Pinto, Ben Preyss, Helen Ryan, and Vivek Sankaran for helpful comments. I would also like to thank a wonderful set of research assistants for their editorial support: Julie Aust, James Coatsworth, Hannah Hoffman, and Joel Richert.

1 In conversation with fellow writer John Townshend Trowbridge; *see* John Townsend Trowbridge, *Reminiscences of Walt Whitman*, THE ATLANTIC MONTHLY (Feb. 1902), *available at* https://www.theatlantic.com/past/docs/unbound/poetry/whitman/walt.htm.

2 Tony Blair, Prime Minister of the United Kingdom, The Prime Minister Launching Labour's Education Manifesto, Address Delivered at The University of Southampton (May 23, 2001), *in* THE GUARDIAN, May 23, 2001 at 11:45 AM, *available at* https://www.theguardian.com/politics/2001/may/23/labour.tonyblair.

3 Brendan Koerner, *Where Did We Get Our Oath?*, SLATE (Apr. 30, 2004, 5:52 PM), *available at* http://www.slate.com/articles/news_and_politics/explainer/2004/04/where_did_we_get_our_oath.htm; *see also United States v. Ward*, 989 F.2d 1015, 1019 (9th Cir .1992).

with some playful questions and examples, each designed to make it easier to recognize and use the Rule of Three in memos, briefs, and many other kinds of legal writing.

I. Attractive Rhythm

The starting point for the Rule of Three is its attractive rhythm,[4] something the Supreme Court knows well. At the start of each session, the marshal of the Court announces "[t]he Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez!"[5] The marshal doesn't say "Oyez!". The marshal doesn't say "Oyez! Oyez!". The marshal says "Oyez! Oyez! Oyez!". That third "Oyez" completes the sound of a comforting syntactic set.

This sound structure rules the world of real estate as well. The mantra of the market is not "Location." Nor is it "Location. Location." It's "Location. Location. Location."[6] Just as the mantra of the football team at the University of Michigan is not "The team" or even "The team. The team." It's "The team. The team. The team."[7]

Examples from other realms abound, emphasizing a range of ideas, from funny to disconcerting:

> **Food**:
> We obsess over every ingredient.
> We obsess over every ingredient.
> We obsess over every ingredient.
> — *Chipotle*, Billboard Campaign in Chicago[8]

4 James Tinford includes making use of this rhythm as one of his "20 Basic Principles of Effective Trial Advocacy. "Use the rule of threes. If it's important, do it three times. The baby didn't just die, he suffocated, turned blue, and died." http://www.law.indiana.edu/instruction/tanford/b584/20BasicPrinciples.pdf (last visited Apr. 9, 2018). Roy Peter Clark endorses something similar in *Writing Tools: 55 Essential Strategies for Every Writer*, although he frames his endorsement in terms of parallel structure. "A pure parallel structure would be 'Boom, boom, boom.' Parallelism with a twist gives us 'Boom, boom, bang.'" ROY PETER CLARK, WRITING TOOLS: 55 ESSENTIAL STRATEGIES FOR EVERY WRITER 43 (2008). There are also books on public speaking that mention the rule of three, such as *Talk Like TED* by Carmine Gallo. "The rule of three simply means that people can remember three pieces of information very well; add more items and retention falls off considerably. It is one of the most powerful concepts in writing and communication." CARMINE GALLO, TALK LIKE TED: THE 9 PUBLIC-SPEAKING SECRETS OF THE WORLD'S TOP MINDS 191 (2014).

5 SUPREME COURT OF THE UNITED STATES, *The Court and Its Procedures*, https://www.supremecourt.gov/about/procedures.aspx (last visited Apr. 9, 2018).

6 For the disputed origins of this mantra, see William Safire, *Location, Location, Location*, N.Y. TIMES MAG., June 26, 2009, *available at* http://www.nytimes.com/2009/06/28/magazine/28FOB-onlanguage-t.html.

7 BO SCHEMBECHLER AND JOHN U. BACON, BO'S LASTING LESSONS: THE LEGENDARY COACH TEACHES THE TIMELESS FUNDAMENTALS OF LEADERSHIP 78 (2007).

8 *Chipotle*, CULTIVATOR, http://www.cultivatorads.com (as of June 5, 2017) (copy on file with author).

Music:
Q. "Pardon me, sir, how do I get to Carnegie Hall?"
A. "Practice. Practice. Practice."
— Popular Joke[9]

The Brady Bunch:
"All I hear all day long at school is how great Marcia is at this and how wonderful Marcia is at that. Marcia! Marcia! Marcia!"
—Jan Brady (whining)[10]

Divorce:
"I divorce you. I divorce you. I divorce you."
—Ancient Islamic practice once used in India whereby men could divorce their wives just by saying "I divorce you" three times.[11] (Women were not given the same power.)

Poets, novelists, and other professional writers are particularly keen followers of this apparent "Rule of Three." In 1835, for example, Lord Alfred Tennyson wrote a poem to try to capture the pain and loneliness he felt after the death of his good friend Arthur Hallam, a fellow poet and university student at Cambridge who died of an unexpected cerebral hemorrhage when only twenty-two years old.[12] Tennyson called the poem "Break, Break, Break." He also included those words at the start of the first and the last stanza.[13]

Over a 150 years later, the Japanese writer Haruki Murakami published the novel *Dansu, Dansu, Dansu*, which has been translated as *Dance, Dance, Dance*.[14] And, for younger readers, there is Pat Mora's

9 Michael Pollak, *The Origins of that Famous Carnegie Hall Joke*, N.Y. TIMES, Nov. 27, 2009, *available at* http://www.nytimes.com/2009/11/29/nyregion/29fyi.html.

10 *The Brady Bunch: Her Sister's Shadow* (ABC broadcast Nov. 19, 1971), *available at* https://www.youtube.com/watch?v=-yZHveWFvqM.

11 Jeffrey Gettleman and Suhasini Raj, *India's Supreme Court Strikes Down 'Instant Divorce' for Muslims*, N.Y. TIMES, Aug. 22, 2017, *available at* https://www.nytimes.com/2017/08/22/world/asia/india-muslim-divorce-triple-talaq.html.

12 LORD ALFRED TENNYSON, THE WORKS OF LORD ALFRED TENNYSON 218 (1998). Hallam was also the subject of Tennyson's longer and more famous poem "In Memoriam A.H.H."

13 *Id.* (Break, break, break,
On thy cold gray stones, O Sea!
And I would that my tongue could utter
The thoughts that arise in me . . . . /
Break, break, break
At the foot of thy crags, O Sea!
But the tender grace of a day that is dead
Will never come back to me.).

14 HARUKI MURAKAMI, DANCE, DANCE, DANCE (1994).

Spanish version of *The Crow and the Pitcher*, a tale of water and ingenuity taken from one of Aesop's fables. Mora calls her version *Agua, Agua, Agua*.[15] The Rule of Three, it seems, speaks multiple languages.[16]

Another example comes from John Cheever's 1954 short story "The Five-Forty-Eight." A master of dialogue, of conveying the meter and mood of ordinary speech, Cheever uses the Rule of Three twice in a very compact space.

> "Oh, no," she said. "No, no, no." She put her white face so close to his ear that he could feel her warm breath on his cheek. "Don't do that," she whispered. "Don't try and escape me. I have a pistol and I'll have to kill you and I don't want to. All I want to do is to talk with you. Don't move or I'll kill you. Don't, don't, don't!"[17]

Emma Cline achieves a similar effect in "Northeast Regional," a short story she published in 2017. This time, however, the Rule of Three is used only once, and the words are imagined to be inside somebody else's head.

> She had tried her best to be a good sport. That was the phrase he was sure was circling down at the bottom of her thoughts[']][] stern ticker tape: be a good sport be a good sport be a good sport.[18]

Both Cheever's story and Cline's story appeared in *The New Yorker*, a magazine whose ad campaign for its digital content shows that the possibilities of the Rule of Three extend beyond the most strict forms of repetition: "Every story. Every issue. Every device."[19]

The ad doesn't stop after one item ("Every story.") or after two ("Every story. Every issue."). It also doesn't stretch to include four items ("Every story. Every issue. Every device. Every day."). That might be overkill. Instead, it settles on three items: "Every story. Every issue. Every device." The Rule of Three is the advertising sweet spot.

All of the following organizations agree:

> **Target (Gift Card)**:
> No fees. No expiration. No kidding.[20]

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15 PAT MORA, AGUA, AGUA, AGUA (1993).

16 The "I divorce you. I divorce you. I divorce you." example is evidence of this as well. *See* Gettleman & Raj, *supra* note 11.

17 John Cheever, *The Five-Forty-Eight*, NEW YORKER, Apr. 10, 1954, *available at* http://www.newyorker.com/magazine/1954/04/10/the-five-forty-eight.

18 Emma Cline, *Northeast Regional*, NEW YORKER, Apr. 10, 2017, *available at* http://www.newyorker.com/magazine/2017/04/10/northeast-regional.

19*See* slogan at https://subscribe.newyorker.com/subscribe/newyorker/90665 (last visited May 19, 2018).

20 Target, *Frequently Asked Questions*, http://www.target.com/c/frequently-asked-questions/-/N-4sro0 (last visited Apr. 11, 2018).

Stanford Business School:
Change Lives. Change Organizations. Change the world.[21]

Buffalo Wild Wings:
Wings. Beer. Sports.[22]

Kahn Academy:
For free. For everyone. Forever.[23]

Southwest Airlines:
New Year. New Adventure. New Sale.[24]

U.S. Marine Corps:
The Few. The Proud. The Marines.[25]

As these initial examples show, sometimes the structure of the Rule of Three is straightforward. It is just the same word (or very similar words) repeated three times. Other times, however, the structure is more subtle, taking on a rhythm that can be described as either "short, short, kind of long" or "same, same, kind of different." The next two sections clarify that difference, after which the essay concludes by (1) connecting how phrase-making can lead to sentence-making (and end paragraph-making) and (2) the helpful reminder, crucial to using the Rule of Three effectively, that one way to view language is as "visible speech."

II. Short, Short, Kind of Long

The example from the U.S. Marine Corps ("The Few. The Proud. The Marines.") is a good place to start. If you focus on the number of syllables in each item in the list—"The Few" (2 syllables), "The Proud" (2 syllables), "The Marines" (3 syllables)—you'll see the shift follows a structure I teach to my students as "short, short, kind of long." A clearer example comes from the most famous line in the Declaration of Independence.

life, liberty, and the pursuit of happiness
(short) (short) (kind of long)

21 STANFORD GRADUATE SCHOOL OF BUSINESS, https://www.gsb.stanford.edu/ (last visited Apr. 11, 2018).

22 Buffalo Wild Wings, *2015 Brand Identity: Style Guide* 12-14, 21 (2015), https://www.buffalowildwings.com/globalassets/pdfs/press-kit/2014-1994_bww_style-guide.pdf.

23 KAHN ACADEMY, https://www.khanacademy.org (last visited Apr. 11, 2018).

24 *Southwest Airlines*, TWITTER, https://twitter.com/SouthwestAir (as of Jun. 6, 2017) (copy on file with author).

25 Jeff Schogol, *Marines are once again 'The Few, The Proud,'* MARINE TIMES, Mar. 30, 2017, *available at* https://www.marine corpstimes.com/articles/iconic-marine-recruiting-slogan-returns.

The words "life" and "liberty" are both under three syllables in length. They're short. By comparison, the phrase "the pursuit of happiness" is kind of long. So it goes at the end of the list. As creators of everything from movie taglines to children's stories to world-changing political documents understand, the last slot in the Rule of Three is often reserved for lengthier, more complex material.

The first draft of the Declaration, for example, received a lot of edits from other founding fathers.[26] Some of these edits Jefferson disagreed with so strongly that he called them "mutilations" and "depredations."[27] But none of the edits ever suggested he change "life, liberty, and the pursuit of happiness" to "life, the pursuit of happiness, and liberty" or to "the pursuit of happiness, liberty, and life." None tinkered with the structure of the Rule of Three.

III. Same, Same, Kind of Different

A more general way to think about this structure is "same, same, kind of different." The first two items in the list have something in common. Maybe they start with the same letter. Maybe they contain the same word. Maybe they each have a common rhythm, syntax, or shape. But then you get to the third item, and the pattern breaks.

A good example is "life, liberty, and estate." The phrase—which some have linked to Jefferson's own "life, liberty, and the pursuit of happiness"[28]—comes from John Locke's *Second Treatise of Government* published in 1689. Notice that Locke's phrase doesn't fit the structure of "short, short, kind of long." The word "life" is one syllable; the word "liberty" is three syllables; the word "estate" is two. Which means one of the slots reserved for a "short" item is actually longer than the slot for the "kind of long" item.

But if you focus on the alliteration in the first two items—"**l**ife"and **l**iberty"—you'll see that it does fit the structure of "same, same, kind of different." The first word ("life") starts with the letter "l"; the second word ("liberty") also starts with the letter "l"; but then the pattern breaks when

26 *Jefferson's "Original Rough Draught" of the Declaration of Independence*, THE PAPERS OF THOMAS JEFFERSON, VOLUME 1: 1760–1776 423–28 (Princeton U. Press 1950), *available at* https://jeffersonpapers.princeton.edu/selected-documents/jefferson's-"original-rough-draught"-declaration-independence. Compare with the final version, *available at* https://www.archives.gov/founding-docs/declaration-transcript.

27 HENRY STEPHENS RANDALL, THE LIFE OF THOMAS JEFFERSON 178 n.3 (1858) (quoting from Jefferson's letter to Walsh in 1818).

28 *See, e.g.*, SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 28 (1995); Kenneth D. Stern, *John Locke and the Declaration of Independence*, 15 CLE-MARSHALL L. REV. 186, 189 (1966).

you get to the third item ("estate"). Ward Farnsworth, the dean of the University of Texas Law School, has a nice way of describing how changing up a rhetorical pattern can have a pleasing and persuasive effect, particularly when the change comes after two examples of the same thing. In these circumstances, he writes in *Classical English Rhetoric*, "the ear welcomes the relief."[29]

I am not sure that the marketing team at Jimmy John's has read Farnsworth's book. But they seem to understand the phenomenon he identifies, at least judging by one of their promotional slogans.[30]

Fresh.	Fast.	Tasty.
(same)	*(same)*	*(kind of different)*

The same appears to be true of the folks at Sidley Austin LLP, one of the largest law firms in the world. As of the summer of 2018, the firm's website showcased this tagline.

Talent.	Teamwork.	Results.[31]
(same)	*(same)*	*(kind of different)*

Big Law gets the Rule of Three.

IV. Phrasemakers

The focus of this essay has been on phrases because if you learn how to create effective phrases, you can learn how to create effective sentences; and if you learn how to create effective sentences, you can learn how to create effective paragraphs; and if you learn how to create effective paragraphs, you can produce some really great writing.

Here, for example, is Justice Oliver Wendell Holmes using the "short, short, kind of long" version of the Rule of Three in his celebrated dissent in *Lochner v. New York*, a piece of writing Judge Richard Posner called "the greatest judicial opinion of the last hundred years"[32] in his 1998 book *Law and Literature*.

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with *by school laws*, *by the Post*

29 WARD FARNSWORTH, FARNSWORTH'S CLASSICAL ENGLISH RHETORIC 71 (2010).

30 For a photo of the slogan, see, e.g., Heber Valley, http://www.gohebervalley.com/Jimmy_Johns.

31 SIDLEY AUSTIN LLP, https://www.sidley.com/en/us/ (last visited May 17, 2018).

32 RICHARD POSNER, LAW & LITERATURE 346 (3d ed. 2009).

> *Office, by every state or municipal institution which takes his money for purposes thought desirable*, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.[33]

And here is a William Finnegan using it in *Barbarian Days: A Surfing Life*, which won the 2016 Pulitzer Prize. Finnegan shows that the Rule of Three can do more than help craft a single sentence; it can also help craft an entire string of sentences.

> Nobody bothered me. Nobody vibed me. It was the opposite of my life at school.[34]

A final example comes from the opening statement in the trial of Timothy McVeigh, who was convicted of blowing up a federal building in downtown Oklahoma City in April of 1995. More than 250 people were killed in the blast. Trying to convey to the jury that none of the victims could have suspected the terrible fate that awaited them when they each got up that morning, the prosecutor in the case, Joe Hartzler, does exactly what Finnegan does in *Barbarian Days*: he uses the Rule of Three to craft a string of sentences.

> The sun was shining. Flowers were blooming. It was springtime in Oklahoma City.

Later, Hartzler returns to the same structure, this time employing a kind of Rule of Three in Reverse: instead of using the order "short, short, kind of long," he uses the order "long, long, kind of short."

> We'll present a lot evidence against McVeigh. *(long)*
> We'll try to make your decision ultimately easy. *(long)*
> That's our goal. *(kind of short)*[35]

Notice, however, that "long, long, kind of short" is still "same, same, kind of different." Or as Farnsworth might put it: "same, same, relief."

33 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) (emphasis added).

34 WILLIAM FINNEGAN, BARBARIAN DAYS: A SURFING LIFE 8 (2015).

35 Opening Statement by Prosecutor Joseph Hartzler (Apr. 24, 1997), *available at* http://www.famous-trials.com/oklacity/727-hartzleropening. For another example of the Rule of Three in Reverse, see this sentence in *The Writing Life* by Annie Dillard: "The page is jealous and tyrannical; the page is made of time and matter; the page always wins." ANNIE DILLARD, THE WRITING LIFE 57 (1989).

V. Visible Speech

Hartzler's opening statement is a good place to end. That it started out as something written and ended up as something spoken—nobody "wings" an opening statement in a case with stakes this big—highlights the connection between writing and speaking. Most people preparing to give a speech understand this connection. They write out what they are going to say beforehand, even if the plan is to eventually deliver their remarks without any notes.

