

LEGAL COMMUNICATION & RHETORIC: JALWD

Fall 2019 / Volume 16

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as Hegemonic Discourse in the Age of #MeToo**

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SPECIAL SECTION

**Linda L. Berger Lifetime Achievement Award
for Excellence in Legal Writing Scholarship**

Professor Kathryn M. Stanchi

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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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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).

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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.

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PREFACE

Words matter. When we write or speak, we are choosing words to communicate our ideas, to persuade, to advise. But as this issue of *LC&R* demonstrates, we must always remember that every word is a choice and those choices have consequences. Consequences for us, for our clients, for our very ability to engage in meaningful discourse with others. The articles in this issue come at this concept from a variety of angles but each one shows that word choice has far-reaching, and often unintended, consequences.

Teri McMurtry-Chubb's article, "There Are No Outsiders Here: Rethinking Intersectionality as Hegemonic Discourse in the Age of #MeToo," begins this issue with a hard look at the modern socio-legal concept of intersectionality and critiques that term's ability to conceptualize difference without also alienating those who do not fit within the dominant social group. According to McMurtry-Chubb, by focusing on our membership in various groups divided by gender, race, sexual orientation, etc., we merely reinforce these differences, eliminate intra-group nuance, and discourage those who belong to the dominant group from examining their own victimization at the hands of white supremacy, patriarchy, and capitalism. As in all things, words matter, and we should be careful of the words we choose, especially when discussing complex socio-legal issues.

In "Abandoning Predictions," Kevin Bennardo warns against the misuse of predictive words when explaining the law to clients because lawyers cannot possibly predict what a judge will actually do when confronted with a case. Bennardo's essay reminds us that judicial or jury decisions are often heavily influenced by the personal prejudices of the trier of law and the trier of fact and, therefore, no matter how well you understand the relevant law and facts of your case, you cannot presume to know how the case will turn out. Bennardo's emphasis on how we communicate to our clients is essential to good lawyering. The words we choose to use to explain legal concepts to laypeople matter, and we should choose with care.

Joe Fore's article, "A Court Would Likely (60-75%) Find..." also looks at the validity of legal predictions but from a more empirical angle. Fore begins with the premise that both lawyers and clients discuss the client's case in terms of the likelihood of success and then seeks to find more precise language to determine how likely the success is. Instead of focusing on what factors to consider when determining success, as Bennardo does, Fore focuses on how that likelihood is communicated to the client and whether using percentages can make those communications more effective and less prone to misinterpretation. Fore's article therefore shows us how even a small change in presenting a choice to our client—by choosing different words to indicate likelihood of success—can improve our own communication skills with those who have entrusted us with their legal problems.

Mark Cooney's article, "Analogy through Vagueness," celebrates the often-maligned word "vague" by showing its essential utility in the crafting of workable analogies. Even if "vague" can be used to criticize a legal argument, without vagueness, we would not be able to maneuver through prior case law to craft persuasive arguments that older cases should apply in a certain way to our new case. Cooney presents vagueness as a valid technique that lawyers use all the time, a choice to broaden our understanding of a set of facts so that it can apply to our own client's situation. Although criticized, using vague language is often a choice, and a well-considered one.

In "Why Congress Drafts Gibberish," Richard K. Neumann Jr. takes the negative aspects of vagueness and raises it to an artform: statutory gibberish. Neumann first shows some examples of statutes so poorly drafted that even those who were tasked with interpreting them—the judiciary—couldn't understand what they meant. Neumann then hypothesizes that the reason Congress drafts statutes this way is because legislators are overly focused on how a statute will be enforced and then do not place any importance in designing the statute so it can be understood. For that reason, legislative drafters, who do have expertise in crafting legislation that is clear to the reader, are excluded from much of the drafting process, and members of Congress end up creating statutes that cannot be understood. Neumann's article reminds us of how important it is to choose our words carefully and with all our goals in mind.

Helena Whalen-Bridge's article, "Negative Narrative: Reconsidering Client Portrayals," uses two case studies to show that some clients could be better served by a narrative that does not seek to only portray them in a positive light. For some clients, a negative portrayal is better than omitting facts and giving an incomplete or unethical use of the available evidence to create a case theory. Again, lawyers must choose how to present their

clients, knowing that their words will have consequences. Whalen-Bridge makes a strong case for expanding lawyers' range of narrative choices when confronted with a client who is not easily portrayed positively.

The books covered in the reviews—some new manuscripts, some timeless classics—give thoughtful guidance on a wide variety of issues: how to think deeply amongst the distractions of the digital age, how to practice law with a focus on social justice, how to find happiness in the midst of a stressful profession, how to persuade by knowing your audience, how to understand and appreciate the untamable nature of language, and how humor and law intersect. Mary Beth Beazley's review "The Digital Natives will Not Save Us: Reflections on *THE SHALLOWS*," looks at Nicholas Carr's *THE SHALLOWS*; Sha-Shana Crichton reviews Peter J. Hammer and Trevor W. Coleman's *CRUSADER FOR JUSTICE: FEDERAL JUDGE DAMON J. KEITH*; Tessa L. Dysart's "[T]he pursuit of Happiness" reviews *HOW TO BE (SORT OF) HAPPY IN LAW SCHOOL* by Kathryn M. Young; Karin Mika reviews Jeffrey Toobin's *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT*; Zachary Schmook's review "Words, Wolves, and Show Dogs," examines Lane Greene's *TALK ON THE WILD SIDE: WHY LANGUAGE CAN'T BE TAMED*; and Jeff Todd's "A Scholarly Though Accessible Exploration of Humor and Law" reviews *GUILTY PLEASURES: COMEDY AND LAW IN AMERICA* by Laura Little. Whether a biography, empirical study, or litany of jokes, each book (and each review) gives its reader something to think about and something to enjoy.

Last, we invite you to read our short piece about Professor Kathryn M. Stanchi, the recent recipient of the Linda L. Berger Lifetime Achievement Award for Excellence in Legal Writing Scholarship.

This issue also marks the first issue for our new Co-EIC, JoAnne Sweeny. Jumping from the micro-editing level of the Associate Editor to the big-picture focus of Co-EIC has been a bit dizzying but also very exciting. The machinery involved in getting this publication out to our readers is (perhaps not surprisingly) complex and requires the work of a lot of people. In particular, JoAnne is incredibly grateful for the mentoring of Co-EIC Ruth Anne Robbins and the ability of both Managing Editors Susan Bay and Jessica Wherry to keep everything moving and the new Co-EIC focused on the next step when she often doesn't know what it is.

This Preface is also the place where we say goodbye to editors who have completed their terms on the editorial board. For ten years, Professor Melissa Weresh has been a strong, stalwart contributor to the work of this Journal. As the editorial board members debated submissions, Mel's opinions were consistently careful, thoughtful, and perceptive. She took her editing duties very seriously, working to ensure the author had a

positive experience while simultaneously bringing the article up to its potential. Mel's own scholarship is vibrant. As a scholar, her curiosity and energy are nearly limitless—there's never a time when she isn't working on at least one project. All of what she knows about the scholarship endeavor she has freely shared with other editors and with our authors.

Mel likes to tell people that she liked serving on the editorial board because it was a happy assignment. Mel may not fully appreciate her own role in this joyful vibe. If we were to assign her a color it would be bright-gold sunlight. We have been nourished by her intellect and will lament her departure from the editorial board.

Ruth Anne Robbins and Dr. JoAnne Sweeny (Summer, 2019)

There Are No Outsiders Here

Rethinking Intersectionality as Hegemonic Discourse in the Age of #MeToo

Teri A. McMurtry-Chubb*

On September 27, 2018, Dr. Christine Blasey Ford testified before the Senate Judiciary Committee about then Supreme Court Nominee Judge Brett Kavanaugh's alleged assault of her 36 years earlier. Rifts soon occurred along partisan and gender lines, with those supporting Judge Kavanaugh on one side of the divide and those supporting Dr. Blasey Ford as a woman and sexual assault survivor on the other. #MeToo had finally come to Capitol Hill. Amidst protests by women's organizations at the Capitol and on social media, Senate Majority Leader Mitch McConnell called for a cloture vote, a vote to end the delay of the proceedings occasioned by a limited FBI investigation, on Judge Kavanaugh's nomination and advance Judge Kavanaugh's candidacy to the High Court for an official vote. Many tweeted their frustrations on Twitter and posted about it on Facebook, but none so famous as Bette Midler. In her angst over the possibility of Judge Kavanaugh's confirmation, Midler tweeted, "'Women, are the n-word of the world.' Raped, beaten, enslaved, married off, worked like dumb animals; denied education and inheritance; enduring the pain and danger of childbirth and life IN SILENCE for THOUSANDS of years[.] They are the most disrespected creatures on earth."¹ Twitter erupted with objections from Black women, among them Franchesca Ramsey of

* Professor of Law, Mercer University Walter F. George School of Law. The author thanks God, who makes all things possible; her husband, Mark A. Chubb, for his enduring love and support; and Associate Provost for Research Gary Simson, for reading and commenting on this article and for his generous research support while Dean of Mercer Law School. The article is dedicated to the women of color who inaugurated the annual Writing As Resistance Workshop, generously sponsored by the University of Denver Sturm College of Law with additional support from Nova Southeastern University Shepard Broad College of Law. We are and will remain #bustinoutbetterthaneverbody.

¹ Bette Midler (@BetteMidler), TWITTER (Oct. 4, 2018, 4:50 PM), tweet deleted by author. You can see the tweet in Zeba Bley, *Bette Midler Is the Clueless White Lady of the World*, HUFFPOST (Oct. 5, 2018, 12:29 PM ET), https://huffpost.com/entry/bette-midler-women-n-word-world-tweet_n_5bb6d9d0e4b01470d050121e.

YouTube fame for her 2012 video “Sh[*]t White Girls Say . . . to Black Girls.”² Ramsey wrote in her response to Midler’s tweet, “no. black women exist. this is some white feminist bullsh[*]t & it’s disappointing af. you don’t get to co-opt a slur created to denigrate black bodies as if we don’t still deal with the consequences of that word. f[*]cking sh[*]t @BetteMidler.”³ Midler responded to the backlash by tweeting, “I gather I have offended many by my last tweet. “‘Women are the . . . etc’ is a quote from Yoko Ono from 1972, which I never forgot. It rang true then, and it rings true today, whether you like it or not. This is not about race, this is about the status of women; THEIR HISTORY.”⁴ The pressure continued, forcing Midler to delete the controversial tweets and to post a third and final tweet:

The too brief investigation of the allegations against Kavanaugh infuriated me. Angrily I tweeted w/o thinking my choice of words would be engaging to black women who doubly suffer, both by being women and by being black. I am an ally and stand with you; always have. And I apologize.⁵

Many chided Midler for her choice of words, both in calling herself an ally and in blaming blackness itself for Black women’s suffering, rather than racism.⁶ Activist, politician, and former law professor Nekima Levy-Pounds summed up the dissenting tweets best when she tweeted, “Dear White Women, Please never say [‘women are the n-word of the world’]. This is deeply offensive and minimizes the significance of the weight, scope, depth, breadth, and long lasting impacts of the institution of slavery on African Americans.”⁷

As the country grappled with Dr. Blasey Ford’s testimony, still others attempted to place it in the context of Anita Hill’s testimony before that same Committee in 1991—before some of the same members—

2 See, e.g., Franchesca Ramsey (a.k.a. chescaleigh), *Shit White Girls Say . . . to Black Girls*, YOUTUBE (Jan. 4, 2012), <https://youtu.be/yIPUzxpIBe0> (over 12 million views). See generally Franchesca Ramsey, *WELL THAT ESCALATED QUICKLY: MEMOIRS AND MISTAKES OF AN ACCIDENTAL ACTIVIST* (2018).

3 Franchesca Ramsey (@chescaleigh), TWITTER (Oct. 4, 2018, 5:35 PM), <https://twitter.com/chescaleigh/status/1048008780372480001>.

4 Bette Midler (@BetteMidler), TWITTER (Oct. 4, 2018, 7:23 PM), tweet deleted by author but available via the article by Zeba Bley, *supra* note 1.

5 Bette Midler (@BetteMidler), TWITTER (Oct. 4, 2018, 10:23 PM), <https://twitter.com/search?q=Bette%20Midler%20ally&src=typd>.

6 See generally #BetteMidler, TWITTER, <https://twitter.com/hashtag/BetteMidler?src=hash>; <https://twitter.com/search?q=Bette%20Midler%20ally&src=typd>. See, e.g., Rachel McKibbins (@RachelMcKibbins), TWITTER (Oct. 4, 2018, 8:35 PM), <https://twitter.com/search?q=Bette%20Midler%20ally&src=typd>.

7 Nekima Levy-Pounds (@nlevy), TWITTER (Oct. 5, 2018, 8:39 AM), <https://twitter.com/nlevy/status/104823615659656448>.

recounting the alleged sexual misconduct by then Supreme Court Nominee Clarence Thomas.⁸ News outlets, drawing parallels between the two, compared Hill’s “strength” to Blasey Ford’s “vulnerability”⁹—a comparison that quickly drew ire for engaging the damaging trope of “the strong Black woman.”¹⁰ Of this comparison, activist, legal scholar, and law professor Kimberlé Crenshaw, credited with coining the phrase “intersectionality,” would write in a *New York Times* Opinion Editorial that “[w]e are still ignoring the unique vulnerability of black women. . . . Black women are vulnerable not only because of racial bias against them, but also because of stereotypes – that they expect less nurturing, they are more willing, no one will believe them.”¹¹ She continued,

We can still redress the shameful legacy of the Hill-Thomas confrontation by placing black women in their rightful place at the center of the fight against sexual predation on and off the job.