Not enough people, however, realize the connection is also important when the end product will remain on a page. Writing, the linguist John DeFrancis has noted, is "visible speech."[36] It is a way of communicating sound and meaning through symbols. Neglect that sound, neglect the possibility for rhythm and melody in sentences, the chance to use pace and harmony, tone and expressiveness—neglect all those musical elements and you neglect much of what gives words their value. As the poet Robert Frost remarked in a letter to a friend in 1914, "The ear is the only true reader and the only true writer."

And no surprise: Frost's own ear was a big, big fan of the Rule of Three, as excerpts from two of his poems show.

> What country'd be the one to dominate
> By character, by tongue, by native trait.
> *(same)* *(same)* *(different)*
> — "The Dedication" (1961)

> *(same)* *(same)*
> The faded earth, the heavy sky,
> The beauties she so truly sees.
> *(different)*
> — "My November Guest" (1915)

VI. Conclusion

After reading about a writing concept like "The Rule of Three," getting the chance to play around with it can be very useful for the many lawyers, judges, and academics whose job is to craft clear, effective sentences, as can seeing the rule applied in a wider range of fields "The best way to become a good legal writer," Judge Frank Easterbrook insisted when asked what lawyers can do to improve their compositional skills, "is to spend more time reading good prose." He specifically recommended the novels

36 JOHN DEFRANCIS, VISIBLE SPEECH: THE DIVERSE ONENESS OF WRITING SYSTEMS 248-52 (1989).

of Ernest Hemingway, William Faulkner, and Saul Bellow, though he also said much can be learned from regularly reading well-edited magazines like *The Atlantic* and *Commentary*. The selections in the two short sections below reflect, if not those exact authors and publications, at least the spirit of Judge Easterbrook's suggestion.

One of the sections is a "Questions Section." It won't be graded. There is no penalty for guessing wrong or for skipping questions that don't work for you. It is simply a chance to stretch your brain a bit and engage in a more active, even playful form of learning.

The other is an "Examples Section." Some of the examples illustrate the concept; others simply provide another way of articulating it. The hope is that each will give you a fuller understanding of how to process and ultimately use the rule of three.

A. The Rule of Three: Questions

1. Children

The Rule of Three gets ingrained early in life. Complete these phrases, all of which come from material designed for various ages of children.

- C.S. Lewis: "The Lion, the Witch, and the _____"[37]
- *The Little Engine That Could*: "I think I can. I think I can. _____"[38]
- *Superman*: "It's a bird. It's a _____. It's Superman!"[39]

2. Slogans

Non-profit organizations often have the Rule of Three in their slogans. Match the slogan with the organizations that has used it.

Slogan

1. Defending. Empowering. Influencing.
2. We build strength, stability and self-reliance through shelter.
3. Helping youth is a key to building a more conscientious, responsible, and productive society.

37 Missing word: "Wardrobe." C. S. Lewis, THE LION, THE WITCH, AND THE WARDROBE: THE CHRONICLES OF NARNIA BOOK 1 (1950).

38 Missing phrase: "I think I can." WATTY PIPER, THE LITTLE ENGINE THAT COULD (Penguin ed. 2005).

39 Missing word: "plane." THE ADVENTURES OF SUPERMAN (ABC television broadcast 1952) (The phrase, "It's a bird, it's a plane, it's Superman!" appeared as dialogue in the introduction to every episode of the series), *available at* https://www.youtube.com/watch?v=Q2l4bz1FT8U.

Group

A. Habitat for Humanity

B. American Civil Liberties Union

C. Boy Scouts of America[40]

3. Alliteration

The Rule of Three is often combined with alliteration. Fill in the blank in the sentences below. Even if you don't recognize the sentence, you may be able to figure out the missing word, given that it starts with the same letter as the other items in the list.

> "It is not from the benevolence of the butcher, the brewer, or the _____that we expect our dinner, but from their regard to their own interest."
>
> —Adam Smith,
> *The Wealth of Nations* (1776)[41]

> "In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the _____, custody, and control of their children."
>
> —Justice Sandra Day O'Connor,
> *Troxel v. Granville* (2000)[42]

> "We are a free clinic staffed by Michigan Law students that provides Unemployment Insurance advocacy, _____, and assistance to Michigan workers."
>
> —Website of the Unemployment Insurance Clinic at the University of Michigan Law School

40 ANSWERS

1/B ACLU, https://www.aclu.org (last visited Apr. 11, 2018).

2/A Habitat for Humanity, *Annual Report FY 2016*, *available at* https://www.habitat.org/sites/default/files/annual-report-2016.pdf.

3/C *About the Boy Scouts of America*, BOY SCOUTS OF AMERICA, http://www.scouting.org/about.aspx (as of Jun. 11, 2017) (copy on file with author).

41 Missing Word: "baker." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 6 (Nelson ed. 1843).

42 Missing word: "care." ("In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.") 530 U.S. 57, 66 (2000).

4. Titles

The titles of books and articles often use the Rule of Three. From the two lists below, match the title with the subtitle.

Title

1. *Lean In* by Sheryl Sandberg
2. *Nudge* by Cass Sunstein and Richard Thaler
3. *Superfreakonomics* by Steven Levitt and Stephen Dubner
4. *The Bully Pulpit* by Doris Kearns Goodwin
5. *Property Rules, Liability Rules, and Inalienability* by Guido Calabresi and Douglas Melamed

Subtitle

A. *Improving Decisions in Health, Wealth, and Happiness*
B. *Women, Work, and the Will to Lead*
C. *One View of the Cathedral*
D. *Theodore Roosevelt, William Taft, and the Golden Age of Journalism*
E. *Global Cooling, Patriotic Prostitutes, and Why Suicide Bombers Should Buy Life Insurance*[43]

5. Ugly Side

I often tell my students that there is an ugly side to the Rule of Three, by which I mean that the Rule of Three's attractive rhythm has been used to promote some unattractive causes. Match the offensive phrases below with their original source.

Phrase

1. "Segregation today. Segregation tomorrow. Segregation forever!"
2. "Gas, Grass, or Ass. Nobody rides for free."

43 ANSWERS

1/B SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

2/A RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

3/E STEVEN LEVITT & STEPHEN DUBNER, SUPERFREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES, AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE (2009).

4/D DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM (2013).

5/C Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). (Note: The Calabresi and Melamed title inverts the usual order of the Rule of Three. Instead of using the Rule of Three in the subtitle—as all the other examples do—it uses the Rule of Three in the main title.)

3. "Remember the weak, meek, and ignorant are always good targets."
4. "We can delay and effectively stop for a temporary period of indefinite length the number of immigrants into the United States. We could do this by simply advising our consuls to put every obstacle in the way and to require additional evidence and to resort to various administrative devices which would postpone and postpone and postpone the granting of the visas."
5. "Ein Volk, Ein Reich, Ein Führer." (Translation: "One People, One Nation, One Leader.")

Source

A. Adolf Hitler and the Nazi Party
B. Former Governor of Alabama George Wallace
C. Bumper sticker targeted by anti–human-trafficking groups
D. Memo given to unscrupulous bond sellers who would eventually be implicated in the 1980s Savings and Loans Crisis
E. Memo written by State Department official Breckinridge Long about how to avoid offering visas to Jewish refugees during World War II [44]

B. The Rule of Three: Examples

1. Martin Luther King

"Free at last. Free at last. Thank God almighty, we are free at last."

—Martin Luther King, "I Have a Dream" (1963)

44 ANSWERS

1/B "Segregation today. Segregation tomorrow. Segregation forever!" George Wallace, Gov. of Alabama, Inauguration Address (Jan. 14, 1963), *available at* http://www.blackpast.org/1963-george-wallace-segregation-now-segregation-forever.

2/C "Gas, Grass, or Ass. Nobody rides for free." Bumper sticker targeted by anti–human-trafficking groups.

3/D "[R]emember the weak, meek, and ignorant are always good targets." Memo given to unscrupulous bond sellers who would eventually be implicated in the 1980s Savings and Loans Crisis. Tom Furlong, *The Keating Indictment: Targets of Bond Sellers: The 'Weak, Meek, Ignorant'*, L.A. TIMES, Sept. 19, 1990, *available at* http://articles.latimes.com/1990-09-19/business/fi-692_1_bond-sales-program.

4/E "We can delay and effectively stop for a temporary period of indefinite length the number of immigrants into the United States. We could do this by simply advising our consuls, to put every obstacle in the way and to require additional evidence and to resort to various administrative devices which would *postpone* and *postpone* and *postpone* the granting of the visas." Memorandum from Asst. Sec. of State Breckinridge Long to State Dept. officials (Jun. 26, 1940), *available at https://www.facinghistory.org/rescuers/breckinridge-long-memorandum* (emphasis added) (last visited May 19, 2018).

5/A "Ein Volk, Ein Reich, Ein Führer." (Translation: "One People, One Nation, One Leader.") David Welch, *Nazi Propaganda* (Feb. 17, 2011), *available at* http://www.bbc.co.uk/history/worldwars/wwtwo/nazi_propaganda_gallery_03.shtml.

2. Writing Tools:

In our language and culture, three provides a sense of the whole:

Beginning, middle, and end.
Father, Son, and the Holy Ghost.
Moe, Larry, and Curly.
Tinkers to Evans to Chance.
A priest, a minister, and a rabbi.
Executive, legislative, judicial.
The *Niña*, the *Pinta*, and the *Santa Maria*.

—Roy Peter Clark,
Writing Tools: 55 Essential Strategies for Every Writer 100 (2008)

3. Justice Sotomayor:

"For example, imagine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals."

—Justice Sonia Sotomayor
Lockhart v. United States,
136 S. Ct. 958, 963 (2016)

4. Spoon River:

"Suppose a boy steals an apple
From the tray at the grocery store,
And they all begin to call him a thief,
The editor, minister, judge, and all the people—
'A thief,' 'a thief,' 'a thief,' wherever he goes.
And he can't get work, and he can't get bread
Without stealing it, why the boy will steal.
It's the way the people regard the theft of the apple
That makes the boy what he is."

—Edgar Lee Masters, "Aner Clute" (1916)

5. Sylvia Plath:

"I took a deep breath and listened to the old brag of my heart. I am, I am, I am."

—Sylvia Plath, *The Bell Jar* (1963)

6. Justice Brandeis:

"The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights."

Justice Louis Brandeis, concurring, *Whitney v. California*, 274 U.S. 357, 373 (1927)

7. Atticus Finch:

"As you grow older, you'll see white men cheat black men every day of your life, but let me tell you something and don't you forget it—whenever a white man does that to a black man, no matter who he is, how rich he is, or how fine a family he comes from, that white man is trash."

—Harper Lee,
To Kill a Mockingbird 252 (2015 ed.)

8. Trial Courts:

"The cornerstone of the American judicial system is the trial courts. . . in which witnesses testify, juries deliberate, and justice is done."

—Justice William Rehnquist,
Engraving in the Lloyd George Federal Courthouse in Las Vegas, Nevada

ESSAY

The Elephant in the Room

Responding to Racially Charged Words

Suzanne Rowe*

- *An attorney tells a racial joke to a few friends at a bar association social.*
- *Members of a hiring committee express concern that the person of color doesn't seem to "fit" with the firm's culture.*
- *A student uses the n-word in a class discussion.*

I. The Elephant Walks In

Whenever I hear of situations like these, I wonder how I would have responded if I'd been present for the joke, the comment, or the discussion. Would I have recognized the injustice being done or just focused on the discomfort I felt? Would I have spoken up? Would I have known what to say to the elephant in the room?

We lawyers are uncomfortable communicating about race. This discomfort arises in large part because the legal profession is not very diverse,[1] most law schools are not diverse,[2] and society is still largely

* James L. and Ilene R. Hershner Professor, University of Oregon School of Law.

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This essay grew from workshops of the Teaching Effectiveness Program at the University of Oregon School of Law in 2017 led by Lee Rumbarger and Jason Schreiner. I appreciate their guidance and the insights of workshop participants. I also appreciate the experiences shared by national colleagues at the Association of Legal Writing Directors' conference at the University of Minnesota School of Law in July 2017, *Acknowledging Lines: Talking About What Unites and Divides Us*, in response to my media presentation.

1 The profession is becoming a bit more diverse, though the small numbers of minority attorneys and judges are disheartening. According to ABA statistics from 2008, 4.6% were Black or African American, 2.9% were Asian, and 3.8% were

segregated.[3] Talking about racial issues, and sometimes even talking with persons of another race, can feel awkward. Talking about race can be difficult even as we make genuine attempts to connect across racial boundaries that exist in our society. Just as complex as talking about race is the subject of this essay: talking about how we talk about race. We may feel stymied because we aren't exactly sure of the reach of First Amendment protections, hate speech statutes, politically correct labels, and rules of professional conduct.[4] These concerns unwittingly conspire to keep us from knowing how to have even this conversation about how we communicate or anticipating what we might say, even in situations where we know we must respond.[5]

Hispanic or Latino. Among judges, magistrates, and other judicial workers, 6.8% were Black or African American, .3% were Asian, and 3.2% were Hispanic or Latino. https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/cpsaat11.authcheckdam.pdf (based on annual averages compiled from the Current Population Survey, a monthly Bureau of Census survey on behalf of the Bureau of Labor Statistics). In 2017, 5.6% were Black or African American, 4.4% were Asian, and 4.8% were Hispanic or Latino. Among judges, magistrates, and other judicial workers, 12.7% were Black or African American, and 7.0% were Hispanic or Latino. Statistically, 0.0% were Asian. Bureau of Labor Statistic, 2017 Current Population Survey, *available at* https://www.bls.gov/cps/cpsaat11.pdf ("Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity") (last visited Apr. 27, 2018).

2 Of the 42,800 students admitted to U.S. law schools in 2016, over 67% were Caucasian/White; 11.7% were Hispanic/Latino; 10.7% were Black/African American; 10.2% were Asian; and 5% were Puerto Rican, American Indian/Alaska Native, or Native Hawaiian/Other Pacific Islander. Law School Admission Council, Admitted Applicants by Race/Ethnicity & Sex at https://www.lsac.org/lsacresources/data/ethnic-sex-admits (last visited Mar. 28, 2018) ("maximum reporting" method included multiple ethnicities selected by some candidates, resulting in a total exceeding 100%). At many schools, the percentage of the student body comprising persons of color will be lower than these aggregate statistics, in part because law schools at Historically Black Colleges and Universities enroll much higher percentages. *See, e.g.,* Thurgood Marshall School of Law, 2017 Standard 509 Information Report, http://www.tsulaw.edu/consumer_info.html (last visited May 1, 2018) (showing 239 of 255 entering students were members of racial minorities).

3 *See* William H. Frey, *Census Shows Modest Declines in Black-White Segregation* (Dec. 8, 2015), https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/ (last visited Mar. 28, 2018).

4 Racial discrimination in conduct related to the practice of law is professional misconduct under the ABA's Model Rules: "It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race . . . ." MODEL RULES OF PROF'L. CONDUCT § 8.4(g). Attorney "[d]iscrimination and harassment . . . undermine confidence in the legal profession and the legal system. Such discrimination includes harmful *verbal* or physical *conduct that manifests bias or prejudice towards others*. Harassment includes . . . derogatory or demeaning verbal or physical conduct." MODEL RULES OF PROF'L. CONDUCT § 8.4 cmt. 3 (emphasis added). The rules raise at least a question of a reporting requirement regarding racial speech. *See* MODEL RULES OF PROF. CONDUCT § 8.3(a) (requiring reporting by "[a] lawyer who knows that another lawyer has committed a violation of [these rules] that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"). The Model Rules define the "practice of law" broadly to include "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." MODEL RULES OF PROF'L. CONDUCT § 8.4 cmt. 4. The comments make clear that lawyers may work to promote diversity and inclusion, specifically permitting "initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." *Id.*

Similarly, judges must perform their duties "without bias or prejudice." ABA MODEL CODE OF JUD. CONDUCT 2.3(A). "A judge shall not . . . by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race . . . and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so." *Id.* Moreover, judges "must require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race . . . against parties, witnesses, lawyers, or others." ABA MODEL CODE OF JUD. CONDUCT § 2.3(C). Manifestations of bias or prejudice include "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race . . . and crime; and irrelevant references to personal characteristics." *Id*. cmt. 2.

This essay shares two approaches for responding to the elephant in the room. Both approaches are based on guidelines developed by facilitators at workshops I've attended to address my own discomfort at the possibility of responding to a racially charged comment. The first approach seems more appropriate in unstructured situations, such as a social setting or an office meeting. The second approach is designed for leading a Continuing Legal Education (CLE) lecture or a law school class. Obviously, there is overlap between the two approaches, and ideas from each might be useful in a number of situations.

After introducing each approach, I offer scenarios where racially charged words are spoken. The scenarios are drawn from situations I have experienced, heard anecdotally, or read about, and they are presented to provide a basis for reflection. The responses are based on trainings, discussions, and readings, and they express what I might hope to say in the moment.[6] For people like me, who only think of the right thing to say hours later, in the middle of the night, rehearsing responses can be helpful. I practice these responses, just as I would rehearse a public lecture or professional presentation, to prepare myself to be effective when I next find myself facing an elephant.

To be clear, I have no solution, no magic that will allow every attorney to respond effectively to racially charged words. My responses are personal, and they likely reflect my position as a white,[7] female, straight, cisgender, tenured law professor.[8] I hope that by sharing my own efforts to respond to the elephant in the room, I can contribute to a conversation about race that we must have,[9] yet is still rare.[10]

5 This essay addresses only explicit, verbal statements, not implicit racism or conduct. Implicit racism raises different problems and requires different responses.

6 These suggested responses may strike some readers as naïve, misguided, or preposterous, based on that reader's identity and experiences. Again, I intend for them to serve as a catalyst for reflection.

7 While writing this essay, I have become even more aware of the privileges attached to whiteness in our society. White privilege is the view of many white Americans that "their experiences, policies, procedures, practices, actions, words, and beliefs [are] 'normal' and that things outside of those parameters are abnormal." Sheryl J. Willert, *Race, Power, Privilege and Bias: The Responsibility of Corporate America Post 2016 Presidential Elections*, 12 IN-HOUSE DEFENSE Q. 22 (2017). This privilege allows white people to feel included and to do so without thinking of the advantages that inclusion brings. Barbara Flagg calls this the "transparency phenomenon," which "may be a defining characteristic of whiteness: to be white is not to think about it." Barbara J. Flagg, "*Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993).

8 I hope the suggestions also reflect what I have learned from my experiences, my relationships, my reading, and my efforts to become more educated about race. *See* Catharine Wells, *Microaggressions in the Context of Academic Communities*, 12 SEATTLE J. FOR SOC. JUST. 319, 320 (Fall/Winter 2013) (noting the particular role white women can play in addressing microaggressions in law schools, "but only if we recognize that our hard won places in the establishment create the risk of blindness").

9 "We have a responsibility to push the conversation forward until we're all equal. Till we're all equal in this place. Because until everyone's free, no one's free . . . ." *The Strongest Thing a Man Can Do Is Cry*, interview of Jay-Z by Dean Baquet in T: N. Y. TIMES STYLE MAG. (Dec. 3, 2017), at 134. This quote echoes a speech by Fannie Lou Hamer, "Nobody's Free until Everybody's Free," which she delivered in 1971 at the founding of the National Women's Political Caucus. SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS 139 (Maegan Parker Brooks & Davis W. Houck eds., 2010).

II. Informal Conversations—Speaking to the Elephant

In one of the most valuable trainings I have attended, Janée Woods suggested a five-part checklist that I find useful when I practice responding to racially charged words in less structured situations.[11]

- Say, "No."
- Ask questions.
- Provide facts.
- Channel empathy.
- Bear witness.

The following scenarios provide a basis for exploring responses to the elephant in social settings or office conversations.

A. Responding to the Elephant in Social Settings

The elephant can show up in any social or informal setting: bar association lunches; client-development activities; holiday parties; work-related travel; alumni events; or just a quick drink with friends at the end of the day. Riding in a taxi or waiting for drinks to arrive, someone might make a comment about a particular person of color that reflects a negative stereotype or tell a racial joke. Instead of letting such comments slide past and hoping to avoid social awkwardness, how might a lawyer respond?

- *Don't laugh (saying "no" implicitly).* If someone makes a race-based joke,[12] your stone face, followed by a new topic of conversation, can speak volumes.
- *Ask questions.* Whatever the racial comment, asking a question shows your interest and willingness to engage, while making the speaker try to support the comment. "What did you say?" "What support do you have?" If you tend to be reluctant to make waves, you could prepare a one-line, all-purpose response that suggests the question, "I hope you're not telling me this because you think I agree."[13]

10 Ronald M. Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community*, 45 COLO. LAW. 67, 73 (Mar. 2016) (illustrating conversations about race in South Africa that never happened in the United States).

11 Janée Woods, *Practicing Resistance: Becoming and Growing as an Ally*, University of Oregon Center for the Study of Women in Society (Feb. 12, 2018); *see also* What Matters, with Janée Woods, at https://janeewoods.com (last visited Mar. 28, 2018). Others have addressed some of these steps. *E.g.,* VERNA A. MYERS, MOVING DIVERSITY FORWARD: HOW TO GO FROM WELL-MEANING TO WELL-DOING 160–62 (2011).

12 Nadra Kareem Nittle, *How to Respond to a Racist Joke*, https://www.thoughtco.com/how-to-respond-to-racist-jokes-2834791 (last visited Mar. 28, 2018).

13 Sarah Kelly Shannon (@thesarahkelly) TWITTER (Aug. 25, 2017, 4:54 AM), https://twitter.com/thesarahkelly/status/901050237552340992.

- *Provide facts.* Another possibility is to provide facts that counter the race-based assertion. These facts could be statistics,[14] scholarly work,[15] or your own experience. Especially if the speaker is also a friend, have a frank conversation. Start by affirming your friendship and your desire to share views that are important to you.[16] "You're my friend, and I know you didn't mean to hurt me. But we need to talk about what you just said."[17]
- *Step away, but bear witness.* Sometimes you might decide to walk away from the group when you hear a racial comment or even as the conversation heads toward a racial topic.[18] Ask others who look uncomfortable to join you. "I'm going for more appetizers. Do you want to come?" Then let any persons of color in that group know that you witnessed what was going on, and what further steps you might take. "I could see where her rant was heading. I'm going to stop by her office on Monday to let her know why I couldn't listen."

B. Responding in Office Settings

Law offices are not without their elephants. Racially charged words may be blatantly obvious or may be couched in terms that appear neutral, or that feel neutral to the speaker.[19] For instance, in a discussion about

14 For example, even though "black and white people use marijuana at roughly the same rates," black people are much more likely to be arrested. Dylan Matthews, *The Black/White Marijuana Arrest Gap, in Nine Charts*, WASH. POST (June 4, 2013), *available at* https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-blackwhite-marijuana-arrest-gap-in-nine-charts/?utm_term=.d529536df764 (last visited Mar. 28, 2018).

15 Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial, in* KENNETH J. FASCHING, TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE 31–38 (Varner et al. eds., 2014).

16 "What Can I Do about Casual Comments?" in Southern Poverty Law Center, *Speak Up: Responding to Everyday Bigotry* (Jan. 25, 2015), *available at* https://www.splcenter.org/20150126/speak-responding-everyday-bigotry#social-events (last visited Mar. 28, 2018).

17 *See* Robin DiAngelo, *White Fragility*, *infra* note 35 (minutes 55:10–57:10 of YouTube video) (explaining the challenges of white people not being open to hearing those concerns from persons of color).

18 For white readers, this strategic decision to step away should not be used as a cover for white fragility that renders you unwilling to engage. As Robin DiAngelo writes, "[W]hites are often at a loss for how to respond in constructive ways. Whites have not had to build the cognitive or affective skills or develop the stamina that would allow for constructive engagement across racial divides." Robin DiAngelo, *White Fragility*, 3 INT'L J. CRITICAL PEDAGOGY 54, 57 (2011). Staying silent when racially charged words are spoken perpetuates white privilege. Robin DiAngelo, *Nothing to Add: A Challenge to White Silence in Racial Discussions*, 2 UNDERSTANDING & DISMANTLING PRIVILEGE 2 (Feb. 2012); *see also supra* note 7 (discussing white privilege).

19 These "neutral" comments might be based on an implicit bias. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); *see also* Erik J. Girvan, *On Using Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON UNIV. CIV. RTS. L.J. 1, 7 (2015), *available at* http://sls.gmu.edu/crlj/wp-content/uploads/sites/16/2016/01/GMC101.pdf. A simple Implicit Association Test, taken online, can be an effective first step in recognizing our own implicit biases, including those along racial lines. *See* Implicit Project, *available at* https://implicit.harvard.edu/implicit/ (last visited Mar. 28, 2018). The key is that every person, and every attorney, has implicit biases. *See* Sandgrund, *supra* note 10, at 73 (describing a Latina attorney who held an unconscious bias

hiring, someone might want to raise the bar for a person of color, suggesting the need for another writing sample or preferring to consider only candidates from certain schools.[20] In staffing a new client matter, or discussing advancement in the firm, someone may note that a person of color doesn't "fit" very well with the team being assembled or with the firm's culture.[21] In meeting new clients, an attorney might try to make small talk by asking, "No, where are you *really* from?"—assuming from the clients' appearance that they aren't Americans.[22] Each of these elephants needs to be recognized and addressed.

- *Say, "No," and provide facts.* If someone is disparaging a particular colleague, offer support for that colleague and back it up with your experience: "I disagree. I've found his analysis to be strong. Remember the *Skye* case?" or "I've had a different experience. I like brainstorming with her because she's so creative."
- *Ask questions.* When the elephant appears as a general comment based on negative stereotypes, your questions can show that you disagree and make the speaker examine his views.[23] "Why do you think that?" "Do you have a specific example?"
- *Channel empathy.* It's possible that the speaker has had little contact with the person being discussed, and channeling empathy can highlight the problem while moving the speaker to a better place. "Maybe you haven't had many opportunities to talk to her, but I'm sure if you stop by her office or invite her to lunch you'll find she's one of our best new associates. I'll be glad to set up a lunch for the three of us next week."

that favored white male colleagues). Being aware of these biases makes it possible to avoid acting on them. Paulette Brown, *A Top-Down Approach to Increasing Law Firm Diversity: What Managing Partners Need to Know*, *in* BUILDING AND ENCOURAGING LAW FIRM DIVERSITY, *4 (Thomson Reuters/Aspatore 2016). Moreover, biases are more often triggered during stressful times, when we default to what is familiar rather than what is right or what is best. *Id.*

20 JOANN MOODY, FACULTY DIVERSITY: REMOVING THE BARRIERS 7–8 (2d ed. 2012).

21 *Id.* at 9–10.

22 This statement is an example of microaggression: "'brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults toward the target person or group.'" Eden B. King et al., *Discrimination in the 21st Century: Are Science and Law Aligned?* 17 PSYCHOL. PUB. POL'Y & L. 54, 56 (2011) (quoting Derald Wing Sue, et al., *Racial microaggression in everyday life: Implications for clinical practice*, 62 AM. PSYCHOLOGIST 271, 273 (May–June 2007). Another example is asking a person of color how he got his job—assuming it was not on merit. *See* http://www.microaggressions.com (last visited Mar. 28, 2018) (defining types of microaggressions and providing examples); *see also* Ronald Wheeler, *About Microaggressions*, 108 LAW LIB. J. 321, 323–25 (2016).

In microaggressions, a white person assumes her view is normal and simply makes a statement; because no insult was intended, she assumes none was felt. When told that a listener was insulted, she is likely to shift the blame to the listener, who is presumed to be too sensitive. Wells, *supra* note 8, at 322–24. Repeated microaggressions take their toll on the listener and can have a negative impact on workplace performance. David W. Fujimoto, *Thrown Under the Bus: Victims of Workplace Discrimination after* Harris, 48 U.S.F. L. REV. 111, 138–39 (2013).

23 Nittle, *supra* note 12.

- *Bear witness.* Sometimes a colleague or supervisor uses words intended to honestly address racial discomfort, but those words carry a racial charge instead. This situation might arise in a group interview, if attorneys spend more time describing the firm's diversity policy than asking the candidate about his impressive credentials. Or it might happen when a supervisor admits to a person of color, "I'm uncomfortable talking to you" or "I've never worked with a black person before." Reference to the sole other person of color in the office ("Maybe you'd be more comfortable talking to Barry"), or to the person of color who left after a few years ("I remember Robin having a similar problem"), will also be counterproductive.[24] A colleague hearing any of these exchanges might not be able to say anything helpful in the moment, but she can later share with the person of color that she heard and was also uncomfortable. She might also circle back to colleagues with feedback and suggestions for better communication.

III. Responding to the Elephant in a CLE or a Classroom

When an attorney is an instructor or guest lecturer for a CLE or a law school class, the attorney can take additional steps—in preparation and during class—to respond to racially charged statements. First, the instructor can set expectations for class engagement; the instructor also has time to anticipate challenging topics, plan his own words with care, and consider where discussions might go. Second, the instructor has a leadership role that is quite different from an attorney in a social or office setting and that requires engaged response to assure no one's learning or professional opportunities are hindered by other participants. This section begins with suggestions for preparing in advance for the elephant's appearance and then explores what to say and do in the moment.[25]

24 Law firms have invested in diversity hiring for decades. Caroline F. Hayday & Carlos Dávila-Caballero, *Strengthening Diversity and Inclusion Efforts through Leadership and Lawyer Engagement*, *in* BUILDING AND ENCOURAGING LAW FIRM DIVERSITY *1. Firms nonetheless continue to struggle with retention and promotion, and half of the minority lawyers in major law firms leave within three years. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1045 (2011); *see also* Nat'l Ass'n for Law Placement, *Representation of Women and Minorities Among Equity Partners Has Increased Only Slightly*, NALP BULL. (Apr. 2017) (https://www.nalp.org/0417research) (citing 2016 NALP survey showing 5.8% of equity partners in multi-tier law firms were racial or ethnic minorities).

25 This section of the article draws extensively on workshops provided by the University of Oregon's Teaching Effectiveness Program, referred to above in the author's note (*).

A. Preparing to Teach

When the topic of a CLE or class is likely to raise racial issues, the instructor should prepare in advance to keep the conversation civil while welcoming different views.[26] Guest lecturers might spend a few minutes before class thinking of hot-button issues, policies, or words that might be used in class and develop responses based on the suggestions below. Further, adjunct instructors in law schools can make civil engagement and persuasive discourse a course objective, stated in the syllabus and referred to at the beginning of sensitive discussions or whenever challenging topics come up.[27] Professor Charles Calleros includes the following in his syllabus:

> **Deriving Maximum Benefits from Diversity of Perspectives:** We should welcome and listen to all perspectives, across the full spectrum of views, with the aim of understanding them fully. As an important facet of our academic and professional training, we must also express our views with utmost civility, good faith, and mutual respect. I urge you to focus on issues and ideas, and to address your arguments to me, rather than to other students. . . . I hope that views stated in class will inspire further constructive conversations after class, again in civil terms and with all mutual respect, in the discussion forum of our course website and in friendly discussions and debates over lunch or coffee.[28]

Experienced lawyers and novice law students alike might benefit from instruction on how to state their views without being provocative.[29] A few pointers on how to present ideas persuasively could be added to the course syllabus. Including handouts or short video links can help participants think about how to engage effectively.[30]

26 For a more extensive treatment of preparation, see Vanderbilt University, Center for Teaching, *Difficult Dialogues*, https://cft.vanderbilt.edu/guides-sub-pages/difficult-dialogues/ (last visited Mar. 28, 2018); University of Michigan, Center for Research on Learning and Teaching, http://www.crlt.umich.edu/multicultural-teaching (last visited Mar. 28, 2018); *see also* Jeannine M. Love et al., *Facilitating Difficult Dialogues in the Classroom: A Pedagogical Imperative*, 38 ADMINISTRATIVE THEORY & PRAXIS 227, 229–30 (2016) (urging faculty to engage in self-reflection and to "anticipate student resistance to difficult dialogue" before leading classes on sensitive topics).

27 American Bar Association standards for accrediting law schools have increasingly turned to course objectives and outcome measures. *See Chapter 3, Program of Legal Education*, https://www.americanbar.org/groups/legal_education/resources/standards.html (last visited Mar. 28, 2018).

28 Charles Calleros, March 2018 (on file with the author). Also included is a note about use of class recordings: "I hope to have IT record class to facilitate your review of lectures, but it would be a serious breach of class rules to post or otherwise repeat a recording, quotation, or paraphrasing of anyone's statement in class for the purpose of ridiculing that person's contribution; that could discourage robust class discussion." *Id.* Other instructors involve students in developing group rules for classroom discussions. Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59, 69–71 (2007).

29 I begin each spring semester by telling students what they learn about appellate advocacy should also help them have more productive classroom discussions and post more persuasively on social media.

30 *E.g.,* Jay Smooth's Ill Doctrine, *How To Tell People They Sound Racist*, http://www.illdoctrine.com/2008/07/how_to_tell_people_they_sound.html (last visited Mar. 28, 2018).

B. Responding to Racial Comments in Class

The CLE or course instructor is the recognized discussion leader and thus has a role different from that described in the prior section on social or office settings. Unfortunately, organizations offering CLE courses and law schools employing adjuncts rarely offer training or even guidance to these practitioners. To address an inappropriate statement in a class setting, consider these steps:[31]

1. observe objectively what is happening;
2. state your response; and
3. act.

The first step is to observe the other participants' response in a non-judgmental way. You might echo the speaker's comment in a neutral way: "I hear that you are sharing your views on affirmative action." Or you could observe the expressions of other participants: "Others in the room seem disturbed by that comment." You might provide some context, especially if the comment is tangential to the topic: "Today's topic is housing, and you've brought up free speech on campus."

In the next step, state your own reaction, presented either as your own view or as a more general position. You might disagree: "I see that point very differently." Or you could attribute the different view to an indeterminate group, which might include yourself and many in the classroom: "That's a provocative position on an important issue. How do you respond to those who see it very differently, who see it as . . . ." Or you might share your personal reaction: "I'm very uncomfortable with that assertion, but it leads to an important conversation."

Finally, lead the group through an activity to engage the issue. Assuming the comment raises legitimate views on multiple sides, you might explain the importance of being able to argue from different perspectives and assign sections of the room to support or oppose the viewpoint expressed in the comment. You could serve as moderator or as a neutral judge trying to reach a decision. For a particularly sensitive topic, you might try a think–pair–share approach to the conversation.[32] Each participant thinks alone for a minute or two, and then joins with a partner

31 The Teaching Effectiveness Program at my university offers a multi-step approach. Jason Schreiner, *Strategies for Engaging with Difficult Topics, Strong Emotions, and Challenging Moments in the Classroom* (on file with the author). I reduced that approach to these three steps, which I am more likely to remember in panic mode. These three steps were summarized in a blog by Professor Jennifer Romig. Professor Jennifer Romig, *Civil Disagreement*, LISTEN LIKE A LAWYER BLOG (Aug. 28, 2017), https://listenlikealawyer.com/2017/08/28/civil-disagreement/.