* * *

Throughout history, black feminist frameworks have been doing the hard work of building the social justice movements that race-only or gender-only frames cannot. Intersectionality, my term for the urgent project of uniting the battles for race and gender justice, is an indispensable way to understand aspects of our history, that, to our peril, remain hidden.

* * *

The Hill-Thomas conflict has gone down in history as a colossal failure in intersectional organizing. It’s not too late, as the Kavanaugh nomination enters its next phase, to write a better history.¹²

8 Michaela Bouchard and Marissa Schwartz Taylor, *Flashback: The Anita Hill Hearings Compared to Today*, N.Y. TIMES, Sept. 27, 2018, https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html?smid=fb-nytimes&smtp=aut&bicmet=1419773522000&bicmp=AD&bicmst=1409232722000&bicmlukp=WT.mc_id.

9 Kay Wicker, *Anita Hill and Christine Blasey Ford are now joined in history*, THINKPROGRESS (Sept. 27, 2018, 4:07 PM), <https://thinkprogress.org/anita-hill-christine-blasey-ford-93c09881e525/>; Ruth Umoh, *How Christine Blasey Ford’s vulnerability shaped her credibility*, CNBC (Sept. 28, 2018, 4:03 PM), <https://www.cnbc.com/2018/09/28/how-christine-blasey-fords-vulnerability-shaped-her-credibility.html>; Erin Hanafy, *Christine Blasey Ford’s Testimony Showed That Vulnerability is Actually a Superpower*, WELL AND GOOD (Sept. 27, 2018), <https://www.wellandgood.com/good-advice/christine-blasey-ford-vulnerability-strength/>; Megan Garber, *For Christine Blasey Ford to Be Believable, She Had to Be ‘Likable’*, THE ATLANTIC (CULTURE) (Sept. 27, 2018), <https://www.theatlantic.com/entertainment/archive/2018/09/christine-blasey-ford-pernicious-demand-be-likable/571555/>.

10 Wicker, *supra* note 9 (referencing CNN analyst Joan Biskupic’s description of Anita Hill as “strong and stoic”); David Lauter, *Hour 1 Analysis: How Christine Blasey Ford’s testimony compares to Anita Hill’s in 1991*, LA TIMES (Sept. 27, 2018, 8:57 AM), <http://www.latimes.com/politics/la-na-pol-kavanaugh-ford-hearing-hour-1-analysis-how-christine-blasey-1538063779-htmllstory.html#>; Karen Attiah, *Christine Ford, Anita Hill and the dangerous myth of the strong black woman*, WASH. POST (Sept. 29, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/09/29/christine-ford-anita-hill-and-the-dangerous-myth-of-the-strong-black-woman/?utm_term=.e5b6bb458de2.

11 Kimberlé Crenshaw, Opinion, *We Still Haven’t Learned From Anita Hill’s Testimony*, N.Y. TIMES, Sept. 27, 2018, <https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html>.

12 *Id.*

To be sure, the history of the Hill–Thomas matter is a carefully constructed intersectional tale—a gendered story in Black and White communities of a Black woman against state power and of a race traitor, a tool of state power led astray by white feminism bent on keeping a good Black man down. However, this story obfuscates the larger one, of the role of state power in protecting patriarchy, white supremacy, and capitalism. It too is the tale of a president, George Herbert Walker Bush, who nominated a Black man with no civil rights record and no affinity for marginalized people to take the place of a newly retired and ailing Thurgood Marshall. Clarence Thomas was state power in Blackface, even as Judge Brett Kavanaugh’s rictus of rage in his response to Dr. Blasey Ford’s testimony has become the face of state power. Yet, twenty-seven years after the Hill–Thomas hearings, it seems that even if we were to write a different history, as Kimberlé Crenshaw urges us to do, how we talk about race, gender, and feminism—whether in person, online, or in scholarly discourse—remains straightjacketed by our notions of whose stories matter more and should take center stage in the telling.

Of feminism and the stories that matter, human rights activist and scholar Angela Davis remarked during her lecture *Feminism and Social Transformation in the Trump Era*,

[Intersectional feminism] is feminism that recognizes the interconnections between gender violence and racist violence, between intimate violence and institutional violence, between individual violence and structural violence If we fail to perceive connections, relations, intersections, crossings, junctures, coincidences, overlapping and cross-hatching phenomena, we will be forever imprisoned in a world that appears to be White and male and heterosexual and cis gender and capitalist and U.S. centric or Eurocentric [We] have to develop habits of perception, habits of analysis that acknowledge the inadequacies of the conceptual tools on which we are compelled to rely.¹³

This article explores intersectionality as an inadequate conceptual tool on which we are compelled to rely. It considers how the shorthand of intersectionality functions as a proxy to describe the relationship between white supremacy, patriarchy, and capitalism in anti-discrimination litigation, activist circles, and across social media. As a proxy it dominates conversations between lawyers, scholars, and activists to dictate how we

13 *Leccion Inaugural 2018 Dra Angela Davis UCR en Inglés*, 13:20–17:16 (Universidad de Costa Rica video Apr. 3, 2019), <https://www.youtube.com/watch?v=sNlgsic3k0k>.

are able to talk about and conceptualize difference. These dominant conversations, hegemonic discourse, reduce how we see discrimination to overly simplistic categories like male/female and White/Black domination. Our facile perceptions are reflected in our conversations, which reinforce the discrimination that we actively seek to prevent and enshrine our notions of the “outsider.”

The pages that follow focus on the use of intersectionality as a rhetorical expression for which a coherent communication of oppression remains elusive. It proceeds in four parts. Section I gives background on the origins of our current understanding of the term “intersectionality.” Section II explores the process by which intersectionality has become hegemonic discourse. Section III considers the practical limitations of intersectionality, understood as the relationship between race, class, gender, and sexuality, through an exploration of several cases engaging anti-discrimination doctrine. Lastly, Section IV examines how the #MeToo movement exposes the analytic gaps between intersectionality—expressed as the intersection of race, class, gender, and sexuality—and the overarching power structures of white supremacy, patriarchy, and capitalism that control them.

I. *Moore v. Hughes Helicopter, Inc.*¹⁴ and the Legal Origins of Intersectional Rhetoric

Kimberlé Crenshaw’s article, *Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, is the legal origin for our popular understanding of intersectionality.¹⁵ In her article, Crenshaw examines the case *Moore v. Hughes Helicopter, Inc.* to arrive at the premise that intersecting identities in White persons are considered the norm, while the intersecting identities of women of color converge as something “other” than and “lesser” than the “norm,” a “marginalized” identity, resulting in anti-discrimination doctrine that falls short of addressing discrimination.¹⁶ Because Crenshaw’s analysis of *Moore* is crucial to the formation of intersectional rhetoric, the case and Crenshaw’s reading of it require closer examination.

14 708 F.2d 475 (9th Cir. 1983).

15 Kimberlé Crenshaw, *Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

16 *Id.* at 143–46. Crenshaw also examines two other cases in the article: *DeGraffenreid v. Gen. Motors*, 413 F. Supp. 142 (E.D. Mo. 1976); *Payne v. Travenol*, 673 F.2d 798 (5th Cir. 1982). *Id.* at 141.

Tommie Moore, an African American woman, sued Hughes Helicopter, Inc. as representative of a class of Black women on allegations that Hughes violated Title VII of the Civil Rights Act of 1964.¹⁷ The class of Black women Moore sought to represent was included in a collective bargaining unit comprised of 1,562 people.¹⁸ Moore cited Hughes' failure to choose African American women for supervisory positions and higher-grade craft positions (Labor Grades 15–20) from 1975–1979 as the basis of Hughes' discriminatory employment practices.¹⁹ She brought the case under a disparate impact theory of employment discrimination, which only required her to prove that Hughes' employment practices had a disparate or "significantly discriminatory" impact on the women as a protected class under Title VII.²⁰ In the years 1975–1979, Hughes employed a total of 427 men (White and African American) and eight women (White) in higher-grade craft positions.²¹ None of the women in the higher-grade craft positions were African American; the eight White women chosen for the positions represented 1.8% of the total number of employees in Labor grades 15–20.²² In the years 1975–1979, Hughes employed eighty-five men (White and African American) and six women (White and African American) as supervisors over members of Moore's collective bargaining unit.²³ Of the six females, two (2.2%) were African American.²⁴ Moore argued that the low percentage of African American women in upper level jobs (craft and supervisory) established a *prima facie* case of discrimination given the overall percentage of African American women in her collective bargaining unit.²⁵

The United States Court of Appeals for the Ninth Circuit analyzed separately Moore's ability to represent a broad class consisting of all women (both Black and White), and the merits of her employment discrimination claim. In considering Moore's ability to represent the class, the Ninth Circuit found that the lower court was correct in denying Moore's right to represent a class consisting of "all black and/or all female" employees in her collective bargaining unit.²⁶ The lower court certified the class as "[a]ll black female employees in [Moore's collective bargaining unit] who have been employed by Hughes Helicopters at any time on or after December 3, 1975."²⁷ In denying Moore the right to represent a class broader than only Black women, the lower court reasoned that in Moore's pleadings, inclusive of her complaint filed before the Equal Employment

17 *Moore*, 708 F.2d at 478.

18 *Id.*

19 *Id.*

20 *Id.* at 481.

21 *Id.* at 478.

22 *Id.*

23 *Id.* at 479.

24 *Id.*

25 *Id.*

26 *Id.* at 480.

27 *Id.*

Opportunity Commission (EEOC), she specifically stated that she had been discriminated against as a Black woman in particular, but not also a woman in general.²⁸ The lower court also found that Moore could not represent Black males, because she indicated in deposition testimony that Black males were not being discriminated against in promotion to supervisory positions or selection for craft positions.²⁹

In upholding the lower court's decision concerning certification, the Ninth Circuit cited to Federal Rule of Civil Procedure 23(a),³⁰ which states the requirements for class certification, but as interpreted in *General Telephone v. Falcon*, 457 U.S. 147 (1982), to support the proposition that "[m]ere membership in a sexual or racial group does not justify a finding that a plaintiff will adequately represent all members of a particular group."³¹ *General Telephone Co.*, a case appealed to the Fifth Circuit Court of Appeals and ultimately the United States Supreme Court, involved the certification of a class pursuant to Federal Rule of Civil Procedure 23(a) comprised of Mexican American employees of General Telephone Company of the Southwest.³² The Respondent/Appellee, Mariano Falcon, alleged that Southwest limited "employment, transfer, and promotional opportunities" of its Mexican American employees because they were Mexican American.³³ Falcon alleged that he was passed over for promotion, while White employees with less seniority were promoted into the position for which he applied.³⁴ The class specified in Falcon's complaint was "composed of Mexican-American persons who are employed, or who might be employed, by G[eneral] T[elephone] C[ompany] at its place of business located in Irving, Texas, who have been and who continue to be or might be adversely affected by the practices complained of herein."³⁵

In sum, Falcon sought to represent Mexican Americans who were not hired on the basis of race, as well as Mexican Americans who were not

28 *Id.*

29 *Id.*

30 Federal Rule of Civil Procedure 23(a) states, in relevant part,

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

31 *Moore*, 708 F.2d at 480.

32 *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 150–51 (1982).

33 *Id.* at 150 n.1.

34 *Id.* at 150.

35 *Id.* at 151.

promoted based on race. At the time Falcon filed his complaint, the Fifth Circuit had just ruled in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), which allowed those suffering racial discrimination to bring an “‘across the board’ attack” against an employer who allegedly engaged in racially discriminatory employment practices based on racially discriminatory policies.³⁶ An “across the board” attack would allow a plaintiff alleging racial discrimination based on one discriminatory practice by an employer to represent a class of persons who alleged racial discrimination based on a different discriminatory employment practice if all members in the class had the same injury.³⁷ Thus, Falcon sought to represent Mexican Americans employed at General Telephone Southwest who were either denied employment or promotion. The commonality between the two, and hence the alleged basis of the employment discrimination, was the employees’ status as Mexican Americans.³⁸

While the United States Supreme Court in *General Telephone* ultimately supported the reasoning in allowing “across the board” attacks on discriminatory employment practices, it nevertheless reiterated that the requirements of Federal Rule of Civil Procedure 23(a) must still be met.³⁹ A group of persons who belong to the same racial group and who allege discriminatory employment practices are definitely a class governed by Rule 23(a).⁴⁰ However, whether that class of persons meets the requirements of Rule 23(a) such that they may be certified is another matter entirely.⁴¹ The Court held that a person purporting to represent the class must do so in actuality; otherwise every individual allegation of discriminatory employment practices could serve as the basis for a class action suit.⁴² In the Court’s words,

Even though evidence that [Falcon] was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of [General Telephone Southwest’s] promotion practices; (2) that [General Telephone Southwest’s] promotion practices are motivated by a policy of ethnic discrimination that pervades [it], or (3) that this policy of ethnic discrimination is reflected in [General Telephone Southwest’s] other employment practices, such as hiring, in the same way it is manifested in the promotion practices.⁴³

³⁶ *Id.* at 152.