32 This approach is credited to Frank Lyman at the University of Maryland in 1981. *See* Danxi Shen, Pair and Share, https://ablconnect.harvard.edu/pair-and-share-research (including variations and alternative approaches) (last visited Mar. 28, 2018).

to exchange ideas. Finally, the pairs share their ideas with the whole class. The advantage of these two approaches—the assigned debate and the think–pair–share—is that you manage the conversation to ensure equal time and civil discourse.[33]

If the comment was particularly harsh, the group might need to take a break. "A number of people seem disturbed by that comment. I'm uncomfortable, too, but the comment raises an important point for us to tackle. I need a few minutes to collect my thoughts, and some of you might as well. Let's take five minutes and reconvene. Some of you might want to step out for a breath of air. Some might want to sit quietly and reflect on your own views." If the comment came up near the end of a session that continues after lunch or on another day, you might instead end this session, encourage participants to reflect,[34] and promise to begin the next session with a discussion. Depending on the situation, you might seek outside assistance in leading the next session, perhaps from an expert on the topic or an administrator who is familiar with the tensions raised or the personalities involved. Adjunct professors should contact the Dean of Students and the Associate Dean of Academic Affairs, both to keep them apprised of the situation and to seek guidance. Transparency is important in the moments immediately following the racially charged comment as well as in later conversations and discussions. Participants need to know that you are not ignoring the comment by deferring discussion until later, and administrators need to have context to respond to any concerns that might be raised. All will benefit from your admission that navigating the conversation is challenging, but important.

Throughout each of these steps, you remain the head of the CLE or class session and the leader of the discussion. You should not rely on a participant from an underrepresented group to object to the racially charged comment, lead the conversation about why the comment is offensive, or offer a perspective that contradicts a racist comment. While any participant may choose to take a vocal role in the instructor's activity addressing a racist comment, the instructor needs to avoid the awkward situation in which everyone looks to a person of color in the room to shoulder the burden of moving the conversation forward. That is especially fraught when there are few participants from the underrepresented group in the CLE or class, or even in the community.

33 Of course, these approaches would not be appropriate for comments that are not open to debate (e.g., plainly attacking a student who is a member of a racial group).

34 A complication especially in the law school setting is that, while the instructor might not engage with the students until the next session, the students may continue to engage in intervening classes or on social media.

The examples above suggest that a participant is the one who raised the challenging point. If you as the instructor spoke in a way that you recognize was inappropriate, an immediate and genuine apology can begin to bridge any divides and model good communication.

Finally, don't ignore resources. For the foreseeable future, our nation—including our law offices and law schools—will be grappling with issues about race, and some people are experts in dealing with these discussions. The law firm's human-resources office or diversity committee can help. If the setting is a law school, the Dean of Students or other administrator can offer advice. Many blogs, essays, articles, books, YouTube videos, and TED talks are available on this topic.[35]

IV. Responding to the Elephant: Breaking the Cycle

People from across our segregated society attend law school. Most law schools are not diverse,[36] meaning the predominant law-school culture is that of white classmates, white professors, and white administrators.[37] The law school should be a place where all students can learn, free of prejudice, but sometimes racially charged statements pass without comment. Students graduate and become attorneys, and some remain unaware that racial comments are hurting their practice,[38] their colleagues who are persons of color,[39] and their clients.[40] These attorneys then become partners, judges, or mentors to other attorneys and law students. Elephants keep lumbering in.

We all have to respond. Responding will help us achieve justice in our law schools and in the workplace. Moreover, creating diverse envi-

35 *E.g.*, materials collected at The Derek Bok Center for Teaching and Learning, Harvard University, https://bokcenter.harvard.edu (last visited Mar. 28, 2018); Professor Jennifer Romig, *Civil Disagreement*, LISTEN LIKE A LAWYER BLOG (Aug. 28, 2017), https://listenlikealawyer.com/2017/08/28/civil-disagreement/; Facing History and Ourselves, *Preparing Students for Difficult Conversations*, *available at* https://www.facinghistory.org/resource-library/facing-ferguson-news-literacy-digital-age/preparing-students-difficult (last visited Mar. 28, 2018); Russell McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016) (tracing the impacts of stereotype threat from admissions, through law school, and into practice); Robin DiAngelo, *White Fragility*, at https://www.youtube.com/watch?v=ktVaZVVgJyc (last visited Apr. 18, 2018). For the ALWD conference "Acknowledging Lines: Talking About What Unites and Divides Us" in July 2017, referred to in the author's note (*) above, the organization's website listed sources for participants to read before the conference. ALWD, *Food for Thought*, *available at* http://alwd.umn.edu/food-thought (last visited Mar. 28, 2018).

36 *See* LSAC statistics, *supra* note 2.

37 To address challenges in the lack of diversity among faculty and administrators, see Moody, *supra* note 20.

38 Law firms stand to lose business and lose cases if their attorney composition does not match the diversity of their clients and if attorneys cannot perform in diverse environments. Brown, *supra* note 19, at *2, *5, *8.

39 *See supra* note 24, discussing the challenges law firms face in retention of attorneys who are persons of color.

40 *S*andgrund, *supra* note 10, at 70 (describing witness interviews in which a lawyer of color was able to obtain more valuable information than senior white lawyers were).

ronments can lead to better solutions to complex problems.[41] While it is important for organizations[42] and law firms[43] to make broad statements about increasing diversity, that is not enough to create diverse spaces where we can learn from and support one another. Each of us has to be ready to respond to the elephant in the room.

41 *See* Willert, *supra* note 7, at 22 (citing studies from 1995, 2011, and 2015 that demonstrate "a strong causal connection between diversity and innovative thinking, problem solving, and productivity"). A 2018 report by McKinsey and Company found significant correlation between diversity and business performance. Vivian Hunt et al., *Delivering Through Diversity* 1–2 (Jan. 2018) (executive summary), *available at* https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx. "While social justice, legal compliance, or maintaining industry-standard employee environment protocols is typically the initial impetus behind [diversity] efforts, many successful companies regard [inclusion and diversity] as a source of competitive advantage, and specifically as a key enabler of growth." *Id.* at 1; *see also* Brown, *A Top-Down Approach to Increasing Law Firm Diversity*, *supra* note 19, at *2 ("If you select a diverse group of people to look at a problem, rather than a group consisting of the same types of people, you tend to come up with a better solution."); Kenneth O.C. Imo, *Leadership Matters: Obstacles and Opportunities in Diversity and Inclusion*, *in* BUILDING AND ENCOURAGING LAW FIRM DIVERSITY (Thomson Reuters/Aspatore 2016), at *5 (arguing that homogeneity "translates into a 'herd mentality' "); Sandgrund, *supra* note 10, at 70 (attorneys and experts in a dialogue agree that "diversity of thought and experience helps inform, if not enhance, our decision-making and analysis").

42 The American Bar Association recognizes the value of diversity, and one of its four key goals is to enhance diversity in the legal profession. *See* AM. BAR ASS'N MISSION, *available at* https://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Mar. 28, 2018). In 2010, the ABA's Presidential Initiative on Diversity reported that "[i]t makes good business sense to hire lawyers who reflect the diversity of citizens, clients, and customers . . . . Indeed, corporate clients increasingly require lawyer diversity and will take their business elsewhere if it is not provided." ABA PRESIDENTIAL INITIATIVE COMMISSION ON DIVERSITY, *Diversity in the Legal Profession: The Next Steps* 9 (2010).

43 Some of the movement to diversify law firms comes from clients. Rhode, *supra* note 24, at 1041; Melinda S. Gentile & Monique S. Cardenas, *The Diversity Dividend: Diversity Does Pay* (Spring 2017), *available at* https://www.pecklaw.com/wp-content/uploads/2017/10/Melinda_S._Gentile_DBR_Article.pdf (last visited Mar. 28, 2018) (explaining that corporations' legal departments are increasingly asking outside counsel about the diversity of their firms' lawyers, with some large corporations even providing incentive programs and paying a bonus to law firms with greater diversity).

BOOK REVIEW

This Book Is Just My Type

Typography for Lawyers
Matthew Butterick (2d ed., O'Connor's 2015), 240 pages

Jennifer Babcock, rev'r*

Every lawyer puts energy into typography.[1] We follow court rules for margins and line spacing. We emphasize headings in bold and line up the elements on a caption page. We argue with our colleagues about the advantages and disadvantages of underlining versus italicization. Defining typography as the "visual component[ ] of the written word,"[2] Matthew Butterick offers concrete instructions in *Typography for Lawyers* to improve the appearance of written work and help lawyers overcome bad typography habits.

Led with a foreword by Bryan Garner,[3] *Typography for Lawyers* is a highly usable manual of document design rules, both large and small. Butterick presents the rules by increasing difficulty: first basic rules (e.g., hyphens and dashes), followed by advanced rules (e.g., widow and orphan control). The rules are cross-referenced frequently throughout the text, with an index of rules helpfully set out on the back cover. Readers can pick and choose which rules to focus on, or read cover-to-cover. He encourages his reader to practice his suggestions along the way by following his step-by-step instructions.

Butterick convinces the reader that typography is more than polishing the document at the last minute. Most lawyers' typographical choices are typically not choices at all; instead, they are habits inherited by document sharing and reuse.[4] Good typography purposefully holds the reader's attention; it allows the reader to be persuaded by the material. As

* Associate Professor of Law, Golden Gate University School of Law.

1 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE 136 (2008).

2 MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS 20 (2015).

3 *Id.* at 9–11.

4 *Id.* at 14.

Butterick suggests, just as a lawyer would not distract from her argument by appearing at a hearing in jeans or speaking in monotone, a legal writer's good document design choices strengthen her communication and create a distraction-free product.[5]

Readers skeptical about the topic of typography holding their attention can take heart. Using a lively, conversational tone, Butterick makes the material inviting and fun ("[P]lease don't adopt the slogan 'A Law Firm Unlike Any Other' and then set it in Helvetica."[6]). This short, 240-page book contains colorful explanations throughout; for example, Butterick compares two fonts with a common name by analogizing to the similarities between Bart and Lisa Simpson.[7]

Butterick's advice is actionable. Most recommendations are accompanied by technical guidance. His instructions cover multiple word processor programs, including Word for Windows, Word for OS X, and WordPerfect. A chapter is devoted to illustrating the effects of typographical choices. Sample before and after captions, motions, memos, and letterhead are displayed, along with annotations about the effect of layout, typeface, letterspacing, line length, line spacing, justification, and other document design elements.[8]

Certain rules stand out. Writers should prevent a single word at the end of a point heading from flowing onto the next line by using a hard line break, as opposed to a "carriage" return. The hard-line-break feature splits the heading in a logical place, resulting in a two-line point heading that is more balanced.[9] While a carriage return could ultimately generate the same result, it requires additional steps because its use creates a second enumerated point heading that the author must delete. Butterick includes an example[10] of the benefit of a hard line break versus a carriage return:

No treatment	IV. The defendant is entitled to judgment as a matter of law.	Awkward and unbalanced.
"Carriage" return	IV. The defendant is entitled to judgment V. as a matter of law	Wrong.
Hard line break	IV. The defendant is entitled to judgment as a matter of law.	Correct.

My favorite rule is the nonbreaking space, used to avoid the unnatural separation onto the next line of two elements that are better off together, such as a section symbol and a statutory section number.[11] A nonbreaking

5 *Id.* at 24.

6 *Id.* at 78.

7 *Id.* at 114.

8 *Id.* at 173–92.

9 *Id.* at 65.

10 *Id.*

11 *Id.* at 61.

space is useful for keeping ellipsis dots together in a *Bluebook*-style ellipsis when reflecting an omission from quoted material.[12] Other rules immediately resonate, such as how to turn off the default conversion of ordinals to superscript.[13]

Butterick also recommends serif fonts for body text because sans serif fonts have weak italic styles, which is problematic in citation.[14] Why concern oneself with font selection in light of local court rules? Local court rules allow more discretion than many lawyers believe. (*See*, *e.g.*, the U.S. District Court for the Central District of California, which requires "either a proportionally spaced or monospaced font."[15]). In fact, Butterick designs his own professional fonts, which he uses in the book and licenses to others. The middle of the book contains a chart comparing the quality of ubiquitous system fonts with suggested substitutes.[16]

He also addresses skeptics. Isn't the substance of a legal document more important than appearance? Not if the writer intends to conserve her reader's attention.[17] Why change habits when a less preferred method has been working all along? Many of Butterick's suggestions serve as time-saving devices (*see*, *e.g.*, avoiding multiple carriage returns[18] and using paragraph and character styles[19]). How can a lawyer circumvent the limitation of system fonts supported by and already installed on her reader's computer? That's a tough one, but even system fonts have desirable typeface options, such as those optimized for both print and screen. Butterick provides a chart of preferred system fonts.[20] If nothing else, the reality of judges' bringing attention to typography by imposing monetary sanctions for the nefarious use of document design (*e.g.*, line spacing) to circumvent page length[21] should give any legal writer pause.

12 *Id.* at 53. A *Bluebook*-style ellipsis is represented by "three periods separated by spaces and set off by a space before the first and after the last period." THE BLUEBOOK 85 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). In some word-processing applications, an ellipsis can also be made with an ellipsis character. The ellipsis character contains three narrowly spaced ellipsis dots. The spaces between the dots are not as wide as a word space and are nonbreaking. BRYAN A. GARNER, THE REDBOOK 39 (3d ed. 2013).

13 BUTTERICK, *supra* note 2, at 101.

14 *Id.* at 82.

15 C.D. Cal. L.R. 11–3.1.1.

16 BUTTERICK, *supra* note 2, at 112–28.

17 *Id.* at 23.

18 *Id.* at 66.

19 *Id.* at 166–67.

20 *Id.* at 78–79.

21 CafeX Commc'ns, Inc. v. Amazon Web Servs., Inc., No. 1:17-cv-01349, slip op. 1–2 (S.D.N.Y. Mar. 30, 2017) (imposing sanctions against defendant Amazon for deliberately "flouting" the court's line spacing rules "to submit a substantially longer memorandum" than permitted).

Readers process more than the substance of a written document. For myself, though I can live without purchasing a small-cap file[22] and cannot picture myself using ligatures,[23] the great takeaway is that investing in typography is putting care into one's practice of law. This phenomenon is not limited to legal writing. In a time when readers must filter false online content, typography "establish[es] authenticity" of its source and makes "a big difference in how [one] absorb[s] the news."[24] Since every lawyer cares about how her readers absorb her written work, Butterick has made the case for meticulous attention to good typographical quality. *Typography for Lawyers* is an easily digestible resource for making it happen.

22 A small-cap font file provides short capital letters that blend with lower case text and are more visually appealing than the inferior substitute offering by standard word processing systems. BUTTERICK, *supra* note 2, at 104–05.

23 Ligatures are a stylistic way to present characters, such as "f" and "i" that collide or overlap when set next to one another. *Id.* at 70–71.

24 Leeron Hoory, *This Design Detail Determines If You Trust Your News Source*, QUARTZ MEDIA LLC (July 6, 2017), http://qz.com/1018086/this-design-detail-determines-if-you-trust-your-news-sources/.

BOOK REVIEW

Making and Breaking Connections

Valuable Perspectives on Persuasion

Legal Persuasion: A Rhetorical Approach to the Science
Linda L. Berger & Kathryn M. Stanchi (Routledge Publishers 2018), 170 pages

Mary N. Bowman, rev'r*

This useful book brings together classical and modern rhetorical theory with contemporary persuasion science in a way that is both theoretical and deeply pragmatic. Linda Berger is a prolific scholar on applying contemporary and classical rhetoric to legal persuasion, while coauthor Kathryn Stanchi has written extensively about persuasion science. Together, they have created a book that gives readers both a deep understanding of these theories and a series of practical principles that legal academics, lawyers, students, and others can use to develop strategic choices in legal persuasion.

The book's central insight is that although the authors began from different places, they "arrived at the same place: legal persuasion results from making and breaking mental connections."[1] The authors argue that persuasion is possible because what we read, see, and hear can be interpreted in various ways; advocates therefore "can influence their audiences to make certain mental connections and to turn away from others."[2]

To help advocates make and break mental connections, the authors explore rhetorical concepts and techniques such as uncovering embedded plots, characters, and images; using familiar analogies and metaphors to reinforce existing connections; and using novel metaphors to break unfavorable connections. The authors also explore the cognitive science around decisionmaking and techniques such as priming and framing to

* Associate Professor of Law and Director of the Legal Writing Program, Seattle University School of Law.

1 LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE xi (2018).

2 *Id.* at 3.

activate particular mental categories or schema. The breadth and depth of the material covered in this book will make the book an excellent read for academics, students, and practitioners.

The book's organization also facilitates its usefulness. Each chapter contains a scholarly introduction of the topic, case studies that illustrate the concepts described, a summary that boils the content down to the essential concepts, and a bibliography of both scholarly works and cases and briefs on the topic for greater study. This chapter structure helps readers make connections between theory and practice for each of the topics covered, and it facilitates application of the book's insights by lawyers, law students, and academic readers to the readers' own persuasive efforts.

The larger-scale organization also meets the needs of a variety of different audiences. After an introductory section, the book begins by exploring concepts related to setting, including audience, timing, and location.[3] The book begins with a detailed exploration of the audience for legal arguments, noting that "[t]he advocate's first job is to make connections with the members of her audience."[4] The authors therefore include a practical focus on "how to construct legal arguments that will effectively connect with particular audiences in specific situations."[5] In this section on audience, the authors explain studies related to judicial decisionmaking, demonstrating a disconnect between what judges say about how they decide and what the empirical research shows about how judges actually decide. While judges seem to sincerely believe that "emotion and politics have no place in legal decision making . . . the science is decisive that emotions, experiences, and culture are a critical part of decision making and persuasion."[6] That chapter offers some suggestions to help advocates pitch arguments to appeal both to judges' conscious preferences and to the underlying factors that influence judges, themes that are explored in more detail in the rest of the book.

The chapter that follows discusses *kairos*, recommending that advocates "learn how to sense the most opportune moment to advance a particular argument and how to isolate the essential moments that convey the heart of the problem."[7] That chapter exemplifies one of the techniques that makes the book so helpful: its use of several case studies to illustrate the key concepts. In the chapter on *kairos*, the authors discuss how advocates on both sides of the political spectrum seized opportunities created by recent United States Supreme Court decisions to make

3 *Id.* at 21–38.

4 *Id.* at 4.

5 *Id.*

6 *Id.* at 28.

7 *Id.* at 37.

seemingly rapid change regarding striking down defense-of-marriage statutes or getting courts to declare that closely-held corporations have a right to religious expression. The case study descriptions help to both illustrate the concepts and suggest ways that advocates can apply the concepts to their own cases.

The authors label the next section of the book "*Invention: Stories, Metaphors, and Analogies*";[8] I would describe this section as a deep dive into storytelling. "[S]torytelling allows lawyers to carve out their client's individual situation from the midst of general rules, to imply causation by placing events into a sequence, to build characters through telling details, to evoke emotions, and to guide decision makers to naturally occurring outcomes."[9] This section explores how lawyers tell stories about both "the world in which the issue arose (the facts) and the world into which the client's story has ventured for a solution (the governing law)."[10] In telling both factual and legal stories, lawyers must focus on audience reaction, making sure that the stories both "ring true" to the audience's experiences and "hang together" by ensuring that the plot, characters, setting, and events satisfy the audience's desire for consistency.[11]

Unsurprisingly, the book has an excellent discussion of telling fact stories; that chapter discusses use of master stories to lead to a favorable result or disrupting the traditional arc by shifting the order and emphasis of various story elements.[12] The examples in that chapter are particularly varied and interesting, ranging from the choice of when to start the factual story in the briefs on behalf of schoolchildren in *Brown v. Board of Education,*[13] to various characterizations of a young female student who was assaulted in *Gebser v. Lago Vista Independent School District,*[14] to the effect of location on two cases involving the display of Ten Commandment monuments.[15] These examples illustrate how lawyers can connect their

8 *Id.* at 39.

9 *Id.* at 50.

10 *Id.* at 52.

11 *Id.* at 54. The idea of the story "ring[ing] true" is often called narrative fidelity, and the idea of a story "hang[ing] together" is often called narrative probability. *Id.*

12 *Id.* at 70.

13 Brown v. Bd. of Educ., 347 U.S. 483 (1954). The briefs for the school children framed the "Trouble," or problem, as the Supreme Court's decision to uphold separate but equal in *Plessy v. Ferguson*. Berger and Stanchi note other possible ways the issue could have been framed that would have led to starting the story in different places, such as with the institution of slavery or the adoption of the United States Constitution recognizing slavery. BERGER & STANCHI, *supra* note 1, at 61.

14 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998). *Gebser* involved a lawsuit against a school district under Title IX by a student who was 14 years old when her 50-year-old teacher began raping her; the school district's brief depicted the student as someone having a consensual relationship and conspiring with him to hide the relationship from the school district, while the plaintiff's brief portrayed her as naïve and abused by a manipulative adult. BERGER & STANCHI, *supra* note 1, at 65–66.

15 *Id.* at 67.

cases to familiar stories or break their case's typical associations by recasting the participants, drawing attention to the setting, or shifting the point of view.

The book then applies storytelling techniques to the stories of law itself.[16] In Chapter 8, Berger and Stanchi describe using archetypal stories to characterize the evolution of the law in ways that can lead decision-makers to more favorable results than would be likely based on a more traditional syllogistic use of precedent. For example, they describe the "birth story" narrative that presents the evolution of the law as a series of steps that logically and inevitably lead to the creation of a new rule desired by the advocate.[17] Rescue stories, on the other hand, are useful when the advocate has well-established precedent that is now under attack, and the advocate wants to use policy arguments to urge the court to "rescue" the precedent from the attack.[18] The authors therefore recommend that advocates "research and understand the law's history and then decide what story of the law's development best fits the client's purpose."[19]

The following section, "*Arrangement: Organization and Connection*," has an excellent discussion of the rhetorical underpinnings of traditional deductive, syllogistic arguments, which have been around for millennia, as well as the underlying System 1 versus System 2 decisionmaking from cognitive science that these arguments produce.[20] The authors then explore in more detail when advocates benefit from using a traditional syllogism versus radically departing from that form by starting with a more controversial premise and moving the reader to a less-extreme version of what the writer wanted all along.[21] The authors recommend the latter technique "in contexts in which the advocate has determined that the issue is worth litigating, but winning is unlikely," such as in criminal-defense work, plaintiff-side employment litigation, impact litigation, and amicus briefing.[22]

The chapters on metaphor and analogy offer other strategies for developing arguments in situations lacking clear precedential rules or cases.[23] Those chapters explore use of analogies in a variety of situations,

16 *Id.* at 72–78.

17 *Id.* at 74.

18 *Id.*

19 *Id.* at 78.

20 *Id.* at 125.

21 See *id.* at 138–39 (connecting this tactic to negotiating theory). The authors return to that strategy when discussing adopting a reasonable rather than aggressive tone, positing that this structure primes the audience to see the second argument as more reasonable. *See id.* at 146–47.

22 *Id.* at 139.

23 *See id.* at 162 (synthesizing Chapters 9–12).

such as answering a question of first impression, as in the case involving students wearing black armbands in protest of the Vietnam War.[24] The authors also explore use of novel metaphors and characterizations to shift the perspective of an audience likely to be hostile.[25] For example, the authors discuss *Plyler v. Doe*, a case in which the Supreme Court somewhat surprisingly struck down a Texas statute that allowed the state to withhold education funding for the education of unauthorized immigrant children.[26] In *Plyler,* the characterization of undocumented schoolchildren as "illegal" was overcome by characterizing them as permanent residents because they were likely to remain in the country indefinitely.[27] However, the authors warn advocates to be careful with the emotional tone of these analogies. They describe analogies that evoke negative emotions, such as talking about "hijacking" a government program or associating a prosecutor's argument with a cockroach in a soup; these analogies can lead listeners to associate the negative emotion with the person offering it rather than with the underlying thing that the advocate was trying to attack.[28]

The final section of the book, on "*Connecting through Tone*,"[29] notes that "[a]lthough lawyers disagree about how aggressively to push, the answer from the persuasion science is pretty clear on this question: an advocate who adopts a more-tempered, reasonable tone is more likely to connect to her audience."[30] This section then describes how to create a moderate, reasonable tone through the structure of arguments. For example, advocates can appeal to a decisionmaker's desire for consistency by building arguments gradually or show fidelity to past decisions and underlying commitments while building to a more difficult conclusion.[31] The authors also discuss the benefits and strategies of "two-sided messages," i.e., disclosing and mitigating rather than ignoring adverse information.[32] The authors explore the paradox, well-documented in social science research, that revealing flaws in your argument can strengthen your connection with the decisionmaker, while hiding these flaws can lead the decisionmaker to view you as biased and to over-correct

24 *Id.* at 91 (discussing Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969)).

25 *Id.* at 163.

26 *Id.* at 101 (discussing Plyler v. Doe, 457 U.S. 202 (1982)).

27 *Id.*

28 *Id.* at 93.

29 *Id.* at 141–60.

30 *Id.* at 141.

31 *Id.* at 144.

32 *Id.* at 150.

in favor of the other side.[33] Based on this research, the authors offer various strategies for effectively managing audience perception while dealing with negative information.

In the preface, the authors note that "the premise of this book is that lawyers should be thinking about theory, and theoreticians should be thinking about the practical, and everybody should be thinking about how to educate the next generation."[34] I saw this premise in action shortly after I finished reading *Legal Persuasion,* when I had the opportunity to sit in on a clinical class in which the second and third year law students were learning about case and client theory. After the clinical professor introduced students to these concepts, the students then brainstormed how they might use five or six sentences to introduce the story of a hypothetical client who was seeking public assistance for the costs of things like food and vet bills to support her service dog. As each student presented his or her story, I noticed students implicitly applying the content from Chapter 8. Some painted the client as a hero, someone who was overcoming the impact of various disabilities by finding a treatment that was more effective than what the agency wanted to cover. Others shifted the focus to the agency's role in providing public assistance, creating space for the agency to be the hero of the story if it found a way to cover the needed costs, while one student focused on the service dog and its value. The various student stories also portrayed "the Trouble" in different ways, from the underlying disabilities that the client struggled to manage to the ancillary costs of the otherwise valuable treatment provided by the service dog to the agency's overly restrictive view of its mission and coverage regulations.

The students then talked about the research they would do and the potential arguments they might make; in doing so, they drew on several different chapters involving invention and sequencing of arguments. They talked implicitly about using traditional deductive arguments if the results of the research seemed promising, but they also touched on the possible role of policy arguments to expand coverage, which sounded like a good opportunity to use a "birth story" frame. And other students were interested in arguments based on more explicit analogies, such as how coverage of expenses for a service dog should be treated like coverage for mobility devices (like wheelchairs) or personal caregivers. After class, I recommended the book to my clinical colleague as a potential resource for students; similarly, even experienced practitioners could benefit from the

33 *Id.* at 152–53.

34 *Id.* at xii.

book's tools for helping lawyers more explicitly recognize the various frames and choices and evaluate how persuasive each approach might be in context.

In the end, this concise but rich book is well worth exploring for anyone interested in how persuasion works or how to advocate more persuasively in a legal context.

BOOK REVIEW

Legal Writing Lessons from American Presidents

Communicators-in-Chief: Lessons in Persuasion from Five Eloquent American Presidents
Julie Oseid (Carolina Academic Press 2017), 255 pages

Megan E. Boyd, rev'r*

What can American presidents teach us about legal writing? Much, says Julie Oseid, author of *Communicators-in-Chief*. According to Oseid, the work of five of our past presidents—or communicators-in-chief—offers excellent examples of techniques legal writers should strive to employ. Oseid highlights the different writing techniques that Presidents Jefferson, Madison, Lincoln, Grant, and Roosevelt each used with aplomb, and gives examples of the use of that technique in the president's writing and speech. Oseid then explains why the examples are effective, particularly in the historical context in which they were offered, and suggests ways in which today's legal writers can employ these techniques in their writing.

The first president featured is Thomas Jefferson, who, according to Oseid, was a master of creating metaphors that are "simple, concrete, visual, creative, and concise."[1] Jefferson, she explains, "recognized that metaphor could stand in the way of truth," and thus used metaphors "for style and persuasion, but not as substitutes for complex abstract ideas."[2] *Communicators* describes in detail the history of Jefferson's "wall of separation" metaphor, which he used only once in a letter to the Danbury Baptist Association after it sent Jefferson a letter congratulating him on his

* Lecturer, Georgia State University College of Law.

1 JULIE OSEID, COMMUNICATORS IN CHIEF: LESSONS IN PERSUASION FROM FIVE ELOQUENT AMERICAN PRESIDENTS 25 (2017)

2 *Id.* at 27.

election and asking him how its members could secure their religious liberty as a minority sect in Connecticut.[3] Jefferson's response included the following:

> Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof; thus building a wall of . . . separation between church and state.[4]

Oseid suggests that Jefferson used the "wall of separation" metaphor as a stylistic device and almost certainly did not intend for it to develop into the doctrinal metaphor that it did.[5] She notes that Jefferson's "classical education . . . [made him] fully aware of the dangers of metaphor because all the classicists he admired pointed out those dangers," and he knew that "metaphor could stand in the way of truth."[6] Oseid contends that Jefferson "did not intend the metaphor to be his final and all-encompassing statement about the First Amendment religion clause," but "once he released the metaphor[,] then it developed, over the last 200 years in the law, into a doctrinal metaphor."[7]

Oseid advocates for the use of metaphor in law but urges writers to take care in creating or borrowing metaphors in legal writing[8] because while metaphors have "the potential for tremendous good, such as perfectly summarizing and simplifying a difficult concept," they also have "the potential for tremendous danger, such as oversimplifying or incorrectly summarizing a difficult concept."[9] Thus, urges Oseid, legal writers should use metaphors that are "decorative" but "concrete" (as is a wall, both literally and figuratively), that are analogic, that are creative in that they assist the reader in understanding an idea "in a new way," and that put "complex legal concepts 'into a few words.'"[10]

3 *Id*. at 29–30.

4 *Id*. at 30–31 (quoting Letter from Thomas Jefferson, President of the U.S., to Danbury Baptist Ass'n (prelim. draft) (Jan. 1, 1802)). Oseid notes that Jefferson's first draft of the letter included the phrase "wall of eternal separation" but that for reasons unknown, Jefferson removed the word "eternal" from the final letter. *Id*. at 33.

5 *Id.* at 34–35. Oseid defines a doctrinal metaphor as one that expresses "doctrinal law, the rules and principles governing a legal issue, in the form of a metaphor." *Id.* at 6.

6 *Id*. at 27.

7 *Id*. at 34–35.

8 *Id.* at 40.

9 *Id*. at 23.

10 *Id*. at 38–39 (quoting Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation between Church and State 112 (2002)).

Oseid next discusses James Madison's rigor, which she defines as "thoroughness, preparation, and diligence."[11] She offers No. 10 of *The Federalist Papers* as an example of that rigor. *Federalist No. 10* was "the distillation of Madison's effort over several years to understand the weaknesses of American government and to design and enact a better alternative."[12] It reflected "years of study and analysis, refined in stages."[13] Madison's main argument in *Federalist No. 10* was that "an extensive republic—like the new federal government—is the most effective form of government to provide for liberty and neutralize self-interest and oppression."[14]

In *Federalist No. 10*, according to Oseid, Madison effectively "reversed the conventional logic" that republics are most effective in small geographic areas where representatives "identif[y] closely with the polity."[15] Oseid highlights the ways in which, through No. 10 and his writings preceding it, Madison clearly and persuasively argued that "majority oppression [is] the greatest danger under popular governments"[16] and is better controlled in a large republic rather than in a direct democracy.[17] His persuasion, says Oseid, resulted from his process of taking "detailed notes" of events, "puzzl[ing] out the logical conclusions and practical consequences of both . . . arguments and counterarguments," and presenting work that was "precise, accurate, logical, anticipatory of other arguments, and persuasive."[18] Eventually, Madison's "insight about the dangers of local majorities" that was at the heart of *Federalist No. 10* "became embodied in the Constitution through the Fourteenth Amendment, which restricted state action, and its incorporation of the Bill of Rights against state government."[19]

Even though Madison was not a lawyer, he wrote like one, says Oseid; "he was thorough, he was prepared, he viewed each problem from every side, and he knew the answers to all the questions about his position before his opponents even formulated those questions."[20] Oseid encourages legal writers to emulate Madison's rigorous process to "produc[e] tightly reasoned, persuasively argued texts."[21]

Oseid then analyzes the writing of Abraham Lincoln, calling the brevity he exemplified "critical" for legal writing.[22] According to Oseid, Lincoln was a slow writer[23] who always started early in drafting his

11 *Id.* at 9.

12 *Id.* at 70.

13 *Id.* at 73.

14 *Id.* at 71.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 54.

19 *Id.* at 73.

20 *Id.* at 55.

21 *Id.* at 56 (quoting GARRETT WARD SHELDON, THE POLITICAL PHILOSOPHY OF JAMES MADISON 2 (2001)).

speeches[24] and edited "ruthlessly,"[25] preferring "short sentences and short words whenever possible."[26] But Lincoln did not eschew clarity in favor of brevity—he learned to visualize his audience when he was a litigator and chose his language carefully to appeal to his particular reader or listener.[27]

Oseid uses Lincoln's first inaugural address to demonstrate Lincoln's process. In drafting that speech, Lincoln sought input from friends and colleagues and worked to eliminate redundant language while being cognizant of cadence.[28] Thus, because of his use of brevity in other areas of the speech, Lincoln felt comfortable incorporating several long sentences, including the "brilliant"[29] final sentence—"The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."[30]

Oseid next highlights the writing of Ulysses S. Grant as a model for clarity, that is, the qualities of clear thought and clear expression.[31] Oseid shows how Grant, a man who "preferred action,"[32] wrote in a "crisp, forceful, and clear"[33] manner. As examples, she offers several of Grant's military orders, including one to General George Gordon Meade, in which Grant wrote, "Lee's army will be your objective point. Wherever Lee goes, there you will go also."[34] While some have claimed that Grant's writing is "without charm and without high breeding,"[35] Oseid points out that he wrote in a way that was "compact, yet packed with meaning."[36] Oseid argues that legal writers should strive for the same type of clarity in their writing, noting that the "value that lawyers add when writing" should be to "clarify and explain the pertinent facts, issues, and law" in a way that is crystal clear.[37] Grant did that, says Oseid, and we should strive as legal writers to do that too.

Oseid's final communicator-in-chief is Teddy Roosevelt. According to Oseid, the hallmark of Roosevelt's writing is zeal, which she describes as a

22 *Id.* at 85.

23 *Id.* at 99.

24 *Id.* at 100.

25 *Id.* at 106.

26 *Id.* at 107.

27 *Id.* at 87.

28 *Id.* at 92.

29 *Id.* at 92 (quoting FRED KAPLAN, LINCOLN: THE BIOGRAPHY OF A WRITER 326 (2008)).

30 *Id.* at 91 (citing RONALD C. WHITE JR., THE ELOQUENT PRESIDENT: A PORTRAIT OF LINCOLN THROUGH HIS WORDS 62 (2005)).

31 *Id.* at 16.

32 *Id.* at 123.

33 *Id.* at 128.

34 *Id.* at 130 (citing ULYSSES S. GRANT, PERSONAL MEMOIRS OF ULYSSES S. GRANT 415–16 (1992)).

35 *Id.* at 140 (quoting JOHN WAUGH, U.S. GRANT: AMERICAN HERO, AMERICAN MYTH 210 (2009)).