³⁷ *Id.* at 153.

³⁸ *Id.* at 153–54 (citing generally *Payne v. Travenol Labs, Inc.*, 565 F.2d 895 (5th Cir. 1978)).

³⁹ *Id.* at 157.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 158, 159.

⁴³ *Id.* at 158.

In crafting its holding in *General Telephone*, the United States Supreme Court also looked to its reasoning in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) handed down just five years prior. *East Texas Motor Freight* involved an employment discrimination suit brought by three Mexican American over-the-road truckers, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera.⁴⁴ The three alleged that East Texas Motor Freight's no-transfer policy, a policy that required a driver seeking a transfer to a different job to forfeit seniority built up in their present job, was in part a violation of Title VII of the Civil Rights Act of 1964.⁴⁵ Procedurally, the parties never moved for class certification at the trial court level, although the Fifth Circuit Court of Appeals certified what it thought to be the correct class before reversing the District Court's ruling against Rodriguez, Perez, and Herrera.⁴⁶ The original complaint in the case brought suit on behalf of all

East Texas Motor Freight's Mexican-American and Black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight . . . from July 2, 1965 (the effective date of Title VII) to present.⁴⁷

Reviewing the Fifth Circuit Court's decision to certify the class, the United States Supreme Court did not consider whether it was proper for an appellate court to certify a class when it had not been previously certified at the trial court level.⁴⁸ Instead, the Court was most concerned about whether the class as certified was properly represented by the three named plaintiffs.⁴⁹ The Court found that the plaintiffs were not proper class representatives because they did not qualify for the positions for which they sought transfer and all three stipulated that they had not suffered discrimination at the time they were hired.⁵⁰

It is important to note that in both *General Telephone* and *East Texas Motor Freight* the Court's main concern was that representative members of the class of persons actually represent the injuries and interests of the class.⁵¹ Neither court denied that: (1) a member of a racial or ethnic group could represent a class consisting of members of that same racial or ethnic

44 *East Tex. Motor Freight*, 431 U.S. at 398.

45 *Id.* at 397–99.

46 *Id.* at 398.

47 *Id.* at 399.

48 *Id.* at 403.

49 *Id.*

50 *Id.* at 403–04.

51 *General Tel.*, 457 U.S. at 156 (citing *East Tex. Motor Freight*, 431 U.S. at 403).

group regardless of sex (the Mexican American male in *Falcon* who endeavored to represent a class of Mexican American persons); nor that (2) members of a single racial or ethnic group (the Mexican American males in *East Texas Motor Freight*) could represent a class consisting of members of the group to which the representatives belonged regardless of sex (Mexican American in city drivers and Mexican American applicants for line driver positions), as well as another group considered a racial minority regardless of sex (Black in city drivers and Black applicants for line driver positions). Rather, the respondents in *General Telephone* and *East Texas Motor Freight* ultimately failed as class representatives because they did not meet the adequacy and typicality requirements of 23(a).

When read in the context of the precedent relied upon by the Ninth Circuit Court of Appeals in arriving at its decision, *Moore* is the continuation of these themes. Had Moore been specific in her pleadings and evidentiary offerings that she alleged discrimination on the behalf of all women regardless of race, all persons regardless of sex, or even all Black persons and all women, there is no indication that the Court would have precluded her representation of any of these classes, provided her claims were typical of and adequate for the class.⁵² To use the language of the *General Telephone* court, even if Moore could prove that she was not selected to work in a higher grade craft position or that she was passed over for promotion, such proof does not support the inference that: (1) any discriminatory treatment against Black women was typical of Hughes' selection and promotion practices at the time with respect to all women and Black men; (2) that Hughes' selection and promotion practices were motivated by a policy of racial and/or sexual discrimination that pervaded it; and (3) that Hughes' policy of discrimination manifested itself in the same way in job selection and promotion.⁵³

Although this line of reasoning may justify the Ninth Circuit's decision to preclude Moore from representing a class larger than Black women, it also reveals essentialist unifiers, words or phrases used to flatten the experiences of a group into one "universal" experience, as the basis for the court's reasoning paradigm. The court's analysis with respect to class representation takes place within the unifier "gender discrimination" or "sex discrimination" expressed and communicated as women as subordinated to men (male/female domination), rather than or in addition to Black women subordinated to White women, or even Black women subordinated to Black women (two black women in Moore's unit did

⁵² See *infra* note 119.

⁵³ *General Tel.*, 457 U.S. at 158.

receive promotions). In the context of legal reasoning as it occurs in this case, “sex discrimination” became a totality encompassing Moore’s relationship to White and Black women in her collective bargaining unit at Hughes. As such, the court required evidence that in some way explained how women in Moore’s collective bargaining unit, regardless of race, were subordinated to the men.⁵⁴

Because Moore did not plead that all women (Black and White) in her collective bargaining unit were discriminated against as women (male/female domination), the class of people who she could represent was limited to Black women; they occupied her same category from which White women were excluded. Accordingly, the Ninth Circuit could only assess Moore’s adequacy as a representative of Black women in the context of her subordination to Black and White men. In suggesting all of the men (both Black and White) were adequately represented in job selection and promotion, Moore’s characterization of her claim reinforced the court’s “sex discrimination” paradigm as women (Black and White) subordinated to men (Black and White). As man’s subordinate, Moore could not be his representative; as a Black woman her claims were too narrow to represent all women. Had Moore been White and presented the same pleadings and evidence supporting class certification, it is unlikely that the court would have allowed her to represent all women given the same relevant precedent.

In *Demarginalizing the Intersection of Race and Sex*, Kimberlé Crenshaw offers a different reading of *Moore v. Hughes Helicopter, Inc.* Crenshaw’s reading takes place within the analytical construct of intersectionality, a construct Crenshaw identified to capture the layers of Black women’s identity as Black people and women, race and gender, as opposed to analyzing those experiences in terms of race or gender.⁵⁵ The premise of Crenshaw’s article is that anti-discrimination doctrine only takes into account the experiences of those privileged within a racial or gender group. In her words, “in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.”⁵⁶ According to Crenshaw, this focus “marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.”⁵⁷ Within the context of the article, “sex- or

⁵⁴ ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* 117–18 (2d ed. 2001).

⁵⁵ Crenshaw, *supra* note 15, at 139.

⁵⁶ *Id.* at 140.

⁵⁷ *Id.*

class-privileged Blacks” are men; “race- or class-privileged women” are White.⁵⁸

For Crenshaw, the Ninth Circuit’s failure to allow Moore to serve as a class representative for all women not only reflected the court’s failure to recognize Black women’s multiple and intersecting identities, but also the court’s centering of White women’s experiences in their understanding and analysis of gender discrimination claims.⁵⁹ The court’s reasoning that Moore could not represent “all women” because she specifically brought her claims against Hughes as a “Black woman” demonstrates, within the intersectionality construct, one of two things: (1) that the discriminatory practices against Black women occupy a limited sphere within discriminatory practices against all women, and therefore cannot be representative; or (2) discrimination against Black women is something different than and stands in opposition to discrimination against women in general.⁶⁰ Black women’s experiences with both race and gender discrimination become marginalized and hybridized to White women’s experiences, which are construed as “normal,” “pure,” or “standard” discrimination claims without any racial dimensions.⁶¹ As Crenshaw states, “[f]or [White women] there is no need to specify discrimination as *white* females because their race does not contribute to the disadvantage for which they seek redress.”⁶²

Crenshaw’s interpretation of the case, first in a lecture and then communicated in a law review article, takes place in the analytic space of college studies departments (Women’s Studies, Black Studies, Queer Studies), where faculty of difference (women, African Americans, LGBTQIA persons) fought for inclusion of their stories and perspectives into college curricula. It also takes place at a time when elite law schools were reluctant to include faculty of color and scholarship about difference into law school curricula. In particular, the relationship between the telling of Black women’s herstories, the telling of White women’s herstories, and the exclusion of certain of these stories in college and law school curricula were all acute political lightning rods. Crenshaw opens her article with a passing reference to the text *All the Women Are White, All the Blacks are Men, But Some of Us are Brave* [hereinafter *But Some of Us Are Brave*]. *But Some of Us Are Brave*, published in 1982, in many ways is a memorialization of the struggle to include Black women’s stories into college

58 *Id.* at 155–56, 160–61.

59 *Id.* at 144–45.

60 *Id.* at 144.

61 *Id.* at 144–45.

62 *Id.*

curricula.⁶³ The book is divided into seven parts: *Part One - Searching for Sisterhood: Black Feminism*; *Part Two—Roadblocks and Bridges: Confronting Racism*; *Part Three – Dispelling the Myth: Black Women and the Social Sciences*; *Part Four—Creative Survival: Preserving Body, Mind, and Spirit*; *Part 5—“Necessary Bread” Black Women’s Literature*; *Part Six—Bibliographies and Bibliographic Essays*; and *Part Seven—Doing the Work: Selected Course Syllabi*.⁶⁴ All of the parts are unified under central themes: the marginalization of Black women’s stories and perspectives in college curricula; the privileging of White women’s stories and perspectives as all women’s stories; and Black female academicians’ struggle for inclusion in the academy.

The year when *But Some of Us Are Brave* was published marked a significant time period for new law students and legal academics of color. Many future contributors to the scholarship of Critical Race Theory/Critical Race Feminism (CRT/F) were entering elite law schools in the early 1980s and found the legal academy an unwelcoming place for their perspectives and experiences as people of color.⁶⁵ The CRT movement happened upon legal academe in much the same way scholars in undergraduate and graduate institutions began to push for “Studies” departments that would teach the work of those whose voices were muted on the periphery of legitimate scholarship and pedagogy.⁶⁶ Like its forbearers in the “Studies” movement, CRT began its critique of the law and institutions through the totalizing unifier “race,” which excluded from critiques of discrimination the relationships between women of all races and men who were not African American.⁶⁷ It is no surprise, then, that by 1989, the year that Crenshaw’s *Demarginalizing the Intersection of Race and Sex* was published and the first CRT Conference was held in Madison, Wisconsin, the field was ripe for beginning a discussion about interpreting Black women’s experiences in various legal contexts, although not fully realized.⁶⁸ The structure for doing so was set by the example in the

63 (Gloria T. Hull et al. eds., 1982). See also *id.* at xv, in which historian and lawyer Mary Berry writes,

The education of students has long been bereft of adequate attention to the experiences and contributions of Blacks and women to American life. But practically no attention has been given to the distinct experiences of Black women in the education provided by our colleges and universities. This absence of attention is molded and reflected in the materials made available by scholars.

64 *Id.*

65 Angela Harris, *Foreward*, in *CRITICAL RACE THEORY: AN INTRODUCTION* xv–xvii (Richard Delgado & Jean Stefancic eds., 2d ed. 2012).

66 See, e.g., FABIO ROJAS, *FROM BLACK POWER TO BLACK STUDIES: HOW A RADICAL SOCIAL MOVEMENT BECAME AN ACADEMIC DISCIPLINE* (2007); DAPHNE PATAI & NORETTA KOERTGE, *PROFESSING FEMINISM: CAUTIONARY TALES FROM INSIDE THE STRANGE WORLD OF WOMEN’S STUDIES* (1994); Marilyn J. Boxer, *For and about Women: The Theory and Practice of Women’s Studies in the United States*, 7 *SIGNS* 661 (1982).

67 *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xxxi (Kimberlé Crenshaw et al. eds., 1995).

68 See generally *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing et al. eds., 1997). Wing conceived this reader to answer the silence of women-centered texts in Critical Race Theory scholarship.

“Studies” movement, which created an analytic, discursive field where Black women’s stories and perspectives were communicated as occupying marginal spaces, subordinated to White women’s stories and perspectives, and subordinated to all men’s stories and perspectives. This “marginalization” became the signifier or symbol under which Black women’s experiences were described vis-à-vis White women, Black men, and White men; this language became the way of describing Black women’s discrimination in a manner that continues to produce actual marginalization and reinforce its symbolic nature.⁶⁹

It is in this context that Crenshaw’s reading of *Moore* reveals the rules governing the hegemonic discourse of intersectionality, or the acceptable means of discussing marginalization in academic and activist circles. Within the analytic field of Crenshaw’s discourse, the Ninth Circuit’s refusal to allow Moore to represent a class of “all women” becomes an articulation of “intersectionality.” The only way to speak of such marginalization is to describe the relationships it includes at a fixed period of time. In Moore’s case, this is her relationship not to the Black men and White men with whom she occupies space in the collective bargaining unit, but with the White women whose status as “women” and “White” converge to Moore’s detriment and exclusion. Thus, under the strictures of this discourse, Moore cannot represent White women because their whiteness is invisible, and they are “all women” while she is not; their experiences are centered while hers are marginalized. It is irrelevant whether, truthfully, Moore’s experiences as a Black woman could fully encompass White women’s claims. In Crenshaw’s construct, Moore, as a member of a “multiply-disadvantaged class,” is strategically poised to represent anyone else who shares a disadvantage (femaleness or Blackness).⁷⁰

Communicated in this manner, the concrete reality of Moore’s failure to advance in her employment with Hughes is a form of dichotomous subordination (White/Black; male/female domination) even if the cause is not readily discernible from the case itself. The way Moore’s experience is discussed as intersectional rhetoric helps to maintain marginalization as a symbol of White and Black female relationships in the employment discrimination arena; those reading Crenshaw’s article, for example, find a means to express White and Black female relationships in these terms. Such expression reinforces how members of those groups perceive themselves in actuality. In this discourse, Black women occupy multiple, intersecting identities that are invisible, while White womanhood is

⁶⁹ See LACLAU & MOUFFE, *supra* note 54, at 117 (discussing how language creates reality).