36 *Id.* at 130.

37 *Id.* at 18.

way of "convinc[ing] the reader that the author actually believes what the author writes."[38] Roosevelt, says Oseid, "lived his life with zeal," and his days were "packed with work, adventure, and joy."[39] Roosevelt's writing was zealous, Oseid contends, because it was "accurate, simple, complete, and full of joy."[40] Oseid offers several examples of Roosevelt's zeal in speeches and his autobiography, including one of my favorite quotes—the man in the arena—from a 1910 speech:

> The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes up short again and again because there is no effort without error or shortcoming; but who does actually strive to do the deeds; who knows the great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold timid souls who know neither victory nor defeat.[41]

Oseid further notes that Roosevelt is perhaps best known for his one-liners—"golden sentences" in which Roosevelt "shares his thoughts and 'vividly sketches his ideals.'"[42] These include such famous lines as, "I have always been fond of the West African proverb: 'Speak softly and carry a big stick; you will go far.'"[43]

The last chapters of *Communicators* are dedicated to a discussion of the five presidents' reading habits and favorite books, the ways in which the presidents influenced the writing (and were influenced by the writing) of each other, and the common character traits that aided these presidents in being strong writers, including hard work, grit, confidence, realism, and creativity.[44]

As a fan of history, I thoroughly enjoyed *Communicators*. Not only did I learn much about the presidents that I did not previously know, but through Oseid's examples of their work, I found myself inspired to employ their writing techniques. *Communicators* does what it promises—gives lessons in persuasion while entertaining the reader with historical tidbits

38 *Id.* at 20.

39 *Id.* at 143.

40 *Id.* at 144.

41 *Id.* at 163–64 (quoting THE WISDOM OF THEODORE ROOSEVELT 48 (Donald J. Davidson ed., 2003)).

42 *Id.* at 161 (quoting MURAT HALSTEAD, THE LIFE OF THEODORE ROOSEVELT: TWENTY-FIFTH PRESIDENT OF THE UNITED STATES 143 (1903)).

43 *Id.* at 163 (quoting JAMES R. HOLMES, THEODORE ROOSEVELT AND WORLD ORDER: POLICE POWER IN INTERNATIONAL RELATIONS 19 (2006)).

44 *Id.* at 229–41.

about some of the nation's most admired presidents. *Communicators* is part history book, part legal writing inspiration, and a must-read for anyone interested in either or both of these topics.

BOOK REVIEW

My Enemy's Enemy and the Case for Rhetoric

Race, Nation, and Refuge: The Rhetoric of Race in Asian American Citizenship Cases
Doug Coulson (SUNY Press 2017), 318 pages

Leslie P. Culver, rev'r*

There is a special need for rhetorical strategy in advocacy where legitimacy, power, and identity are rooted in particular relationships. In *Race, Nation, and Refuge: The Rhetoric of Race in Asian American Citizenship Cases*, Doug Coulson analyzes race eligibility cases[1] to dramatically underscore the value of rhetoric in judicial advocacy. With this frame, he contests the view that effective legal discourse must use technical language and rules. Instead, in exploring the "deeply intertwined histories of rhetoric and law," Coulson contends that "legal discourse can only be adequately understood by considering its rhetorical dimension."[2] While traditional legal discourse might endorse judicial narratives grounded in well-established and neutral decisionmaking based on clear rules of law, many immigrant advocates in the nineteenth and twentieth centuries relied upon imagery of the American dream to successfully challenge arbitrary barriers to becoming "free white persons." In doing so, they used a rhetorical strategy that politically aligned the advocate's interest with the United States's national security.

Coulson's thesis is to showcase the rhetorical dance that balances the United States's perceived threats to national security with the nation's

*Legal Writing Professor and Program Director, A.I.M. for Law Diversity Pipeline Program, California Western School of Law.

1 "Race eligibility cases" are judicial decisions between 1878 and 1954 in which federal and state courts, as well as the United States Board of Immigration Appeals, interpreted the racial-eligibility provision of the 1790 Naturalization Act for purpose of American citizenship. DOUG COULSON, RACE, NATION, AND REFUGE: THE RHETORIC OF RACE IN ASIAN AMERICAN CITIZENSHIP CASES ix (2017). For the specific ethnic groups, see *infra* note 9.

2 COULSON, *supra* note 1, at xii.

profoundly subjective definition of whiteness and freedom. Borrowing from linguists' theory of transitivity,[3] Coulson argues that where high transitivity[4] was attributed to a third party's actions to demonstrate a "shared external threat"[5] between the advocate and the United States, the advocate was successful. More simply put, where advocates successfully pointed to a third party as the true source of persecution or fear (attribution of high transitivity), a persecution or fear that the United States also experienced (shared external threat), the advocates successfully aligned themselves with the United States and appealed to the need to unify, thus becoming "free white persons" for citizenship by naturalization. Yet, where applicants were the archetype of their own racial group, proclaiming their group bore characteristics of, or better than, European whiteness, and were therefore deserving of racial and political inclusion, they generally "failed to invoke the unifying power of a shared external threat to transcend racial differences."[6] Instead, such rhetoric often raised concerns of a potential threat to the United States.

To demonstrate the value of rhetoric in legal advocacy, Coulson's book moves beyond the often-explored published judicial opinions in race eligibility cases and casts a larger literary net to include unpublished judicial opinions, hearing transcripts, legislative documents, and other memoranda that captured the vigorous debates, sentiments, and emotive appeals from the various legal actors on both sides of the issue.[7] The book is divided into four chapters with the focus on Asian-race-eligibility cases. This focus is due to the exclusion of Asians within the Naturalization Act of 1790, which limited eligibility of naturalization to "free white persons" and, for a period after the Civil War, to those of African descent.[8] Thus,

3 "Although transitivity is most commonly used to refer to the classification of transitive and intransitive verbs depending on whether they allow or take an object, linguists have identified transitivity as a property of all languages that describes situations in which one participant in a clause transfers action or "'does something to' another" in a relative and contextual manner that is gradable rather than absolute." *Id*. at xxv–xxvi (quoting ÅSHLID NÆSS, PROTOTYPICAL TRANSITIVITY 42 (2007)). Most notably Coulson's reliance on transitivity as a theoretical foundation is to note that "[a]n action that has little or no effect on the actor who does something to the other, but a substantial effect on the target of the action, reflects a greater transfer of action and is therefore higher in transitivity than an action that has more effect on the actor or less effect on the target." *Id*. at xxvi.

4 For an explanation of high transitivity, see *supra* note 3.

5 COULSON, *supra* note 1, at 31, xxiv (discussing his reason for examining the shared external threats in race eligibility cases as a purposeful intent to not focus on "imitative racial performance[]," as many studies of these cases employ, because "imitative performance fails to account for cases in which applicants were held to be racially ineligible for naturalization despite having offered impressive evidence of assimilability as well as for cases in which applicants were held racially eligible for naturalization despite offering little evidence of assimilability").

6 *Id.* at 32.

7 *See id.* at xix (discussing the extensive review of National Archive records from judicial files among other research Coulson conducted beyond published judicial opinions).

8 *Id.* at xi.

the issue of Asian inclusion for naturalization became highly contested in both state and federal courts.[9]

In Chapter 1, Coulson examines race and citizenship from the period shortly after the Naturalization Act through the United States Supreme Court's first race-eligibility-for-naturalization case, *Ozawa v. United States*.[10] Telling rhetorical strategies during this period included American Indians' being dubbed eligible for citizenship because of the need to have them serve on the United States's behalf in times of war, particularly so because African Americans were prohibited from serving in such capacity. Thus categorical whiteness for naturalization purposes was, as Coulson describes, "contingent on perceived threats to the nation's borders and the enmities and alliances they prompted."[11]

Next, in Chapter 2, Coulson compares the rhetorical strategies of appealing to Indian nationalism on the one hand to a stateless personhood on the other, employed in *United States v. Thind*[12] and post-*Thind* cases. For example, prior to *Thind*, the Court held Indians to be racially eligible for naturalization. However, the *Thind* court ruled oppositely on the application of Bhagat Singh Thind, a high-caste Indian. Coulson maintains this reversal was largely due to Thind's political activism for Indian nationalism and Thind's failed rhetorical strategy of asserting that high-caste Indians, as descendants of Aryan ancestry, actually rendered Hindus "more 'white' than the 'whites'"—a sentiment that enraged Americans.[13] The attorneys for the United States argued that the "negative associations of the Indian caste system"[14] culturally and politically separated Indians and Europeans, and thus Indians did not share "the 'white' man's burden but 'imposed' it"[15] and were not racially eligible for naturalization.[16] For contrast, Coulson compares Thind's case to *United States v. Sakharam Ganesh Pandit*,[17] where Asian Indian lawyer Sakharam Pandit fought to retain his naturalization certificate. Already an American citizen, Pandit's

9 *Id*. (noting Asian immigrant groups affected included Afghan, Arab, Armenian, Burmese, Chinese, Filipino, Hawaiian, Hindu, Iraqi, Japanese, Kalmyk, Korean, Mexican, Palestinian, Parsi, Syrian, Tatar, Turkish, Thai, Vietnamese, as well as American Indians).

10 Ozawa v. United States, 260 U.S. 178 (1922).

11 COULSON, *supra* note 1, at 10.

12 United States v. Thind, 261 U.S. 204 (1923).

13 COULSON, *supra* note 1, at xxix, 62 (quoting HAROLD ISAACS, SCRATCHES ON OUR MIND: AMERICAN VIEWS OF CHINA AND INDIA 290 (1958)).

14 *Id*. at 66.

15 *Id*. at 68.

16 *Id*. at 82 (noting that Thind eventually obtained citizenship by way of naturalization in 1935 only under the Nye-Lea Act, "which made World War I veterans eligible for naturalization regardless of race").

17 United States v. Sakharam Ganesh Pandit, 15 F.2d 285 (9th Cir. 1926).

rhetorical strategy successfully magnified the "perceived dangers of the Indian caste system"[18] the Americans already believed from *Thind*. Specifically, Pandit argued that due to his American citizenship he would be an outcast in India and become a stateless person. This plea of being a victim of the oppressive Indian caste system, Coulson suggests, created a bond with the United States who equally shared in the distaste of statelessness, commenting that "like the fear of enemies, offering asylum to fugitives has often been associated with the founding of political groups."[19] Ultimately, under both equitable estoppel and the "conscience of the court," Pandit's naturalization was not cancelled and the court called him a member of the "national family."[20]

To provide further contrast, in Chapter 3, Coulson examined the 1924 naturalization trial of Tatos Cartozian,[21] an Armenian immigrant. The United States opposed Cartozian's naturalization on the assertion that Armenians were Asian, and thus neither free white persons nor of African descent under the Act. In reviewing the *Cartozian* transcript, Coulson effectively moves the reader beyond the evidence regarding racial history—that Armenians were descendants from European ancestry, retained strict segregation in Asia, and thus were white and not Asian—and toward the defense's use of emotions and experiences of Armenian and American soldiers who fought together against Turkey in the Armenian Genocide of World War I. Specifically, the defense framed this wartime brotherhood as inspirational and loyal based on testimony from United States soldiers. The defense also framed the Armenian history as entrenched with religious persecution from the Turks and other Asian constituents because of the Armenians' professed Christianity and sympathy for Europeans. In this way, Coulson suggests the rhetorical strategy of uniting the Armenians and Americans against shared external threats—Turkish aggression and Islamophobia—established that Armenians have suffered in Asia due to their European identity, and effectively secured Armenian status as *free white persons* eligible for naturalization.

Finally, in Chapter 4, Coulson maintains that the extension of racial eligibility for the Chinese was fueled primarily by the United States's need to "strengthen alliances in Asia against Japanese aggression."[22] Perhaps equally as important during and after World War II was the United States's

18 COULSON, *supra* note 1, at xxx.

19 *Id.* at 158.

20 *Id.* at 81.

21 United States v. Cartozian, No. E-8668 (D. Or. May 8–9, 1924); United States v. Cartozian, 6 F.2d 919, 922 (D. Or. 1925).

22 COULSON, *supra* note 1, at xxxi.

use of the proclamation from the Declaration of Independence that "all men are created equal."[23] This proclamation became a rhetorical "unifying device"[24] in that the shared external threat motivated the United States to convert immigrants into friendly allies through naturalization. For example, prior to World War II, the Chinese were specifically excluded from citizenship through the Chinese Exclusion Act of 1882. But after the Japanese invasion on Pearl Harbor, "the Chinese were suddenly depicted as a brave and honorable people due to their status as allies in the war"[25] and were then eligible for citizenship.

Coulson concludes by remarking on the value of examining these cases to "understand[ ] racial and national formation."[26] Specifically, the rhetorical strategy of amplifying shared external threats was necessary for two reasons. First, immigrants obtained a favorable construction of whiteness for American citizenship. Second, the United States often reconstructed its alignment with other nations, previously perceived as potential enemies. This alignment of the "construction of enemies" functioned as "a form of rhetorical transcendence, by which divisions are overcome [through] shifting perspective."[27] Coulson also defends his position that critical rhetorical approach should be infused within modern legal theory and is particularly suitable to understand "relationships that constitute identity, power, and legitimacy in the practice of legal advocacy."[28] In racial eligibility cases, for example, where America's white elitism often butted against the immigrant's humble dreams of freedom, Coulson makes an effective argument that the rhetorical strategy of appealing to shared external threats was a better means of "transcending perceived racial divisions" as opposed to formal legal doctrine, particularly where the United States's enemies and allies were "closely intertwined" with "race, nation, and sovereignty."[29]

For those interested in critical race theory and critical legal studies, readers will find the book both profound and enlightening. One critique is that while the book conveyed many important and complex ideas, the text is weighed down at times with technical language. That said, the theory of transitivity[30] (Coulson's theoretical framework) is the language of

23 *Id.* at 120.

24 *Id.*

25 *Id.* at 127.

26 *Id.* at xxxi.

27 *Id.* at xxiv–xxv.

28 *Id.* at 164.

29 *Id.* at 165.

30 *Id.* at xxv–xxvi.

linguists.[31] It is possible then that what could feel seemingly technical and unwieldy to a legal reader is both relevant and necessary for this work to credibly reach an interdisciplinary audience.

Ultimately, this book will delight legal historians, critical race scholars, and those excited by the passion of rhetorical strategies in the law. Coulson's use of a critical rhetorical approach[32] provides a unique vantage point from which to view these cases, that is, not from a stance of truth and falsity, but rather with a focus on, as articulated by Raymie Mckerrow, how "symbols come to possess power—what they 'do' in society as contrasted to what they 'are.'"[33]

Reading this work provoked two persistent thoughts—one saddening and the other insightful. First, reflecting on the immense resources and energy the immigrants in these race cases expended to simply be deemed a "free white person," one is reminded of W.E.B. Du Bois's words, "But what on earth is whiteness that one should so desire it?"[34] And Du Bois answers his own question stating, "Then always, somehow, some way, silently but clearly, I am given to understand that whiteness is the ownership of the earth forever and ever, Amen!"[35] Second, in pondering the value of Coulson's rhetorical strategy beyond race-eligibility cases for Asians in the eighteenth and nineteenth centuries, one wonders if his strategy could provide a template for any disenfranchised or marginalized group that seeks inclusion or status equality within a dominant societal structure to simply survive. While the race-limiting provision of the original Naturalization Act has long since been amended,[36] could marginalized and privileged groups find a common enemy that would unite them in the twenty-first century? What praise to this rhetorical strategy that would be.

31 *Id.* at xxv.

32 *Id.* at xv ("A critical rhetorical approach recognizes the materiality of discourse, viewing it as a mediated and fragmented, 'unconnected, even contradictory or momentarily oppositional' in its mode of presentation, and disputes the distinction between knowledge and power.").

33 *Id.* at xv–xvi (quoting Raymie McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 COMM. MONOGRAPH 91, 101 (1989)).

34 W.E.B. DU BOIS, *The Souls of White Folk*, *in* DARKWATER: VOICES FROM WITHIN THE VEIL, ch. II (1920), https://www.gutenberg.org/files/15210/15210-h/15210-h.htm#Chapter_II (last visited Mar. 31, 2018).

35 *Id.*

36 This language was removed from the Naturalization Act in 1952. *See* COULSON, *supra* note 1, at xi.

BOOK REVIEW

Judicial Opinions Reimagined

Engendering a Language of Justice

Feminist Judgments: Rewritten Opinions of the United States Supreme Court

Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, eds. (Cambridge University Press 2016), 566 pages

Andrea McArdle, rev'r*

What separates the language of law from the language of justice? Where do we see the language of justice in the form and framing of law, and in law's substance? Can judicial opinions—as a genre, as a form of public discourse—contribute to law's capacity to avoid legal formalism and instead achieve justice? If existing judicial opinions could be reimagined and revised to incorporate theoretical perspectives and methods associated with feminism, what impact would such a reworking have on the trajectory of legal doctrine and the prospects for reaching just outcomes?

Feminist Judgments: Rewritten Opinions of the United States Supreme Court offers revelatory responses to these questions.[1] Reconstructing U.S. Supreme Court opinions from a range of feminist perspectives, this coedited volume drew inspiration from the groundbreaking Feminist Judgments projects launched in Canada[2] and the United Kingdom,[3] and adds to a growing body of work flourishing in Ireland[4] and Australia.[5] A hallmark of the U.S. project is its pluralist understanding of feminism and

* Professor of Law and Director of Legal Writing, City University of New York School of Law.

1 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford, eds., 2016) [hereinafter FEMINIST JUDGMENTS].

2 *Women's Court of Canada Rewrites Supreme Court Decisions,* UNIV. OF TORONTO (Mar. 6, 2008), https://www.law.utoronto.ca/news/press-releases/women%e2%80%99s-court-canada-rewrites-supreme-court-decisions.

3 *Feminist Judgments Project*, UNIV. OF KENT, https://www.kent.ac.uk/law/fjp/ (last visited Apr. 6, 2018).

4 *Northern/Irish Feminist Judgments Project*, http://www.feministjudging.ie/ (last visited Apr. 6, 2018).

5 *Australian Feminist Judgments Project: Jurisprudence as Praxis (2012–2014),* UNIV. OF QUEENSLAND, http://researchers.uq.edu.au/research-project/14034 (last visited Apr. 6, 2018).

the theoretical frameworks, analytic methods, and rhetorics feminism embraces.[6] As the editors recognize, feminism is a justice-seeking political movement but also a philosophical undertaking, a way of seeing and processing human experience.[7] Applied to law and to drafting the distinctive genre of the judicial opinion, the book's inclusive orientation highlights the multiple ways in which feminism has advanced women's equality, and how it could further serve that purpose and broader social-justice struggles.[8]

The twenty-five rewritten U.S. Supreme Court opinions included in the volume analyze issues of gender inequality implicating the Fourteenth Amendment, the Commerce and Establishment Clauses, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and U.S. immigration law. Although the feminist opinion writers were asked to work within the parameters of the record, the amicus briefs filed in relation to the case, and the law and factual sources existing at the time of the original opinion, the authors were otherwise free to pursue alternative approaches to reasoning and writing the opinions. The aim of this partial stricture was to demonstrate that, even under the constraints of the era in which the original opinions were written, other legal framings and analyses were feasible, and well suited to the legal issue and context.[9] The rewritten versions bear out the insight behind the editors' guidelines. Notwithstanding the aura and "rhetoric of inevitability"[10] that judicial opinions as a genre invoke, the feminist opinions show that other analytic and rhetorical choices were indeed apposite, jurisprudentially persuasive, and justice-serving.[11]

Each opinion is preceded by a contextual essay that summarizes the original opinion, situates it in U.S. jurisprudence, and theorizes the impact the rewritten opinion would have had on the landscape of U.S. law. These illuminating essays carry forward the editors' elaboration of the project's aims and methods, as well as Berta Esperanza Hernandez-Truyol's magisterial chapter reviewing the roots of feminism and its principal branches,

6 FEMINIST JUDGMENTS, *supra* note 1, at 3–4.

7 *Id.* at 3.

8 *Id.* at 5–6.

9 *Id.* at 9–12. However, the authors were not asked to show that their rewritten rationales and rhetoric would have commanded the support of the Justices who served on the Court when the original opinions were rendered—an endeavor that is conjectural at best. *Id.* at 9. Removing that condition of judicial writing allowed the authors greater scope to pursue the full measure of their reasoning and voice, especially if they wrote a majority opinion.

10 Robert A. Ferguson, *The Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213–16 (1990).

11 FEMINIST JUDGMENTS, *supra* note 1, at 4.

the emergence of feminist legal methods, and feminism's potential reach in the context and the work of judging.[12]

What makes an opinion feminist? As the editors argue, an author's reliance on any strand of feminist theory to support legal reasoning qualifies—formal/substantive equality, anti-subordination theory, sex stereotyping, autonomy/agency analysis, or an intersectional approach.[13] Use of feminist methodology—practical "outsider" reasoning, narrative method, unconventional rhetoric, or expanding the frame to incorporate alternative rationales and rules, as well as interdisciplinary analysis—also meets the project's criteria.[14] In this volume, the feminist opinion authors—women and men—adopt various approaches to draw attention to gaps in the original opinion's analysis or factual narrative, expose flawed gender-based assumptions underpinning the opinion, or exploit missed opportunities to achieve a more just outcome. All, as well, call into question the ostensibly neutral and objective perspective to which law lays claim.[15]

Some opinions adhere to the original judgment but add to and strengthen the main opinion's reasoning, such as Carlos Ball's reworking of *Obergefell v. Hodges,*[16] which expands the majority's equal-protection analysis legalizing same-sex marriage to address how same-sex marriage bans have been rooted in classifications based on both sex and sexual orientation.[17] Similarly, Teri McMurtry-Chubb's rewritten opinion for the Court in *Loving v. Virginia*[18] augments the opinion's scope by examining how the intersecting histories of slavery, white supremacy, and patriarchy underpinned Virginia's anti-miscegenation laws, and impermissibly restricted the legal possibilities for interracial marriage and family life.[19]

Others revise reasoning *and* result, as Lucinda Finley's majority opinion does in rehabilitating *Geduldig v. Aiello*,[20] which did not recognize statutory discrimination against pregnant women as discrimination on the basis of sex.[21] Still others, written as concurrences or dissents, address limitations in the original opinion traceable to socially entrenched gender inequalities, gender subordination, and stereotyping. Phyllis Goldfarb's comprehensive dissent in *Bradwell v. Illinois*[22] discredits the original concurring opinion's bald effort to naturalize the gender role distinctions enshrined in "separate spheres" ideology[23] and draws on the full force of

12 *Id.* at 24–51.

13 *Id.* at 18–22.

14 *Id.* at 15–17.

15 *Id.* at 4–5.

16 135 S. Ct. 2584 (2015).

17 FEMINIST JUDGMENTS, *supra* note 1, at 534–39.

18 388 U.S. 1 (1967).

19 FEMINIST JUDGMENTS, *supra* note 1, at 117–18.

20 417 U.S. 484 (1974).

21 *Id.* at 494–97.

22 83 U.S. 130 (1873).

23 FEMINIST JUDGMENTS, *supra* note 1, at 74–76.

Section One of the Fourteenth Amendment to support Myra Bradwell's admission to the Illinois bar.[24]

Whether through fresh readings of doctrine, revised narratives of the facts, explicit use of feminist arguments, or reconceived rhetorical possibilities, the rewritten opinions offer a window into how an intentionally feminist approach can be justice-enhancing. Although discussing how each of the rewritten opinions is justice-serving would be tempting, it would hardly be feasible in a book review. Nonetheless, a number of the outstanding contributions to this volume warrant mention here.

In fact, a number of rewritten opinions pointedly call for the Court to seek and do justice. Ruthann Robson's rewritten opinion in *Lawrence v. Texas*[25] centers the concepts of sexual equality[26] and sexual autonomy (in preference to the original opinion's use of a privacy- and dignity-based analysis).[27] Recounting the "devastating" human impact of *Bowers v. Hardwick,*[28] which upheld a statute criminalizing same-sex activity, an outcome *Lawrence* overruled, Robson's opinion avows that the Court must take "responsibility for justice."[29] The Robson majority does so by explicitly apologizing for the harm caused by criminalizing same-sex relations. The opinion deepens the apology by recounting the impact of the ruling in *Bowers v. Hardwick*—on Hardwick himself, and on others whom the legal system effectively punished, including in employment and custody cases, for their openly gay sexuality.[30]

Ann Bartow's dissenting opinion in *Gebser v. Lago Vista Independent School District*[31] is similarly justice-focused. This Title IX damages action brought by a high-school student and her parent against a school district had alleged that one of the student's male teacher-mentors had sexually exploited her. Justice O'Connor's majority opinion held that an implied private right of action for money damages under Title IX requires a showing that the school district had been deliberately indifferent to the teacher's conduct after having received actual notice of the claim.[32] Rejecting this difficult-to-meet liability standard as a "travesty of justice,"[33] Bartow highlights the minor student's vulnerability. Drawing on a signature feminist method, Bartow pointedly uses narrative to expand on the majority's recital of facts. The opinion also reframes the majority's references to the teacher's sexual "relationship" with the student as, in fact,

24 *Id.* at 66-72.

25 539 U.S. 558 (2003).

26 FEMINIST JUDGMENTS, *supra* note 1, at 496–500.

27 *Id.* at 490–94.

28 478 U.S. 186 (1986).

29 FEMINIST JUDGMENTS, *supra* note 1, at 503.

30 *Id.* at 501–03.

31 524 U.S. 274 (1998).

32 *Id.* at 292–93.

33 FEMINIST JUDGMENTS, *supra* note 1, at 443.

34 *Id.* at 431, 437–40.

constituting "rape" and "sexual abuse" preceded by the teacher's deliberate "grooming" of the student.[34]

Opinions that originally reached salutary results also benefited from a feminist reworking. When accountant Ann Hopkins was denied a promotion because she did not conform to her male colleagues' expectations of female behavior, Justice Brennan's plurality opinion in *Price Waterhouse v. Hopkins*[35] reaffirmed the Court's recognition in *City of Los Angeles, Department of Water and Power v. Manhart*[36] that Title VII's ban on discrimination "because of sex" covered the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[37] Martha Chamallas's rewritten concurrence makes the social-science evidence that was available to the Court at the time more central to her opinion's reasoning; she uses it effectively to unpack sex stereotypes and illuminate the workplace culture and the biased assessment standards that blocked Hopkins's advancement.[38]

Similarly, Val Vojdik's concurrence to Ruth Bader Ginsburg's majority opinion in *United States v. Virginia*,[39] striking down Virginia's males-only admission policy to the Virginia Military Institute (VMI), adds to the majority rationale. In particular, the rewritten opinion emphasizes how VMI's admission policy subordinated women[40] and adopts strict scrutiny to assess the policy.[41] Rejecting outright a separate educational program for women,[42] Vojdik requires Virginia to take affirmative steps to eradicate a culture of "misogyny" at VMI predicated on debasing women.[43]

For their intellectual breadth, incisive analysis, and creativity, the rewritten opinions stand on their own as legal literature. The volume is also a highly useful resource. It would be especially valuable in a course on feminist legal history and theory as it charts the development of gender equality law and invites readers to consider the distance between what the law is and what it could become. And for teachers of legal rhetoric, *Feminist Judgments* provides a crucial implement in the writer's toolkit. As I've found in my own use of the collection in a seminar on judicial-opinion writing, the opinions offer compelling evidence of intentionality in writing. They showcase the choices available to opinion authors in framing, structure, and rhetoric.[44]

35 490 U.S. 228 (1989).

36 435 U.S. 702 (1978).

37 *Id.* at 350–51 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

38 FEMINIST JUDGMENTS, *supra* note 1, at 351–53, 357–60.

39 518 U.S. 515 (1996).

40 FEMINIST JUDGMENTS, *supra* note 1, at 394–96, 398–400.

41 *Id.* at 401.

42 *Id.* at 401–03.

43 *Id.* at 402, 403–07.

44 I use "rhetoric" here in the broader sense in which Patricia Wald has applied the term, i.e., committing fully developed judicial reasoning to written form. *See generally* Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

For students who want to become acquainted with the conventions of the judicial opinion as a legal writing genre, studying the feminist opinions in relation to the original versions offers exemplars of a broader analytic and writing process. Aided by the contextual essays,[45] students can see contrasts in scope, vision, and tone between the official and rewritten opinions. From the contrast, they can recognize ways in which feminist theory and method contribute to the justice-serving capacity of the refashioned judgments. Students can learn from examining the feminist writers' deliberate choice of sources—precedent, facts, social-science evidence—and the authors' considered use of that material. Students can benefit, too, from robust examples of concurring and dissenting opinions, evidence of clarity of voice and engagement with audience, and, relatedly, demonstrations of empathy and humanity. By offering feminist judgments to students as exemplars, and then encouraging them to reflect on the process of using these opinions as touchstones, we can help students add to their repertoire as writers, and deepen their discernment as readers.

Whether read for our own or our students' edification, *Feminist Judgments* is replete with examples of writing that is bracing, thought-provoking, and humane. The opinions reject categories and frameworks of law that limit and oppress, and embrace a discourse marked by candor, clarity, and empathy, in which gender is never a deficit, but an attribute connected to human flourishing. I can think of no better reason to seek out and spend time with this compelling book, and to learn and draw inspiration from it.

45 For instructors who wish to assign a limited number of opinions in a course, Cambridge University Press has made *Feminist Judgments* available as an e-book for "institutional acquisition," which then enables students to access individual opinions without purchasing the entire book.

BOOK REVIEW

A Wound, A Chasm, or Both?

The Doctrine–Skills Divide: Legal Education's Self-Inflicted Wound
Linda H. Edwards (Carolina Academic Press 2017), 357 pages

David Thomson, rev'r*

Increasingly, it seems, we are at a chasm in legal education, not a crossroads.[1] The latter image suggests a choice, a waypoint, beyond which a better place exists. A chasm suggests an insurmountable leap, and danger in the leaping. Naturally, one blanches and looks for alternatives. Despite significant progress, from capped programs to examples of unitary tenure, most of the legal writing professorate stands staring across a void. This will either continue to be the case, or it will eventually change, and the void will be filled and disappear. We are making some incremental progress,[2] usually using end-run approaches: the "three yards and a cloud of dust" strategies,[3] common to many law schools yet specific to each one. So there are reasons to think the wound will be healed at some uncertain day off in the future. But it remains difficult to draw a reliable map of how we get there.

One aspect—even prerequisite—of the map does seem fairly obvious: we all need a deep understanding of the terrain. This is a necessary step without which we make only dusty and uncertain progress over the long

* Professor of Practice and John C. Dwan Professor for Online Learning, University of Denver, Sturm College of Law.

1 Many commentators in recent years have used the term "crossroads" to describe the current position of legal education. *See, e.g.*, DAVID M. MOSS & DEBRA MOSS CURTIS, REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS, 1-9, (D. M. Moss & D. M. Curtis eds., 2012); Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads,* 44 IND. L. REV. 735 (2011); Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot* , 17 CLINICAL L. REV. 205 (2010); Adam Lamparello, *Legal Education at a Crossroads: A Response to Measuring Merit: The Shultz-Zedeck Research on Law School Admissions,* 61 LOY. L. REV. 235 (2015); Karla Mari McKanders, *Clinical Legal Education at a Generational Crossroads: Shades of Gray* , 17 CLINICAL L. REV. 223 (2010); Ellen Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?* 73 UMKC L. REV. 497 (2004).

2 Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School's Experience*, 31 COLUM. J. GENDER & L. 65, 74–79 (2015).

3 A phrase made famous by Woody Hayes, the longtime coach of the Ohio State football team, which referred to his preference for a methodical, determined, and unbending ground game.

term. Professor Linda Edwards's book aims to address this need and does so in an unblinkered and utterly direct fashion.

For at least twenty-five years—and certainly since the publication of the MacCrate[4] report—the pressure on legal education has been focused on increasing skills courses. This led to the creation and expansion of the legal writing foundational course, as well as additional clinical offerings and externships. All of these have required hiring and resources that might otherwise have gone to expanding the status quo in legal education, and so we should hardly be surprised when there has been resistance. When we have gone so far as to suggest the former status quo should also relinquish its own course objectives to advance the skills agenda—and the power to vote about it—this is often where the resistance has become stiff, and occasionally unmovable.

Professor Edwards suggests that we have been going at this all wrong, and that both sides of the chasm need to understand and accept a fundamental problem in legal education, one which has been there virtually from the beginning but which has now reached the level of a "self-inflicted wound," causing injury to all, not least our students.[5] The problem: that we have created and let grow an artificial divide between "doctrine" and "skills," when in fact they are both essential elements of the *same* equally desired outcome.[6]

The curriculum at any given law school is a fairly complex and ornate structure, founded on several essential beliefs. This book dismantles that structure, element by element, leaving little room for doubt about the fundamental bankruptcy of much of the categorical thinking upon which the structure was built. In doing so, Professor Edwards has relied on many of our clearest voices in the legal writing and skills academy and integrated those voices in her text through excerpts from seminal law-review articles on each topic.

The book is divided into five parts, and a total of fifteen chapters. In Part I, which forms an introduction, she asks the question, Why should we accept that Doctrine and Skills are two objectively different categories? She concludes that they are not and that we make a fundamental error when we assume they are.[7] In Part II, the book analyzes the divide from the perspective of jurisprudence, theories of meaning, rhetoric, and the

4 Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992), known colloquially as "The MacCrate Report," after the Chair of the Committee, who wrote it, Robert MacCrate.

5 Linda H. Edwards, The Doctrine–Skills Divide: Legal Education's Self-Inflicted Wound 163–175 (2017).

6 *Id.* at 268–76.

7 *Id.* at 5–9.

scholarship of learning theory.[8] In this section, Professor Harold Lloyd debunks the theory–practice divide, showing it to be illusory and arguing that "theory without practice is empty while practice without theory is blind."[9]

Part III addresses the many negative consequences that the divided categories have produced and caused, such as the continued effect of the gendering of the legal writing profession.[10] Another negative consequence has been discouraging the spread of some of the more promising innovations in legal education of the last decade. Those include Carnegie integration of doctrine, skills, and professional formation,[11] and expanded use of formative assessment in all courses across the curriculum.

It is in this part of the book that Professor Linda Berger is excerpted, presenting her Ideological Rhetorical analysis of the "seven-tenths" terminology in the ABA Standards when counting non–tenure-track faculty at American Law Schools.[12] This is, in some senses now like shooting fish in a barrel, but it was not always thus. Further, that language—so obviously unfair, exclusionary, and impolitic—served to both capture the fact of the dichotomy and to affirm its going forward. This is all painfully familiar and deeply understood by those of us who labor in this framework and its aftermath. But it is a worthy exercise to watch Professor Berger dissect and dismember with such rigor and precision the standards that govern many of our professional lives in large and small ways every day.

Also in Part III, in Chapter 10, Professor Ann McGinley details the gendering of the legal writing professorate—statistically undeniable—and explains the differences in what is expected of us but that is not typically expected of tenure-line faculty, such as tissues in the office and broad topic counseling of our students, always with the phone number of the counseling office at the ready.[13] In Chapter 11, Professors Terry Pollman and Elaine Shoben discuss the disadvantage we suffer when our scholarship is subjected to categorization. They explain that articles in the "devalued" scholarship categories often exhibit all the hallmarks of

8 *Id.* at 13–160.