⁷⁰ Crenshaw, *supra* note 15, at 145.

subsumed in whiteness and considered “the norm.” As the term “intersectionality” has become the shorthand by which scholars and activists discuss multiple, intersecting identities for marginalized people—primarily people of color—it has essentialized marginalization and set up whiteness as a monolithic identity without interrogating the nuanced race, class, gender, and sexualities that comprise it.

Such hegemonic discourse limits how scholars, litigators, and activists can discuss the consequences of difference as they manifest in the law and legal and societal institutions, and how litigators and activists can use the theories that comprise “intersectionality” for social change. To continue this discourse in ways that both define and solidify difference does little to address the nuances of white supremacy, patriarchy, and capitalism as they operate in the descriptors “race,” “class,” “gender,” “sexuality,” and “sexual orientation.” Rather, it sets up intersectionality as hegemonic discourse.

II. Creating Intersectionality as Hegemonic Discourse

Ernesto Laclau and Chantal Mouffe’s *Hegemony & Socialist Strategy: Towards a Radical Democratic Politics* is an effort to reconceptualize theories of hegemony as expressed by Hegel, Marx, Gramsci, and their progeny.⁷¹ Laclau and Mouffe’s work not only sheds light on the binary conception of hegemony (us/them; insider/outsider), but also on the formation of hegemonic discourse. Roughly defined, hegemony is predominant influence or domination that is perpetuated and preserved through power relationships between the oppressor and oppressed. In Hegelian, Marxian, and Gramscian theories of hegemony, the source of the predominant influence or domination shifts according to each theorist’s explanation of historical and political phenomena. For example, the source of Hegelian hegemony is the State or an entity characterized by rules, customs, and laws designed to advance its people (subjects) toward a freedom it defines.⁷² Hegel’s freedom is the reconciliation of man’s Spirit and mind as embodied in the State.⁷³ In comparison, Marxian theories of

71 See generally LACLAU & MOUFFE, *supra* note 54; see also, G.F.W. HEGEL, INTRODUCTION TO THE PHILOSOPHY OF HISTORY 67 (1988); C.L.R. JAMES, NOTES ON THE DIALECTICS: HEGEL, MARX, AND LENIN 41, 43 (1948); Karl Marx, *Contribution to the Critique of Hegel’s Philosophy of Right*, in THE MARX-ENGELS READER 21 (Robert C. Tucker ed., 2d ed. 1978); Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 84, 92–93 (Robert C. Tucker ed., 2d ed. 1978); Karl Marx, *The German Ideology*, in THE MARX-ENGELS READER 151 (Robert C. Tucker ed., 2d ed. 1978); ANTONIO GRAMSCI, PRISON NOTEBOOKS xvii (1971); MARTIN CLARK, ANTONIO GRAMSCI AND THE REVOLUTION THAT FAILED 2 (1977); JOHN HOFFMAN, THE GRAMSCIAN CHALLENGE: COERCION AND CONSENT IN MARXIST POLITICAL THEORY 53–59 (1984); DANTE GERMINO, ANTONIO GRAMSCI: ARCHITECT OF A NEW POLITICS 256–57 (1990).

72 HEGEL, *supra* note 71, at 64–65.

73 *Id.* at 67.

hegemony highlight the conflicting nature of the State as it is and the State as it imagines itself.⁷⁴ Marxist hegemony creates a State that advances its people toward an ideal that does not capture their existence, dual existences of the material and spiritual, which remain irreconciled.⁷⁵ In order to maintain its illusion of the ideal, the State makes definitions and sets limits on the people's actions.⁷⁶ At the heart of Marxist hegemony theory is that the definitions and limitations that are set by the State vary in each stage of history and are dependent upon man's relationship to labor and the means of production, the source of predominant influence and domination.⁷⁷ Lastly, the Gramscian source of hegemony rests neither in the State, nor in man's relationship to the means of production. It rests in the development and preservation of classes, namely the ruling class and its antithesis, the subaltern or working class.⁷⁸ All three theories have as their goal universal man's freedom, universal man's ability to live reconciled in oneself (mind, spirit, and material existence) absent the intervention and interference of a supreme power.⁷⁹ However, all three describe different single unifiers (the State, relationship to the means of production, and class preservation) as the source of hegemonic power.

Laclau and Mouffe's work is a departure from embodying hegemony within a single unifier. In the theorists' view, a unifier (e.g. race) is a fictionalized description that attempts to harmonize a series of varied and diverse experiences.⁸⁰ In the Laclau/Mouffe paradigm, a unifier falls into the category of an "articulated practice" or "any practice establishing a relation among elements such that the identity [of an element] is modified."⁸¹ Discourse is the discussion of the articulated practice as a unifier or a "structured totality."⁸² In turn, these discussions are governed by certain rules that are set by the context, the analytic/discursive field, where such discussions occur.⁸³ Such discourse is communicated or "dispersed" based on the discursive/analytic spaces that govern it.⁸⁴ The analytic space governs the acceptable scope of relationships in an articulated practice.⁸⁵

For Laclau and Mouffe, every object of study within a discursive field is created by the method and means of how it is discussed.⁸⁶ There is no

74 Marx, *Contributions to the Critique of Hegel's Philosophy of Right*, *supra* note 71, at 21.

75 Marx, *The Economic and Philosophic Manuscripts of 1844*, *supra* note 71, at 84, 92–93.

76 *Id.*

77 Marx, *The German Ideology*, *supra* note 71, at 151.

78 GRAMSCI, *supra* note 71, at 51–52.

79 HEGEL, *supra* note 71, at 67; Marx, *The Economic and Philosophic Manuscripts of 1844*, *supra* note 71, at 91; JAMES, *supra* note 71, at 41.

80 LACLAU & MOUFFE, *supra* note 54, at 95–96.

81 *Id.* at 105.

82 *Id.*

83 *Id.* at 105, 107, 109.

84 *Id.* at 105.

85 *Id.* at 110.

86 *Id.* at 108.

distinction between language and behavior, or the spiritual, material, and mental.⁸⁷ On the contrary, language, behavior, spirit, material and mental all exist on the same plane, each is its own discursive space.⁸⁸ Any relationship between them is temporarily fixed by discourse and dispersion in a discursive/analytic field. Any unifier connecting them is a symbol or signifier of a (false) totality.⁸⁹ Furthermore, the relationship between the subjects of the unifier (the spiritual and mental for Hegel's "State, for example") is a creation of discourse and dispersion, and the symbol that unifier becomes.⁹⁰

Accordingly, unifiers such as race, class, gender, sexuality, and sexual orientation are essentialist descriptors—totalizing descriptors—of the relationships that comprise them.⁹¹ Discussions of difference and discrimination as they occur in the discursive field of scholarly legal discourse cast unifiers (race, class, gender, sexuality, and/or sexual orientation) or a series of unifiers (race x class x gender x sexuality x sexual orientation) as categories of oppression.⁹² In actuality, each unifier is an expression of a series of relationships that is temporarily fixed by discourse and dispersion, and then by the symbolism attached to the unifier as dispersed.⁹³ Laclau and Mouffe give an example of this phenomenon in their critique of feminist essentialism.⁹⁴ They argue that the whole of sexual differences are cast as woman subordinated to man, regardless of the forms these differences take or the relationships they encompass.⁹⁵ In construing the relationships between men and women in this manner, each relationship becomes symbolized (falsely) as an expression of the male domination of females.⁹⁶ In turn, the symbolism in which the expression takes place produces real forms of subordination in male and female interactions. Ultimately, these

87 *Id.* at 109–10.

88 *Id.*

89 *Id.* at 106.

90 *Id.* at 114–16.

91 *Cf. id.* at 109. The authors argue,

The objective world is structured in relational sequences which do not necessarily have a finalistic sense and which, in most cases, do not actually require any meaning at all: it is sufficient that certain regularities establish differential positions for us to be able to speak of a discursive formation. Two important conclusions follow from this. The first is that the material character of discourse cannot be unified in the experience or consciousness of a founding subject.

92 *Cf. id.* at 115–16. The authors explain how subject categories are attempts to capture complex relationships. To the extent that a writer or speaker assembles these subject categories as a means to express their underlying relationships, the writer or speaker is essentializing each subject category and fixing the reader/hearer's understanding of it in a particular moment of converging relationships.

93 *Id.* at 116.

94 *Id.* at 117.

95 *Id.* at 117–18.

96 *Id.* at 118.

interactions reinforce and reproduce the symbolism from which they were born.⁹⁷

CRT/F scholars' discussion of White race, class, gender, sexuality, and sexual orientation intersections as the "norm" or as White domination of Black people, and gender as male domination of female is another example of symbolic language that seeks to express complex relationships as temporarily fixed under essentialist unifiers. Such discussions have obfuscated the underlying relationships that comprise the unifiers "race," "class," "gender," "sexuality," and "sexual orientation" and are temporarily fixed under those unifiers.⁹⁸ Discussing intersections of race, class, gender, sexuality, and sexual orientation almost exclusively in terms of the dichotomous relationships (male/female domination, White/Black) denies larger patterns of oppression that reinforce discrimination against both women and men and manifest differently across race, class, gender, sexuality, and sexual orientation.

Sociologists Patricia Hill Collins and Deborah King were instrumental in developing foundational theory for interlocking oppressions, which later birthed the discourse on "Black Feminist Thought" or race, class, and gender as a framework for analyzing difference.⁹⁹ While the focus of her work is Black women, Collins' foundational tenet of developing theoretical models from multiple interacting oppressions has wide application. Building on the work of feminist scholar bell hooks,¹⁰⁰ namely hooks' assertion that dichotomous thinking is "the central ideological component of all systems of domination in Western society,"¹⁰¹ Collins situates race, class, and gender analyses within a fluid set of analyses (e.g. race, class, gender, sexuality, region, age,¹⁰² and culture¹⁰³) involving interacting systems of oppression.¹⁰⁴ Collins' work is a departure from what she calls "dichotomous oppositional difference," or the notion that an identity gains meaning only when defined in relation to its opposing counterpart (i.e.

97 *Id.*

98 *Cf. id.* at 117–18, 121 (Note how the authors discuss the role of unifiers in obscuring the relationships they attempt to explain.).

99 See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2008); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *SIGNS* 42 (1988); Jennifer C. Nash, 'Home Truths' on Intersectionality, 23 *YALE L.J. & FEMINISM* 445 (2011) (historicizing the relationship between intersectionality and Black feminism).

100 BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984).

101 Patricia Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought* (No. 6), 33 *SOC. PROBS.* S14, S20 (1986).

102 *Id.* at S16.

103 *Id.* at S21–S24.

104 *Id.* at S20–S21.

male/female, White/Black, etc.).¹⁰⁵ Likewise, in her article *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, King cautions against developing a simplistic framework for analyzing race, class, and gender because “[their significance] is “neither fixed nor absolute but, rather, is dependent on the sociohistorical context and the social phenomenon under consideration.”¹⁰⁶ Both King and Collins’ work stand in contrast to those totalizing unifiers that form intersectionality as hegemonic discourse.

III. The Limitations of Intersectionality in Practice

Privileging experiences of women of color as subordinated to White women and all men in describing intersectionality obfuscates how white supremacy, patriarchy, and capitalism operate as race, class, gender, sexuality, and sexual orientation, and prevents more dynamic theoretical frameworks for analysis. Several case examples detailing sex and race discrimination in the employment realm illustrate the limits of intersectionality as shorthand in practice: *Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971), *Earwood v. Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976), and *Vinson v. The Cheesecake Factory Restaurants, Inc.* (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)).¹⁰⁷

A. *Phillips v. Martin Marietta Co.*

In 1969, Ida Phillips brought a sex discrimination lawsuit against Martin Marietta Co. pursuant to Title VII of the Civil Rights Act of 1964.¹⁰⁸ Phillips alleged in her claim that Martin Marietta’s refusal to accept her application for assembly trainee because she was the mother of preschool age children was a violation of Title VII’s prohibition on sexual discrimination. The United States District Court for the Middle District of Florida granted Martin Marietta’s Motion for Summary Judgment on grounds that Martin Marietta employed men with preschool aged children in the position Ms. Phillips sought, and that 75–80% of the people hired for the position were women.¹⁰⁹ The Court of Appeals for the Fifth Circuit affirmed the District Court’s decision and denied a rehearing in a *per curiam* decision.¹¹⁰ In the dissent, Chief Judge John R. Brown and Circuit Court Judges Ainsworth and Simpson considered whether the

¹⁰⁵ *Id.*

¹⁰⁶ King, *supra* note 99, at 49.

¹⁰⁷ All that exists for this case are the initial disclosures and the docketing record.

¹⁰⁸ *Phillips*, 400 U.S. at 543.