9 *Id.* at 89.

10 *Id.* at 163–263.

11 WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007). This book, known as the "Carnegie Report," argues for integration of the three "apprenticeships" required for legal education: Doctrine, Skills, and Professional Formation.

12 EDWARDS, *supra* note 5, at 209–27. Professor Berger provides a rhetorical analysis of provisions in Chapters 3 and 4 of the ABA Standards for Approval of Law Schools, focusing on its form in July of 2014. In that form, in Interpretation 402-1 about student faculty ratios, tenure-track faculty were to be counted as "one," while "additional teaching resources" were to be counted as less than one.

13 *Id.* at 229–54.

otherwise acceptable scholarship, yet they get lesser placements and are valued less by the academy.[14]

Part IV addresses how we got where we are now—in the author's own article about the doctrine–skills divide,[15] and through a historical piece by Professors Jeffrey Jackson and David Cleveland—with particular focus on why we cannot seem to work as mixed faculties to achieve the Carnegie integrated model. In short, both history and the "category" way of thinking that permeates legal education have limited our ability to see another way of operating.[16]

The last part of the book, Part V, offers a few strategies for repairing the self-inflicted wound in legal education. In this section, Professor Edwards returns to the possibilities offered by integration of the Carnegie apprenticeships, in as many courses as possible.[17] Professor Jessica Erickson argues for the integration of experiential learning in the large lecture courses,[18] and Professor Gerald Hess explains the progress in this direction made at Gonzaga Law School with their integrated curriculum.[19] Unfortunately, that newly revised 1L curriculum merely shortened the traditional courses from one year to one semester and added a "Perspectives on the Law" course and two-credit Litigation and Transactional Skills courses, with Professionalism components. While significant changes were made, this falls short of true Carnegie integration, which Professor Edwards describes briefly in this book as a possible "third category." If there is a flaw in this important book it would be that more could have been said about the possibilities of true integration across the curriculum and the contribution a new third category might have going forward.

Professor Deborah Merritt is perhaps our best example of how the chasm might one day be filled—with colleagues like her, who started as a doctrinal professor and transitioned to skills, and obviously learned a lot along the way. In the closing chapter, Chapter 15, she describes her transition and how it changed her thinking.[20] In her transition, Professor Merritt learned to look at the curriculum in a different way—from the perspective of the six elements of lawyering, which she defines as Facts,

14 *Id.* at 255–63.

15 Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine–Skills Divide*, 64 J. LEGAL EDUC. 181 (2014).

16 EDWARDS, *supra* note 5, at 267–91.

17 *Id.* at 295–357.

18 *Id.* at 319–24.

19 *Id.* at 325–36.

20 *Id.* at 347–57.

Doctrine, Client Goals, Legal Culture, Personalities, and Attorney Constraints. Although an understanding of doctrine is important to conduct the necessary legal research on the client's problem, skills, she learned, "are the muscles that animate legal representation."[21]

She further suggests that, if we are to have new categories, we distinguish courses that "explore" doctrine with those that "engage" doctrine. She does not denigrate the importance of courses that explore doctrine in any way, but explains that courses that *engage* doctrine require a "sustained interaction with doctrinal principles in the context of a realistic problem."[22] She explains that these interactions must span more than a single class and include some ambiguity or a change in circumstances (just as in practice). If we were to think of the curriculum in this way, we would come to recognize that all courses in law school teach skills, but there is value in *naming* the skills they teach. Some will be doctrine-centered, and some will be client-centered, and a balanced curriculum needs many of both types of courses.

Ultimately, this book argues for us to all be partners, not winners and losers. Which is admirable, of course. But in some ways, the situation we have now was not exactly a self-inflicted wound. Legal Education as it was fifty years ago was one thing, and skills courses and faculty have been wedged in and resisted, and the resistance is what has caused a wound, a break. But the wound is suffered by our students, and by us, but barely felt by some of our partners. It is hard to be a partner in solving a problem with someone who does not understand the problem to begin with.

The solution will likely be found in a collective desire to put it all on the table and start over. This means creating measurable learning outcomes for each course and developing a new curriculum map with assessments of all types throughout, with intentional work on the formation of professional identity in our classes, all for the benefit of our students and their preparation for practice. And, critically, this means that all faculty treat each other fairly, equally, and respectfully. But these seemingly small things all require a willingness to start over and create a system quite different from what we currently have. This book provides a map of the terrain for this intractable problem in legal education, one that festers in one way or another every day in most law schools in the country.

What Professor Edwards has done here is quite brilliant. She has taken her original article about what categories have done to create, contribute to, and support the doctrine–skills divide[23]—and the damage

21 *Id.* at 353.

22 *Id.* at 354.

23 *See* Edwards, *supra* note 15.

that has resulted to legal education from this—and expanded it with the work of others, many of whom she cited to in the original article. She has thus created a book-length treatment addressing the entire problem in full. But not just any book, a valuable compendium of scholarship—her own and others—on the subject of the chasm that exists in many law schools between the traditional "doctrinal"[24] faculty and "other" faculty, exposing, once and for all, its fundamental intellectual bankruptcy. It is a book that, after suggesting that our library should purchase a copy, we all should buy two copies of our own. One to keep for those days when we need to reference the scholarship around these issues—for a committee report on one of these subjects, for example. And the other to give to a sympathetic colleague on our "doctrinal" faculty, perhaps the Curriculum Committee chair, with a personal note inviting that person to lunch a few weeks hence to discuss it.

Why? Because many (or all) of us have had the experience, perhaps multiple times, with colleagues who—when faced with the facts about the gendering of the legal writing faculty, our lower salaries, our devalued scholarship, or the nature of our workload, respond with something like, "I didn't know." (Well, you might think, they did *sort of* know, but they might not have *really* known.) No member of the "doctrinal" faculty at any law school could not know after reading this book. *Really* know. It's all here.

24 Of course, "doctrinal" is an imperfect term itself and resisted by some faculty who primarily teach those courses, providing further proof that these categories—from both sides of the divide—are not workable. However, for a reference point that most readers understand to describe the current situation, it is used in this review, albeit in quotation marks.

BOOK REVIEW

Legislative History is Dead; Long Live Legislative History

Misreading Law, Misreading Democracy
Victoria Nourse (Harvard University Press 2016), 259 pages

Genevieve B. Tung, rev'r*

Misreading Law, Misreading Democracy is a call to rethink everything that most lawyers, judges, and academics think we know about legislative history. Even the term "legislative history," Nourse argues, should be treated as a misnomer;[1] we should instead seek out evidence of legislative decisionmaking. The book explains several reasons for this shift; prominent among these is that the search for "history" implies the existence of a single story, "as if the final text reflected a straight narrative line from the first draft."[2] The actual process of American lawmaking is dominated by recursive combat and compromise.

Before becoming a law professor, Victoria Nourse served as counsel to the Senate Iran Contra Committee and later became senior advisor to Senator Joe Biden during his time as chairman of the Senate Judiciary Committee.[3] Professor Nourse's service to Congress is reflected by her work, both in her detailed knowledge of legislative procedure and by the respect with which she treats her subject. Respect, she argues, is an essential part of statutory interpretation: if we treat the authors of legislation with disdain, we undermine the representative foundations of our democracy.

* Associate Director, Rutgers Law Library.

1 VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 79–80 (2016).

2 *Id.* at 157.

3 *See Victoria Nourse*, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/victoria-nourse/ (last visited June 6, 2018). Professor Nourse later spent a year working as then–Vice President Biden's Chief Counsel before returning to academia. NOURSE, *supra* note 1, at 247–48.

What is needed, she argues, is for anyone in the business of statutory interpretation to become well-versed in Congress's rules, mores, and motivations. The topic is neglected in many law schools. A realist understanding of how Congress operates should demystify how statutory language comes into being and make the documentation of that statute's legislative journey intelligible. When lawyers can correctly isolate and interpret the meaningful pieces of a legislative record, we can use them for statutory interpretation. We cannot determine what materials are meaningful, or interpret them accurately, without considering when they occur in the sequence of lawmaking, the audience to which they are addressed, and the status of the author—qualities that are determined by Congress's rules.

To begin, Nourse explains that we must appreciate that legislative action is determined by two inescapable realities: legislators' need to satisfy their constituents (the "electoral connection") and the requirement of broad-based consensus to actually accomplish anything (the "supermajoritarian difficulty"). Armed with this knowledge, we can view the process of lawmaking from the perspective of the lawmaker, as opposed to the ex post view more commonly taken in law schools and the courts. These structural factors explain why so much legislation is ambiguous, and why a theory of statutory interpretation must be prepared to deal with ambiguity as a feature instead of a bug.

Familiarity with Congress's rules is also critical to Nourse's "legislative decision theory" of statutory interpretation, which responds to flaws she identifies in both textualist, purposivist, and contract theory approaches. Legislative decision theory is predicated on understanding "Congress 101," five basic principles of congressional procedure that inform how legislation develops:

1. "Statutes are Elections" with winners and losers. Before relying on a congressional committee report or member statement to interpret a statute, courts should know if it was generated by the proponents or opponents of the underlying legislation. The best type of such "legislative evidence" are documents that demonstrate bipartisan agreement on core principles.
2. "Statutes Follow a Sequence," and must be "reverse-engineered" in order to determine what legislative evidence is relevant.
3. "Congress's Rules Can Help Interpret Statutes," and these rules can be used as "legislative canons" to solve interpretive puzzles.
4. "Typologies of Legislative History May Mislead," such that traditional hierarchies of legislative material can be worse than useless; no single "type" of document will always be the most reliable evidence of a legislative decision, and focusing on type

without contextual considerations can lead to inefficient, fruitless, or misleading analysis.

5. "What is Unthinkable to a Judge May Be Quite Thinkable to a Member of Congress," meaning that the congressional rules that govern cloture, reconciliation, or appropriations bills may shape legislators' decisions in logical and predictable ways, and courts should be cognizant of these rules and their effects.[4]

Nourse elaborates on each of these foundational principles in Chapter 3, illustrating the importance of each with examples of judicial opinions that seriously misunderstood or misapplied legislative material in search of statutory meaning. In *United Steelworkers of America v. Weber*, for example, Justice Rehnquist's dissenting opinion included a voluminous legislative history of the 1964 Civil Rights Act. [5] Rehnquist's dissent, Nourse points out, has been praised by some liberal scholars for embracing legislative history in lieu of textualism.[6] But the congressional text Rehnquist relied on, notably a House committee report, was created before the relevant language was incorporated into the legislation, and was a minority report drafted by opponents of the larger bill.[7] As such, she argues, Rehnquist's narrative "reflects a flawed understanding of legislative process" because it conflates earlier, superseded text with final text, and "risks normative bias against majorities" by allowing the views of bill opponents to speak with equal or greater authority to those of the bill's proponents.[8]

In Chapter 4, Nourse argues that methods of statutory interpretation that pointedly avoid looking to legislative material, such as "petty textualism" (isolating a disputed term from its surrounding text) and reliance on judicial canons, are inferior both as a practical matter and because they elevate judicial authority over legislative authority.[9] Such "canon textualism," she argues, is anti-democratic because it allows judges to impose their views (about what constitutes "plain meaning," or which canons to apply), often in ways that may be shaped by unconscious bias.[10] For example, statutory interpreters may be vulnerable to the "focusing illusion," in which a person's focus on a particular aspect of a situation (or,

4 *See id*. at 68–69.

5 443 U.S. 193, 219–55 (1979) (Rehnquist, J., with Burger, C.J., dissenting).

6 NOURSE, *supra* note 1, at 74 (citing Philip P. Frickey, *Wisdom on Weber*, 74 TULANE L. REV. 1169, 1183, 1195 (2000)).

7 *Id.*

8 *Id.*

9 *See id.* at 103–06.

10 *See id*. at 116.

say, a particular phrase in a statute) leads her to overvalue that aspect and undervalue the context in which it arises, which may lead to snap judgments based on inadequate information.[11] Understanding the rules that bind congressional action, and taking the time to read legislative documentation, are both methods that interpreters may use to mitigate their cognitive biases.

By focusing entirely on the timing and significance of legislative materials within their congressional context, Nourse's inquiry steers away from the search for "legislative intent" and looks instead for evidence of legislative decisions.[12] Chapter 5 is entirely devoted to dismantling notions, offered by scholars Max Radin, Ronald Dworkin, Jeremy Waldron, Kenneth Shepsle, and others that a legislature cannot act with "intent" because it is a collective body without a single mind.[13] This skepticism, she argues, is irrelevant: the question "is not whether Congress has a mind but how it decides and what it means by its decision."[14] Nourse argues for a pragmatic view of intent inferred from action.[15] Again, Congress's rules of proceeding are critical because they provide the necessary context to interpret congressional action as a manifestation of pragmatic intent.[16] As Nourse has previously explained, the idea of congressional intent is a metaphor,[17] and the metaphor does not work without the referent of legislative context.[18]

Reading as a researcher who is accustomed to spending time identifying and gathering legislative histories, Nourse's view is powerful and affirming, and her recommendations instantly useful. In Chapter 3, she provides step-by-step instructions for "reverse engineering" a statute to identify the most relevant legislative evidence, guiding the reader to seek out last-in-time documentation of bipartisan agreement on statutory meaning.[19] As the book repeatedly points out, databases like ProQuest Congressional and websites like Congress.gov (not to mention search engines like Google) make the once-laborious process of finding these

11 *See id.* at 118–19. The focusing illusion was first identified by Prof. Daniel Kahneman, who addressed its impact on decisionmaking in his recent best-seller, *Thinking Fast and Slow*. *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 85–88 (2011).

12 NOURSE, *supra* note 1, 68.

13 *See id*. at 137–38.

14 *Id.* at 135–36.

15 *Id*. at 142–44.

16 *Id.* at 149.

17 *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation*, 122 YALE L.J. 70, 82–83 (2012).

18 NOURSE, *supra* note 1, at 147.

19 *See id.* at 80.

texts simple. By encouraging the reader to seek out statements made at the most significant moments in the lawmaking sequence, such as cloture, the book also provides a method for streamlining legislative research. As Nourse points out, Justice Rehnquist's lengthy *Weber* dissent could have been stronger and shorter had he "reverse-engineered" the text.[20] Given how voluminous legislative materials can be, this is no small matter. The time saved on assembling minutely detailed, potentially irrelevant documents can be better spent reading the most relevant statements with a careful view to the procedural posture of the legislation and the identity of the speaker—is it from a "winner" or a "loser" of the ultimate political combat?

Misreading Law, Misreading Democracy was published several weeks before the 2016 elections that brought the Republican party into control of the presidency and both houses of Congress. The vitriol of our current political climate does not factor into Nourse's conclusion; congressional actions are entitled to respect by virtue of their representative privilege, not their wisdom. In other words, "even if one has contempt for Congress, a judge cannot have contempt for the real authors of legislation, the people."[21] To proceed otherwise would allow judges to break faith with democracy.

But what do we do with these principles if Congress "breaks faith" or alters its practices in ways that undermine the predictability or transparency of its actions? The 115th Congress has been criticized for drafting important bills "in secret" and in the face of significant public disapproval.[22] Does documentation of such decisionmaking, to the extent it is truly preserved, truly amount to evidence of popular will? How should we use unofficial, journalistic accounts of private dealmaking that may be instrumental to a bill's passage?[23] Nourse reassures the reader that most legislation is passed by large bipartisan coalitions, which is evidence of the stability created by institutional rules that favor supermajorities.[24] This

20 *See id.* at 83. For example, Justice Rehnquist spends significant time analyzing draft language and House debates that predate the addition of the key textual provision at issue, and Senate debates prior to cloture—information that is "true but unhelpful." *Id.* at 82–83. "Justice Rehnquist's account of the legislative history is at its most persuasive when he cites statements occurring at the proper moment in the sequence: *post-cloture statements* against quotas, made by supporters and opponents of the bill." *Id.* at 83.

21 *Id.* at 185–86.

22 *See, e.g.*, Thomas Kaplan & Robert Pear, *Senate Democrats Plan Showdown to Protest Secrecy over Health Law Repeal*, N.Y. TIMES, June 20, 2017, at A16.

23 *See, e.g.*, Mike DuBonis & Erica Werner, *How Republicans Overcame Outside Threats and Internal Strife*, WASH. POST, Dec. 21, 2017, at A1.

24 NOURSE, *supra* note 1, at 73 ("Congress 101 tells us that 'normal lawmaking' depends upon the filibuster; bills don't pass by 51 votes; they pass by overwhelming supermajorities precisely because of the filibuster.").

leaves the reader unsure of how to interpret legislation passed in highly partisan circumstances under majoritarian exceptions.[25]

Misreading Law, Misreading Democracy is at its most compelling when it draws the reader away from his or her own "electoral connection" to the frustrations of politics, and refocuses attention on what Congress symbolizes as a co-equal branch of government. It effectively demonstrates that understanding congressional procedure is essential to statutory interpretation and should be elevated within the law-school curriculum. Even if the reader isn't ready to give Congress high marks of approval, Nourse's work makes the case for understanding how Congress works.

25 Consider Acts like the major tax bill passed in the final days of 2017 without any bipartisanship to speak of. H.R. 1, the "Tax Cuts and Jobs Act" of 2017, passed under majoritarian rules (51/49) without any Democratic votes in the Senate. *See Vote Summary on Passage of H.R. 1*, U.S. SENATE (Dec. 2, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00303. The result was similar in the House. *See Final Vote Results for Roll Call 699*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/evs/2017/roll699.xml; *see also* DuBonis & Werner, *supra* note 23, at A1 ("The decision to spurn Democrats underscores the political risks undertaken by the GOP, which pushed forward on the tax bill despite polls showing that it is one of the most unpopular pieces of legislation in recent history . . . .").