¹⁰⁹ *Id.*

¹¹⁰ *Phillips v. Martin Marietta Co.*, 416 F.2d 1257, 1258 (5th Cir. 1969).

court should have heard argument on whether claimants bringing Title VII lawsuits should be able to allege discrimination based on one of Title VII's protected classes, in this case sex, in addition to another non-protected class, motherhood, as a basis for discrimination.¹¹¹ In Judge Brown's words,

The case is simple. A woman with pre-school age children may not be employed, a man with pre-school children may. The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody – and this includes Judges, Solomonic or life tenured – has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman. It is the fact of the person being a mother – i.e., a woman – not the age of the children, which denies employment opportunity to a woman [sic] which is open to a man.¹¹²

The Supreme Court of the United States granted Phillips' request for *certiorari*.¹¹³ In its opinion, the Court found that the Fifth Circuit Court of Appeals erred in interpreting Title VII as allowing different hiring policies for men and women with preschool age children on the basis of sex.¹¹⁴ However, the Court did state that it would be possible for the Fifth Circuit Court of Appeals on remand to uphold Martin Marietta's employment policy if the Company showed that familial obligations interfered more with a woman's job performance than a man's.¹¹⁵ If so, Martin Marietta's policy would qualify as a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise," exempting it from Title VII scrutiny.¹¹⁶ Criticizing the majority opinion, Justice Thurgood Marshall in his concurrence remarked,

By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." . . . Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a "bona fide occupational qualification" was not intended to swallow the rule.¹¹⁷

While *Phillips v. Martin Marietta* is cited as a victory for mothers and is popularly known for the controversial sex-plus analysis in Title VII

111 *Id.*

112 *Id.* at 1259.

113 *Phillips v. Martin Marietta Co.*, 397 U.S. 960 (1970).

114 *Phillips*, 400 U.S. at 544.

115 *Id.*

116 *Id.*

117 *Id.* at 545.

claims,¹¹⁸ this case is full of unexplored contours. Although Ida Phillips was a White woman, the NAACP Legal Defense Fund (LDF) served as her legal team.¹¹⁹ Reporting on the case in 1971, *Jet Magazine*, a magazine wholly devoted to dispensing news to African Americans about African Americans, described Ms. Phillips as having “seven pre-school age children.”¹²⁰ Phillips’ occupancy in the workplace as a mother of seven young children suggests that she had assumed the role as either the primary breadwinner or a breadwinner in her family, and that she needed to work to support her family. This is precisely the reason why the LDF took the case; its rationale was that Martin Marietta’s reasoning in the case, if adopted by the court, could prove detrimental if applied to similarly situated African American women.¹²¹ Historians have noted the prevalence of Black female-headed homes to argue that feminist agendas pushing the right to enter the workplace were primarily concerned with White women.¹²² Implicit in this telling of social history is the assumption that the majority of White women occupied positions of stay-at-home-wife and mother, who had little to no responsibility in financially supporting their families.¹²³ Ms. Phillips was the negation of this assumption; she occupied a space so far beyond acceptable White womanhood that she became a Black woman by proxy in the legal proceedings.¹²⁴ Placing Ms. Phillips in this historical context reveals that her race (White), class (economically poor or working class), gender (woman), and sexuality/sexual orientation (presumably cis heterosexual) converged to her detriment; it made her motherhood something less than fully protected. However, “race,” “class,” “gender,” “sexuality,” and “sexual orientation” as totalizing categories of analysis expressing Black subordinated to White and female to male are far too narrow to adequately describe her case and place sex-plus cases in a dynamic discursive field.

The United States’ *amicus curiae* brief in *Phillips* gives further insight into how advocates for Ms. Phillips’ position struggled to fit her reality into the categories available under Title VII. Based on the “Introduction

¹¹⁸ See, e.g., *Jeffries v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1033 (5th Cir. 1980); *Judge v. Marsh*, 649 F. Supp. 770, 780 (D.D.C. 1986); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987).

¹¹⁹ SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 51 (2011).

¹²⁰ *JET MAG.*, Feb. 18, 1971, at 23.

¹²¹ MAYERI, *supra* note 119, at 53.

¹²² See, e.g., JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (2d ed. 2009).

¹²³ See, e.g., Joanne Meyerowitz, *Beyond the Feminine Mystique: A Reassessment of Postwar Mass Culture, 1946–1958*, in *NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945–1960* 229–62 (Joanne Meyerowitz ed., 1994).

¹²⁴ Cf. MAYERI, *supra* note 119, at 51–53. A discussion of how Ms. Phillips’ attorneys chose to represent her, especially their references to Black mothers in legal arguments, is discussed *infra* note 128.

and Summary of the Argument” in its brief, the United States’ concern was that denying women with pre-school age children the opportunity to work would cause a greater welfare burden on the state.¹²⁵ It cited to statistics from the U.S. Department of Labor that showed as of March 1968 “fourteen percent (4.1 million) of all women in the labor markets were mothers with children under six years of age. [And] of this number, 33 percent were either heads of their households or had husbands whose incomes were below \$5,000 in 1967.”¹²⁶ The U.S. cited additional statistics to show that “[a]mong all non-white mothers with children under six years of age, a larger percentage worked (45 percent) than did white mothers with such children (27 percent).”¹²⁷ Despite the statistics available to it on the impact the Fifth Circuit Court of Appeals decision if upheld could have on all working mothers, the United States gave cursory attention to this line of reasoning before turning to address Martin Marietta’s claims of BFOQ. Significantly, the United States emphasized the disproportionate impact the decision could have on African American mothers.¹²⁸ While from a litigation standpoint, arguing race discrimination under Title VII seems persuasive given the shakiness of Phillips’ sex discrimination claim, this strategy did not strike at the decaying heart of the court’s interpretation of motherhood, especially as it pertained to Ms. Phillips as a working-class White mother. Ultimately, it was a strategy designed to defend the gains of the feminist movement and a nascent Title VII, but not to advance to the battlefield of gender equity.

By framing the argument in terms of the group that would be disproportionately burdened (African American mothers), instead of focusing on the group burdened by the current litigation (all working women with pre-school age children; White women in particular), the United States reinforced dichotomous thinking by pitting race against sex. In its words,

The decision below directly affects a substantial number of women in the labor market, many of whom are the sole or principal income-producing member of households with children and thus are among those in our society least able to afford restrictions upon their employment opportunities. The burden falls heaviest among Negroes and other non-whites.¹²⁹

This limited argument failed to address that Ida Phillips was being punished through eclipsed employment opportunities as a working White mother of pre-school age children, not merely by stereotypes about the

¹²⁵ *Brief for the United States as Amicus Curiae* at 4–5, *Phillips v. Martin Marietta*, 397 U.S. 960 (1970) (No. 1058).

¹²⁶ *Id.* at 5 n.2.

¹²⁷ *Id.* at 6 n.3.

¹²⁸ *Id.* at 5–6.

¹²⁹ *Id.*

societal role of women, but by a patriarchal, capitalist structure that subordinates and erases women's reproductive and care-taking labors as they support male capitalist enterprise in the marketplace and have a value on their own.¹³⁰

Women of all races are affected by this phenomena, but historically White women's labor at home (reproduction, childcare, housekeeping) has been tied to the capitalist economy through the White men it supports and enables to engage in it outside of the home, and the legitimate White children that continue this legacy.¹³¹ In contrast, Black women's reproductive labor directly supported the capitalist enterprise of slavery, while their care-taking labor on the plantation (in the household or in the fields) reinforced and solidified the class position of wealthy Whites (the planocracy).¹³² Black women's care for White children during slavery and throughout the Jim Crow era took them away from their children and households, and again funneled the economic benefits of their labor primarily into the White households they served.¹³³ When viewed through this lens, Ms. Phillips' presence in the workplace, like all working mothers, simultaneously made visible and monetized the cost of childcare. However, its significance for White women was different than for Black women. For White women, it separated the caretaking role from one's sex, which was a direct challenge to so-called "acceptable" racialized gender roles for White women that could form the basis for Martin Marietta's BFOQ claim. The basis for the stereotype of what working mothers of small children were fit to do was tied to White women's work.

B. *Earwood v. Continental Southeastern Lines*

Ronald Earwood brought suit against Continental Southeastern Lines, Inc. for refusing to allow him to work without receiving a haircut. He alleged that Continental's enforcement of its rules for hair length discriminated against him on the basis of sex in violation of Title VII.¹³⁴ The United States District Court for the Western District of North Carolina ruled in Earwood's favor, awarded him back pay, and ordered Continental to cease enforcement of the policy.¹³⁵ Earwood was employed as a bus driver at Continental, who at the time employed only males as bus drivers.¹³⁶ Under its grooming policies, Continental required its bus drivers to "report for work cleanly shaved with a trim haircut, a clean shirt,

¹³⁰ See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 3-4, 5-6, 16-17 (1993).

¹³¹ *Id.* at 8-9, 10-11.

¹³² *Id.* at 7-8, 12-13.

¹³³ *Id.* at 19-21.

¹³⁴ *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976).

¹³⁵ *Id.* at 1350.

shoes polished, and a clean, neat uniform.”¹³⁷ The hair length requirement also provided that, “1. Sideburns will not be worn lower than the ear lobe. 2. The hair will not at any time hang over the shirt collar. 3. Hair will not be worn over the ears. 4. Moustaches will be neatly trimmed, straight and no handle bars. 5. Beards are not permitted.”¹³⁸ These particular standards only applied to bus drivers; employees in Continental’s other divisions were allowed to have longer hair than drivers, but were still required to “be neat and clean and groomed in a manner commensurate with their jobs.”¹³⁹ According to the Fourth Circuit, “The district court described Earwood’s hair as ‘modishly full’ . . . It was combed over his ears and was thick upon his neck, but not so long as to fall about his shoulders.”¹⁴⁰ Citing *Phillips v. Martin Marietta*, Earwood argued that Continental’s grooming regulation deprived him of an employment opportunity because it reinforced a “sex stereotype.”¹⁴¹ The Fourth Circuit distinguished *Phillips*, reasoning that sex-plus cases involved discrimination based on sex and another immutable characteristic like sex (e.g. motherhood).¹⁴² In the court’s view hair was not an immutable sex characteristic; it could be changed on a whim.¹⁴³ On the basis of this reasoning, and the precedent set by the Fifth, Eighth, Ninth, and D.C. Circuit Courts of Appeals, the Fourth Circuit reversed the lower court’s ruling.¹⁴⁴ The sole dissenter to the opinion, Circuit Judge Winter, reasoned that because hair length was only an issue for men, Continental’s policy discriminated on the basis of sex.¹⁴⁵

Of import here is the district court’s use of the words “modishly full” to describe Earwood’s hair. 1976, the year the Fourth Circuit opinion was filed, marked an era just shy of the negative associations with hair length and political associations.¹⁴⁶ The anti-war movement surrounding the conflict in Vietnam, which ended with the departure of the last United States military helicopter from Saigon,¹⁴⁷ was a challenge to all things conservative and of the status quo. America looked with derision on its “hippie,” inhabitants, primarily middle class Whites,¹⁴⁸ who espoused free love, and encouraged life outside of suburbia and the confines of 9-to-5.¹⁴⁹ Long hair was the style preferred by male “hippies,” a “mod” or faddish style, and had no place in the conservative workplace.¹⁵⁰ “Hippie” is a

136 *Id.*

137 *Id.*

138 *Id.* at 1350 n.2.

139 *Id.* at 1350.

140 *Id.*

141 *Id.* at 1351.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 1352.

146 BARRY MILES, HIPPIE 10 (2005).

147 *Id.*

148 *Id.* at 9–16; LEWIS YABLONSKY, THE HIPPIE TRIP: A FIRSTHAND ACCOUNT OF THE BELIEFS AND BEHAVIORS OF HIPPIES IN AMERICA BY A NOTED SOCIOLOGIST 103 (1968).

distinctly White male and female identity, in contrast to the “Black Power” association with the Afro in the same era, or long natural “radical” hair for Black people.¹⁵¹ All court and newspaper accounts of the case suggest that Earwood was White.¹⁵² It would be an inaccurate description of Earwood’s case to cast it simply in terms of “hair preference,” as indeed the Fourth Circuit Court of Appeals did. The convergence of Earwood’s race (White), gender (man), class (economically middle class),¹⁵³ and sexuality/sexual orientation (arguably cis heterosexual)¹⁵⁴ were the basis for his discrimination. However, in a framework that casts White males as solely the oppressor of persons of color and all women, such an analysis is not possible.

At its core, Earwood’s case is about how White male hippie identity posed a challenge to patriarchy. As historian Sara M. Evans argues in her article, *Sons, Daughters, and Patriarchy: Gender and the 1968 Generation*, the children of middle-class and elite parents lived in overt, visible opposition to the values held dear by their parents’ generation.¹⁵⁵ She writes,

These wholesale attacks on authority and hierarchy, however, had different political implications for men and women. Young men were visible leaders, the public figures who actively rejected both the power of their father’s generation and the culturally sanctioned trappings of successfully achieved masculinity. They attacked the rigidity of school rules, militarism, and the

149 YABLONSKY, *supra* note 148, at 106–07; JOHN BASSETT MCCLEARY, *THE HIPPIE DICTIONARY: A CULTURAL ENCYCLOPEDIA (AND PHRASEICON) OF THE 1960S AND 1970S* 50, 166, 323 (2004); JON WIENER, *COME TOGETHER: JOHN LENNON IN HIS TIME* 40 (1991).

150 MILES, *supra* note 146, at 9–16.

151 See PAMELA FERRELL, *LET’S TALK HAIR: EVERY BLACK WOMAN’S PERSONAL CONSULTATION FOR HEALTHY GROWING HAIR* 18–19 (1996).

152 See *Bus Driver Says He’ll Keep Hair*, STAR-NEWS (Wilmington, N.C.), Oct. 6, 1972, <http://news.google.com/newspapers?nid=1454&dat=19721005&id=6mg0AAAAIABJ&sjid=yAkEAAAAIABJ&pg=1912,1247082>; *Bus Company Fires Driver for Wearing Lengthy Hair*, STAR-NEWS, Oct. 7, 1972, <http://news.google.com/newspapers?nid=1454&dat=19721007&id=7Gg0AAAAIABJ&sjid=yAkEAAAAIABJ&pg=6012,1579744>; *Hair Rules Upheld*, TUSCALOOSA NEWS, Sept. 5, 1976, <http://news.google.com/newspapers?nid=1817&dat=19760905&id=2BgfAAAAIABJ&sjid=8J0EAAAAIABJ&pg=4060,1450521>. The newspaper articles appear to mention someone’s race when they are not White. See, e.g., *Indian Leader to Jail*, TUSCALOOSA NEWS, Sept. 5, 1976, <http://news.google.com/newspapers?nid=1817&dat=19760905&id=2BgfAAAAIABJ&sjid=8J0EAAAAIABJ&pg=4060,1450521>. This article is listed above the Earwood article *Hair Rules Upheld*. It is the only mention of a racial designation in any headline on the entire page. Also, how the courts describe Earwood’s hair suggests that it is straight, not the kinky hair necessary to create an Afro. Kinky hair grows up and out; straight hair grows down. Finally, because of the politicization of the Afro, it is unlikely that it would go unmentioned in court and media coverage of the Earwood case if he was indeed Black.

153 Earwood was \$20,000 in debt from his son’s medical bills. He was suspended from his job without pay for failure to cut his hair. Having the choice to keep his hair over receiving payment from his job suggests that Earwood was not poor. *Bus Driver Says He’ll Keep Hair*, *supra* note 152.

154 Earwood’s son is mentioned in *id.* While having children is not determinant of a person’s sexual status, the non-mainstream nature of gay adoption in 1972 suggests that Earwood was heterosexual.

155 114 AM. HIST. REV. 331, 334 (2009).

meaninglessness of affluent consumption, arguing instead for authenticity, spontaneity, and freedom from tradition.

* * *

A critical subtext of the revolt of young male students was that it contested the constructions of masculinity of their fathers' generation. Their choices of gender-bending self-presentation—long hair, rejection of “suits,” draft resistance, and anti-war activism—only heightened the threat.¹⁵⁶

Mr. Earwood's hair was a symbol of this identity, even if he did not personally ascribe to the ideals attached to it. As a bus driver, he was the public face of the company, his body (“cleanly shaved with a trim haircut, clean shirt, shoes polished, and clean, neat uniform”)¹⁵⁷ a representation of the company's adherence to hierarchy and elite and middle-class values wrapped in White cis heterosexual masculinity. His deviation from this standard was a threat. Moreover, the rules governing his presentation furthered Continental Southeastern Lines as a capitalist enterprise, a brand that operated out of a bus station that refused to sell beer at its café due to the large numbers of WWII soldiers who frequented that station during the war.¹⁵⁸ So concerned with its image, its parent company Queen City Trailways accepted the early retirement of one of the owner's sons, Jack Love, after he was accused of selling buses for which he received no payment.¹⁵⁹ The case began in 1959, the year Mr. Love retired, and dragged on until its resolution by settlement in 1964.¹⁶⁰ The Love family continued to run the company until 1975,¹⁶¹ three years after Ronald Earwood began his employment discrimination claim.¹⁶²

The image of the hippie in opposition to patriarchal gender norms persists in American jurisprudence. In his dissent in *Obergefell v. Hodges*, Justice Antonin Scalia suggested that hippie values were in conflict with intimacy as expressed within the confines of marriage. Responding to the majority's assertion that “[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality,”¹⁶³ Scalia opined “(Really? Who ever

¹⁵⁶ *Id.* at 335.

¹⁵⁷ *Earwood*, 539 F.2d at 1350.

¹⁵⁸ Walter R. Turner, *Coming Home: The North Carolina Bus Companies that Became Part of Trailways and Greyhound*, 90 N.C. HIST. REV. 355, 371 (2013). Carolina Scenic Stages became Continental Southeastern Lines upon its acquisition by the Transcontinental Bus System in 1966. *Id.* at 376, 376 n.52. Prior to that time, it operated as a subsidiary of Queen City Trailways. *Id.*

¹⁵⁹ *Id.* at 375 n.48

¹⁶⁰ *Id.*

¹⁶¹ Turner, *supra* note 158, at 377.

¹⁶² *Earwood*, 539 F.2d at 1350.

thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.”¹⁶⁴ Scalia’s statement reveals that just under the surface, white supremacy, patriarchy, and capitalism function to shape White male identity and experience even as their influence appears to be invisible. Practitioners who reject such invisibility can work to capture the complexity of White masculinities as they reinforce discrimination and fall prey to it.

C. *Vinson v. The Cheesecake Factory Restaurants, Inc.*

In 2003, Bryan Vinson, an African American male, brought a racial discrimination suit¹⁶⁵ pursuant to Title VII against the Cheesecake Factory in the United States District Court for the Northern District of Georgia (Atlanta).¹⁶⁶ Although no published opinion exists for the case,¹⁶⁷ Vinson’s initial disclosures provide information on the basis for his claim.¹⁶⁸ The case involved the grooming standards at Cheesecake Factory, where Vinson was employed as a server.¹⁶⁹ Vinson wore his hair cornrowed, a hairstyle where hair is tightly braided flat to the scalp in various patterns.¹⁷⁰ According to Vinson’s description, “[c]ornrows, like other traditional African-American hairstyles, are an expression of African-American culture and have developed great cultural significance. Cornrows and variations thereof have been appropriated as a cultural symbol of the African American race and are often worn to affirm African-American’s African heritage.”¹⁷¹

Vinson’s direct supervisor was Louis Sandor.¹⁷² Vinson alleged that Sandor commented inappropriately and negatively about his cornrows, as well as about traditional African American hairstyles worn by other African American employees at Cheesecake Factory.¹⁷³ According to

¹⁶³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015).

¹⁶⁴ *Id.*

¹⁶⁵ Plaintiff’s Responses to Initial Disclosures 1-2, *Vinson v. Cheesecake Factory Rests., Inc.*, (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)). Vinson also alleged “negligent supervision/retention and intentional infliction of emotional distress.” *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Docket, *Vinson v. Cheesecake Factory Rests., Inc.*, (N.D. Ga. 2003) (No. 1:03CV02231 (WBH)). The docket ends with a reference to a “Joint Preliminary Report and Discovery Schedule (to Judge) (ALS) (Entry Date 09/03/03).”

¹⁶⁸ Plaintiff’s Responses to Initial Disclosures and Plaintiff’s First Supplement to Plaintiff’s Responses to Initial Disclosures, *Vinson v. Cheesecake Factory Rests., Inc.*, (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)).

¹⁶⁹ Plaintiff’s Responses to Initial Disclosures 1, *Vinson v. Cheesecake Factory Rests., Inc.*, (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

Vinson's disclosures, Sandor's negative views about his cornrows, "labeled 'extreme' and in a 'pattern,'" were the cause for his termination.¹⁷⁴ He argued that Cheesecake Factory's application of its grooming standard was neither reasonable nor even handed for African American employees, because it did not allow hairstyles predominantly worn by African Americans.¹⁷⁵ By targeting these hairstyles specifically, the grooming policy had a disparate impact on African Americans.¹⁷⁶

While legal challenges to traditional African and African American hairstyles in the workplace have garnered much litigation¹⁷⁷ and scholarly attention,¹⁷⁸ much of the discussion has centered on Black women's right to wear these hairstyles and not Black men. Cornrows as worn by Black men have been a hotbed of public debate. When Black males wear them, they are associated with gang behavior, crime, violence, and the like.¹⁷⁹ In 2006, the Dean of Hampton University Business School, Sid Credle, came under media scrutiny for lauding the Business School's grooming policy,

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 See, e.g., *Hollins v. Atl. Co.*, 188 F.3d 652 (6th Cir. 1999) (suit brought by African American female employee alleging that company grooming policy which, in practice, required her supervisor to pre-approve "ethnic" or other "eye-catching" hairstyles was discriminatory in violation of Title VII); *Eatman v. UPS*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (suit brought by African American male alleging that a work policy requiring drivers with "unconventional" hairstyles to cover their hair with a hat was discriminatory in violation of Title VII); *Halton v. Great Clips, Inc.*, 94 F. Supp. 2d 856 (N.D. Ohio 2000) (suit brought pursuant to Title VII by African Americans who were refused hair services for African American textured hair types at Great Clips locations); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (Title VII suit brought by African American female against American Airlines fired because of her braided and cornrowed hairstyle).

178 See, e.g., Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355 (2008); Constance Dionne Russell, *Styling Civil Rights: The Effect of § 1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons*, 24 HARV. BLACKLETTER L.J. 189 (2008); Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POLY 407 (2007); Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 CHI.-KENT L. REV. 41 (1999); Devin D. Collier, Note, *Don't Get it Twisted: Why Employer Hairstyle Prohibitions Are Racially Discriminatory*, 9 HASTINGS RACE & POVERTY L.J. 33 (2012); Monica C. Bell, Comment, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125 (2007); Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115 (2001).

179 See *School's Ban on Boy's Cornrows is 'Indirect Racial Discrimination'*, THE GUARDIAN (June 17, 2011, 7:01 PM BST), <http://www.guardian.co.uk/uk/2011/jun/17/school-ban-cornrows-indirect-discrimination>. In this article about a boy of African descent banned from school in Kenton, Harrow North London for wearing cornrows, the headteacher of the school stated, "Our uniform and haircut policy for students other than sixth formers is a critical part of our strategy for maintaining excellent behavior, for keeping gang mentality out of the school and for ensuring that students do not adopt attire or haircuts that may encourage this mentality." The High Court subsequently found that there was race discrimination, but no sex discrimination. Ben Power, *Ban on Cornrows Race, but Not Sex, Discrimination*, SPRINGHOUSE SOLICITORS EMPLOYMENT LAW UPDATE (June 17, 2011), <https://www.springhouselaw.com/updates/ban-on-cornrows-race-but-not-sex-discrimination/>; *Fenceroy v. Morehouse Parrish Sch. Bd.*, No. Civ.A. 05-0480, 2006 WL 39255 (W.D. La. Jan. 6, 2006) (suit brought by parents on behalf of their minor son who was expelled from school for wearing braids); *ENCYCLOPEDIA OF THE AFRICAN DIASPOR: ORIGINS, EXPERIENCES, AND CULTURE*, VOLUME 2 493-94 (Carole Boyce Davis ed. 2008).

also known as the “hair code,”¹⁸⁰ which was implemented in 2000 as a policy for the five-year MBA students.¹⁸¹ The “hair code,” which Credle stated was “more for [Black] male students,”¹⁸² prohibits cornrows and other “extreme” and non-conservative hairstyles.¹⁸³ A syllabus for the Leadership Application Program at the Business School stated that “[b]raids, dreadlocks and other unusual styles [were] not acceptable.”¹⁸⁴ Students violating the “hair code” were asked to leave class or sit in the back of the room.¹⁸⁵ In some instances, they were also prevented from attending seminars, received a course credit deduction for non-attendance, and were asked to complete additional class work to account for the lost credit.¹⁸⁶ Of these practices Credle commented,

I want the best for them [our Business School students]. Our job as educators is to teach our students at the highest levels . . . If a student looks unkempt or sloppy, it can leave a negative impression . . . cornrows could set you back. The first thing they (interviewers) see is your appearance.¹⁸⁷

As Vinson wore them, his cornrows became an expression of a particular Black masculine identity associated with poverty, danger, and criminality. This image would not be conducive to the Cheesecake Factory’s reputation as an “upscale casual dining” franchise.¹⁸⁸ Moreover, Dean Credle’s comments highlight the intragroup controversy surrounding cornrows. As one Hampton student remarked, “[the hair code] is more than a rule, it is a way of making African Americans assimilate to the mainstream standards of ‘what is professional and what is not.’”¹⁸⁹

180 See Latasha Willis, *Hampton Business School Sticks by Requirement for “Conservative Hairstyles,”* JACKSON FREE PRESS, July 11 2006, <http://www.jacksonfreepress.com/news/2006/jul/11/article-hampton-business-school-sticks-by/>; *Hairy Debate Grips School*, THE NEWS & OBSERVER (RALEIGH, N.C.), May 14, 2006, <http://thirdcity.org/articles/Hair.pdf>; *Dreadlocks Don’t Make the Cut*, MAYNARD INST. FOR JOURNALISM EDUC. (June 23, 2006), <http://mije.org/richardprince/dreadlocks-dont-make-cut>.

181 Willis, *supra* note 180.

182 *Hairy Debate Grips School*, *supra* note 180. Hampton is an Historically Black College and University. Its Mission Statement states in part: “A historically black institution, Hampton University is committed to multiculturalism.” *Mission*, HAMPTON UNIV., <http://www.hamptonu.edu/about/mission.cfm>.

183 *Hairy Debate Grips School*, *supra* note 180.

184 Willis, *supra* note 180.

185 *Id.*

186 *Id.*

187 *Id.*

188 *About the Cheesecake Factory*, CHEESECAKE FACTORY, <https://investors.thecheesecakefactory.com/home/default.aspx> (stating that “[t]he Cheesecake Factory Incorporated created the upscale, casual-dining segment in 1978 with the introduction of our namesake concept”).

189 Willis, *supra* note 180.

In this context, Bryan Vinson's desire to present his body in a particular way at his workplace is a challenge to white supremacy, patriarchy, and capitalism, as they restrict presentation of the Black masculine body to what is marketable and accessible. Vinson's wearing his hair in cornrows invoked the image of criminality inconsistent with the Cheesecake Factory brand. Masculinities theorist Frank Rudy Cooper has described Black masculinities as bipolar with the "Bad Black Man" and the "Good Black Man" at each pole.¹⁹⁰ The Bad Black Man is criminal and outcast, while the Good Black Man has the option of assimilating into dominant (White) society through adopting White patriarchal norms.¹⁹¹ Cooper argues,

Many whites expect the Good Black Man to assimilate as the price for his inclusion into the mainstream. Consequently, they feel no guilt when the non-assimilating Bad Black Man is consigned to the lower-classes or jail. Bipolar representation of black masculinity thus protects the status quo of exclusion of most black men into the lower-classes and jail and the inclusion of only a token few assimilationists into the white mainstream.¹⁹²

When the Cheesecake Factory fired Vinson for not adhering to its grooming policy, it left him facing unemployment and possible consignment to the lower classes. Its framing of the issue as one of "proper grooming" rendered Vinson's cornrows a "choice," rather than an acceptable grooming method for his hair texture and an expression of cultural pride. However, Vinson's choice was about whether he would assimilate into a white supremacist, patriarchal, capitalist marketplace, by making his bodily representation saleable to Cheesecake Factory patrons—a head unadorned by cornrows sitting on the shoulders of a "Good Black Man"¹⁹³—and therefore employable. He literally paid a price, his wages and other employment benefits, for keeping his cornrows and his cultural representation of himself intact. This cost illustrates the pernicious nature of workplace rules that target how employees can present their bodies for work.

190 Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857–58, 876–78 (2006).

191 *Id.* at 857–59.

192 *Id.* at 858–59.

193 *See id.* at 881–82. Cooper argues,

We can say, then, that many whites carry around an image of a 'paradigmatic black man' against whom they measure other blacks. That Good Black Man is 'passive, nonassertive, and nonaggressive. He has made a virtue of identification with the aggressor, and he has adopted an ingratiating and compliant manner. The image of the Good Black Man thus requires that he assimilate into white culture by downplaying his race. In a sense, he must become a Good White Man.

Id.

In sum, these cases demonstrate the limits of intersectionality as shorthand for what are actually a host of feminist-centered strategies designed to expose, weaken, and eventually eradicate white supremacy, patriarchy, and capitalism. Practitioners employing the term “intersectionality’ should fully engage it as a viable analytical framework to communicate how discrimination has manifested against their client, rather than use it as a catchall for combinations of claims or a descriptor for the multiple categories implicated in a Title VII claim. Doing so requires the advocate to understand the historical, sociological, and legal underpinnings of intersectionality; the intellectual rigor required to create documents of persuasion that communicate its tenets; and the advocacy skills necessary to convince courts of law and public opinion of its importance in anti-discrimination jurisprudence and social activism.

IV. Intersectional Feminism and the Activism of #MeToo

In early 2017, five days after the presidential inauguration, USA Today ran a story titled “What is intersectional feminism? A look at the term you may be hearing a lot.”¹⁹⁴ In an illustration of the term, the article’s author wrote, “A white woman is penalized by her gender but has the advantage of race. A black woman is disadvantaged by her gender *and* her race. A Latina lesbian experiences discrimination because of her ethnicity, her gender and her sexual orientation.”¹⁹⁵ The article went on to explain how calls for intersectional feminism came out of the Women’s March on Washington as a criticism of how women of color were excluded in the planning process for the March.¹⁹⁶ Similarly, Denison University posted an article written by a current student on its Women’s & Gender Studies webpage.¹⁹⁷ In her description the author, a White woman, opines that

“white feminism” ignores intersectionality and neglects to recognize the discriminations experienced by women who are not white. It’s important to note that not all feminists who are white practice “white feminism.” “White feminism” depicts the way white women face gender inequality as the way all women experience gender inequality, which just isn’t correct.¹⁹⁸

¹⁹⁴ Alia E. Dastagir, *What is Intersectional feminism? A look at the term you may be hearing a lot*, USA TODAY, Jan. 25, 2017, <https://www.usatoday.com/story/news/2017/01/19/feminism-intersectionality-racism-sexism-class/96633750/>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Taylor Hawk, *Intersectional Feminism: What It Is and Why We need it For a Truly Gender Equal World*, DENISON (July 26, 2016), <https://denison.edu/academics/womens-gender-studies/feature/67969>.

¹⁹⁸ *Id.*

These dialogues, descriptions, and definitions underscore why using the term “intersectionality” as a rhetorical shorthand to express interlocking identities when discussing claims of discrimination and marginalization demonstrates that each unifier—“race,” “class,” “gender,” “sexuality,” and “sexual orientation”—is treated as a modifier for others depending on the impetus for the discrimination claim. The legacy of such usage is an expression of various aspects of identity as amplifiers. For Black women, womanness is amplified by Blackness. For white women, Whiteness is amplified by womanness. The danger present in this shorthand is that it obscures the power at play behind the scenes. It obscures how white supremacy, patriarchy, and capitalism are expressed through the possible combinations of race, class, gender, sexuality, and sexual orientation. We live in three dimensions simultaneously and our various identities are simultaneously shaping each other, the varied results of which are present in any given context.

As this foray into explaining intersectional feminism demonstrates, the legacy of intersectionality as shorthand is present in both descriptions, where for White women Whiteness is amplified by womanness, and for Latinas where gender and sexuality are amplified by race and ethnicity. The language of intersectionality becomes a proxy for the exclusion of women of color, and sets up whiteness as a fixed, static, and neutral set of insider relationships inaccessible by outsiders. This language is also polarizing, as evidenced by several tweets highlighted in the USA Today article, which read, “If you don’t know the difference between white feminism vs. intersectional feminism then you’re probably a white feminist,”¹⁹⁹ and “Wishlist for the bookish diversity discussion in 2017: - Stop comparing marginalizations; - Intersectionality; - LISTEN TO WOC [women of color].”²⁰⁰ But compare we must if intersectionality would also take into account the intersecting identities of men of color, White women, White men, and the nuances of their marginalization as well. To do otherwise contributes to these groups’ colonization of marginalized people’s experiences to describe their own. Armed solely with language that casts them as insiders, even as they are having outsider experiences,

¹⁹⁹ Mami Nature (@maminature), TWITTER (Jan. 16, 2017, 7:30 PM), https://twitter.com/MamiNature_/status/821197993110081536.

²⁰⁰ Marines (@mynameismarines), TWITTER (Jan. 17, 2017, 1:23 PM), <https://twitter.com/mynameismarines/status/821468059881930752>.

²⁰¹ See, e.g., Veronica Wells, *You Better Not: White Women Suggest Kneeling for Nat’l Anthem to Protest Kavanaugh’s Confirmation*, MADAMNOIRE (Oct. 8, 2018), <https://madamnoire.com/1043270/white-women-suggest-kneeling-for-national-anthem/>; Keka Araujo, *White Feminists Attempt to Co-opt ‘Take a Knee’ Movement*, DIVERSITYINC (Oct. 10, 2018), <https://www.diversityinc.com/Haters/white-feminists-coopt-take-knee>.

these groups plant their flags on the bloody battlefield of intersectional feminism (read as intersectional oppression), colonizing women of color's experiences as their own.²⁰¹

Purveyors of #MeToo litter the same field like fallen Themysciran warriors on the frontlines of feminism. Headlines like "The #MeToo Movement Looks Different For Women of Color. Here Are 10 Stories"²⁰² or "Black women are waiting for their #MeToo moment"²⁰³ speak to the exclusion of women of color from discussions of sexual harassment and assault, rather than taking a hard look at how white supremacy, patriarchy, and capitalism converge to silence the women and men who would dare declare #MeToo.²⁰⁴ Actor Alyssa Milano made the hashtag popular on October 15, 2017, using it as a way for survivors of sexual harassment and assault to find community in each other and to bring their stories to the forefront.²⁰⁵ Milano's tweet came ten days after the *New Yorker* published actor Ashley Judd's allegations of sexual harassment by producer Harvey Weinstein.²⁰⁶ Judd's allegations were followed by accounts made by countless, additional women, most of them White, who reported that Weinstein harassed them, raped them, and/or blacklisted them.²⁰⁷ Among the cacophony and cross talk of the accusers, Lupita Nyong'o and Salma Hayek raised their voices to the roar of outrage.²⁰⁸ Journalists, tweeters, bloggers, and public intellectuals were quick to point out that Nyong'o and Hayek's stories received less attention in the media because they are

202 Jessica Prois & Carolina Moreno, *The #MeToo Movement Looks Different For Women of Color. Here Are Ten Stories*, HUFFPOST (Jan. 2, 2018, 9:20 AM), https://www.huffpost.com/entry/women-of-color-me-too_us_5a442d73e4b0b0e5a7a4992c.

203 Renée Graham, Opinion, *Black Women are waiting for their #MeToo moment*, BOSTON GLOBE (May 15, 2018, 3:21 PM), <https://www.bostonglobe.com/opinion/2018/05/15/black-women-are-waiting-for-their-metoo-moment/BuZ8QJXP09k6ZNKIDgdTBJ/story.html>.

204 *But see* Lolita Buckner Inniss, *The Absent Racial #MeToo and Rekindling Intersectional Identity*, A'INT I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 23, 2018), <http://innissfls.blogspot.com> (Inniss' analysis begins to unpack #MeToo and its relationship to patriarchy and White supremacy, but only scratches the surface.).

205 Alyssa Milano (@Alyssa Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E919659438700670976&ref_url=https%3A%2F%2Fmashable.com%2F2017%2F10%2F15%2Fme-too-alyssa-milano-twitter-harassment%2F.

206 Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, THE N.Y. TIMES, Oct. 5, 2017, <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

207 *See, e.g.*, Emma Dibdin, *A Full List of Harvey Weinstein's Accusers and Their Allegations: Actresses Ashley Judd, Gwyneth Paltrow, Angelina Jolie, Lea Seydoux, and Cara Delevigne are among the women who have come forward*, ELLE (Dec. 13, 2017), <https://www.elle.com/culture/a12838402/a-full-list-of-harvey-weinsteins-accusers-and-their-allegations/>.

208 *See, e.g.*, Lupita Nyong'o, Opinion, *Lupita Nyong'o: Speaking Out About Harvey Weinstein*, N.Y. TIMES, Oct. 19, 2017, <https://www.nytimes.com/2017/10/19/opinion/lupita-nyongo-harvey-weinstein.html>; Salma Hayek, Opinion, *Harvey Weinstein is My Monster Too*, N.Y. TIMES, Dec. 17, 2017, <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html>.

209 *See, e.g.*, Errin Haines Whack, *Why few women of color in wave of accusers? 'Stakes Higher'*, NW1 TIMES (Ind.), Nov. 20, 2017, https://www.nw1times.com/entertainment/why-few-women-of-color-in-wave-of-accusers-stakes/article_8c94544b-9ed8-5c8f-8627-0e90826ad828.html; Isha Aran, *Harvey Weinstein is Saving His Nastiest Smear Attempts for Women of*

women of color,²⁰⁹ and that Alyssa Milano's #MeToo hashtag originated in 2007 with a Black woman, activist Tarana Burke.²¹⁰ Although the media did indeed pay less attention to Nyong'o and Hayek's claims and Weinstein directly denied their allegations in a way he had not done for prior allegations brought by White women, the waning attention and denials were more a function of white supremacy, patriarchy, and capitalism as expressed in Weinstein's wealthy, racialized masculinity, than in White women as beneficiaries of the same.

Tensions over inclusion in discussions of sexual harassment and assault also served to marginalize, if not outright oust, White men and men of color from the #MeToo movement. For example, when actor Corey Feldman attempted to bring attention to what he described as a Hollywood pedophile ring, which he asserts operated to prey on child actors like himself and fellow child actor and friend Corey Haim, his claims were met with incredulity by the press and his peers.²¹¹ His 2013 memoir, *Coreyography*, gives accounts of childhood sexual abuse by industry heavyweights, abuse that Feldman insists led to his ongoing struggles with substance abuse and Haim's fatal overdose.²¹² Feldman's allegations received renewed and serious consideration as Weinstein's accusers continued to come forward.²¹³ Although somewhat vindicated by the #MeToo movement, Feldman has been accused of lying and of paranoia.²¹⁴ As a White male, Feldman cannot occupy a place of vulnerability when compared to any woman alleging claims of sexual assault. Despite his marginalized and unprotected status as a child star—a status that set him up as prey for Hollywood powerbrokers that had the power to end or prolong his career—White male Hollywood insiders are construed

Color, SPLINTER NEWS (Dec. 14, 2017, 12:43 PM), <https://splinternews.com/harvey-weinstein-is-saving-his-nastiest-smear-attempts-1821293136>; Shannon Carlin, *Salma Hayek Says Harvey Weinstein Specifically Discredits Women of Color*, REFINERY29 (May 14, 2018, 11:30 AM), <https://www.refinery29.com/2018/05/199077/salma-hayek-harvey-weinstein-discredited-women-of-color>.

210 See, e.g., Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES, Oct. 20, 2017, <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

211 Jason Duaine Hahn & Christina Dugan, *Corey Feldman 'Shattered' Over Lack of Support from Peers in Wake of Abuse Claims*, PEOPLE.COM (Dec. 27, 2017), <https://people.com/tv/corey-feldman-lack-support-abuse-claims-tale-two-coreys/>; Christabel Duahm, *Corey Feldman calls out Hollywood for not supporting his sexual abuse claims*, ATLANTA J. CONST., Dec. 29, 2017, <https://www.ajc.com/entertainment/celebrity-news/corey-feldman-calls-out-hollywood-for-not-supporting-his-sexual-abuse-claims/wpNucl1WF6sOeHX5DQmIN/>.

212 COREY FELDMAN, *COREYOGRAPHY: A MEMOIR* (2013).

213 Yohana Desta, *Corey Feldman on Abuse Allegations: "It's All Connected to a Bigger, Darker Power,"* VANITY FAIR (Nov. 10, 2017, 8:00 AM), <https://www.vanityfair.com/hollywood/2017/11/corey-feldman-movie-campaign-interview>.

214 Christie D'Zurilla, *Corey Feldman 'not playing around' about naming Hollywood pedophiles – if his movie gets funded*, L.A. TIMES, Oct. 30, 2017, <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-corey-feldman-hollywood-pedophiles-1509372721-htmlstory.html>.

as those who wield privilege and power, not those who are silenced within its stranglehold.

Former football star, actor, and comedian Terry Crews suffered a similar fate in reporting his status as a sexual assault survivor. When Crews shared his story via Twitter of sexual assault by a White male executive during a work party, reactions ranged from sympathetic to skeptical.²¹⁵ In his account, Crews revealed his conflicted feelings of anger and voicelessness during the assault and in the days following. Right after the assault, Crews remembers his desire to fight the executive, but decided physical violence to be an ill-considered path.²¹⁶ In his words, “‘240 lbs. Black Man stomps out Hollywood Honcho’ would be the headline the next day. Only I probably wouldn’t have been able to read it because I WOULD HAVE BEEN IN JAIL. So [my wife and I] left.”²¹⁷ Crews would later testify before Congress in support of the Sexual Survivor’s Bill of Rights, an act in furtherance of his advocacy against toxic masculinity and for survivors of sexual assault.²¹⁸ He received criticism from other men, who would cast his Black masculinity (construed as justified anger and aggression as a response to sexual assault) as antithetical to his status as an abuse survivor (silenced by trauma, shame, and fear).²¹⁹ Yet, the movement that gave him the courage to speak out about his own experiences possessed no effective language to navigate warring conceptions of Crews’ black masculinities. Thus, it could hold no space for him simultaneously as an ally and a survivor.

Elsewhere, the #MeToo camp was fighting a different battle over the intersectional ownership rights to #MeToo. Arguments that Tarana Burke’s status as the originator of #MeToo was overshadowed by Alyssa Milano’s use of the hashtag and the overwhelming support Milano received was boiled down to the obvious differences between the two—Milano is a White woman; Burke is a Black woman.²²⁰ Prior to Milano’s October 15, 2017 tweet using the hashtag #MeToo, she called for women to boycott Twitter in support of Rose McGowan and her allegations that

²¹⁵ Yohana Desta, *In the Wake of Weinstein News, Terry Crews Shares His Own Sexual –Assault Story*, VANITY FAIR (Oct. 10, 2017, 6:23 PM), <https://www.vanityfair.com/hollywood/2017/10/terry-crews-harvey-weinstein>.

²¹⁶ Lucia Graves, *Terry Crews Details His Sexual Assault in Powerful Testimony to the Senate*, VULTURE (June 26, 2018), <http://www.vulture.com/2018/06/terry-crews-details-sexual-assault-in-testimony-to-senate.html>.

²¹⁷ Desta, *supra* note 215.

²¹⁸ Graves, *supra* note 216.

²¹⁹ Hannah Giorgis, *Terry Crews and the Discomfort of Masculine Anxiety*, THE ATLANTIC (June 29, 2018), <https://www.theatlantic.com/entertainment/archive/2018/06/terry-crews-and-the-discomfort-of-masculine-anxiety/564047/>.

²²⁰ Garcia, *supra* note 210.

²²¹ *Id.*

Harvey Weinstein raped her.²²¹ McGowan had been locked out of her Twitter account for a short time as she sought to bring attention to sexual harassment and assault in Hollywood.²²² On October 12, 2017, Milano tweeted, “Tomorrow (Friday the 13th) will be the first day in over 10 years that I won’t tweet. Join me. #WomenBoycottTwitter.”²²³ Black Twitter, among them April Reign, architect of the hashtag “#OscarsSoWhite,” was quick to respond.²²⁴ Reign commented, “White women have not been as supportive as they could have been of women of color when they experience targeted abuse and harassment If there is support of Rose McGowan, which is great, you need to be consistent across the board. All women stand with all women.”²²⁵ Perhaps best tweeted by Kimberly Bryant @6Gems: “Intersectionality = when you really want to support #WomenBoycottTwitter but you’re conflicted [because] Black women never get the same support. [frowny face Emoji].”²²⁶

Implicit in these comments is the reality of women of color being erased in narratives of sexual assault.²²⁷ However, expressing this erasure as evidence of the need for intersectionality underscores how intersectionality as shorthand obfuscates the interplay of white supremacy, patriarchy, and capitalism. White women’s stories about sexual harassment and assault receive greater media attention because race (white) and gender (woman) expressed as descriptions of white supremacy, patriarchy, and capitalism are elevated and idealized in the marketplace as the most valuable articulation of femaleness above all other incarnations. This does not mean that White women are not also victims and survivors of sexual harassment and assault or that they always receive redress for the crimes against them. Weinstein’s many accusers demonstrate the contrary, as does the confirmation of Justice Brett Kavanaugh to the Supreme Court of the United States. Nor does it mean that White women have prevented women of color from doing the work to end sexual assault and harassment among women of color, hindered their stories from being heard, or otherwise thwarted women of color’s attempts to make the crimes against them public. Beginning with Rosa Parks’ ardent

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE – A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (2010).

228 See MCGUIRE, *supra* note 227.

advocacy of Recy Taylor²²⁸ and continuing with Tarana Burke's organization, Just Be Inc. Girls for Gender Equity, the absence of a hashtag did not mean that the activism was absent or ineffective. Tarana Burke's comments about Milano's use of #MeToo are instructive in this regard: "Initially I panicked . . . I felt a sense of dread, because something that was part of my life's work was going to be co-opted and taken from me and used for a purpose that I hadn't originally intended."²²⁹ Burke's angst over Milano's tweet speaks to the issue of exclusion and visibility, another function of white supremacy, patriarchy, and capitalism—one that Milano attempted to rectify by giving well-publicized attribution to Burke for #MeToo and by ensuring that she was included publicly in discussions about the shape of the #MeToo movement going forward.²³⁰ If recognition, allies, and support are needed, describing the absence of them as a call for intersectionality is a perilous strategy that accomplishes the opposite. The 2016 Presidential election is illustrative of this point. Scholars and activists alike remain conflicted as to why over 50% of United States White women voted for a man for president who had been accused of sexual harassment and assault,²³¹ and who glories in making misogynistic comments about women. Perhaps the failure of intersectionality as shorthand to make the multiple, intersecting identities of White women explicit prevented them from seeing themselves as outsiders too.

V. Conclusion

As the work of Critical Race Theory/Critical Race Feminism scholars, litigators, activists, and social media influencers demonstrate, new analytical models for anti-discrimination must move beyond intersectional rhetoric to capture how white supremacy, patriarchy, and capitalism operate to marginalize people of all races, classes, genders, sexualities, and sexual orientations. By continuing the hegemonic discourse of intersectionality, those with the power to shape our national conversations in legal arenas and across social media platforms march in lockstep to a theory that does not realize the promise of theorists Patricia Hill Collins and Deborah K. King—a transformative model for addressing patterns of domination in historical, cultural, political, and social context. Scholarly legal discourse communities and practical legal discourse communities are separate but linked; acceptable and viable theories in one inform what are

229 Garcia, *supra* note 210.

230 *Id.*

231 *Exit Polls – Election 2016*, CNN (Nov. 23, 2016, 11:58 AM), <https://www.cnn.com/election/2016/results/exit-polls/national/president>.

viable and acceptable methods and analytical processes in the other. Likewise, these communities impact how conversations about multiple interlocking oppressions are carried out across social media platforms and in activist circles. For these reasons, CRT/F scholarship must reformulate what the law posits itself to be, where it gains power, and by what means it exercises authority. In its next stage of development, it must endeavor to mold critical lawyering, activist, and influencer practices to reimagine and destroy “dichotomous oppositional difference,” especially as it perpetuates the hegemonic discourse of the “outsider.” Failure to do so will leave us divided and fighting each other over the scraps that white supremacy, patriarchy, and capitalism throw at our respective communities, rather than uniting to fight these sources of predominant influence and domination that leave us all wanting. We can choose to remain suspended in the pain of invisibility and disregard or attempt to move beyond it. Ultimately it is our collective responsibility to change the conversation from one that reinforces hierarchies to one that creates equity and inclusion, for this is the hope and the promise of #MeToo.

Abandoning Predictions

Kevin Bennardo*

Analytical documents are a hallmark of the law school legal writing curriculum and of the practice of law. In these documents, the author applies a body of law to a set of facts and reaches a conclusion. Oftentimes, that conclusion is phrased as a prediction (“The court is likely to find . . .”),¹ and many academics even refer to analytical documents as “predictive” document types.² If that describes you, my goal is to convince you to change your ways. Instead of conceptualizing legal analysis as “predictive,” we should simply conceptualize it as analytical. Rather than writing predictive conclusions to legal analyses, attorneys and law students should simply write legal conclusions to legal analyses. Why is this distinction important? Because when it comes to legal analyses, couching the conclusion in terms of a prediction is inaccurate. The conclusion of a legal analysis should be a statement about the law, not a prediction about the decisionmaker.

Sensing that inaccuracy, phrasing conclusions to legal analyses in the predictive causes discomfort to some legal writers and can be a barrier especially when training new legal writers. There is a difference between conducting a legal analysis and predicting the outcome of a legal dispute. That line should both be recognized in the teaching of analytical document genres and be conveyed by legal professionals in the execution

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¹ See MARY BETH BEAZLEY & MONTE SMITH, LEGAL WRITING FOR LEGAL READERS 173 (2014) (“In the iconic research memorandum, the senior lawyer will ask the junior lawyer to write an analysis of one or more legal issues, to explore them objectively, and to predict how a court in the relevant jurisdiction would resolve them.”); Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN. ST. L. REV. 41, 57 (2018) (“Research memoranda (a.k.a. ‘legal memoranda’ or ‘formal office memoranda’) have traditionally been the vehicles through which lawyers record and convey their outcome predictions.”).

² See *infra* note 6.

of legal analyses. Thus, law professors and legal supervisors should avoid instructing their charges to hypothesize on the future actions of a third-party decisionmaker when what they really want is for the student or junior attorney to apply the currently existing law to the client's facts and arrive at a legal decision.

I. Predictive Conclusions to Legal Analyses are Inaccurate

Prediction is forecasting a future occurrence. In the legal context, a prediction often forecasts what a decisionmaker will do.³ For example, a predictive conclusion is one that surmises that a court is likely (or unlikely) to find that a set of facts satisfies a legal test. Here are just a couple examples of predictively oriented conclusions from popular legal writing texts:

- “[T]he court will probably decide that the substituted service of process was not valid and vacate the judgment terminating Ms. Olsen’s parental rights.”⁴
- “In conclusion, a court in this circuit will likely categorize the Byerman trial as one raising issues about judicial integrity and government corruption. Combined with the fact that the Byerman trial received extensive public attention during and after its time in court, the court will most likely rule that it was a public controversy.”⁵

³ See RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 7 (7th ed. 2013).

⁴ LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* 119 (6th ed. 2014).

⁵ ELIZABETH FAJANS, MARY R. FALK & HELENE S. SHAPO, *WRITING FOR LAW PRACTICE* 278 (2004). I don’t mean to pick on these sources—plenty of similar examples may be found in other legal writing texts. See, e.g., BEAZLEY & SMITH, *supra* note 1, at 10 (“A court would almost certainly find Ms. Wheelwright guilty of [the offense] . . . [A] guilty verdict is almost certain.”); CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 9 (2d ed. 2013) (“Accordingly, a court will likely determine that Mr. Adams was not stopped and that his statement about the lollipop is admissible.”); JOHN C. DERNBACH, RICHARD V. SINGLETON II, CATHLEEN S. WHARTON, JOAN M. RUHTENBERG & CATHERINE J. WASSON, *A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD* 452 (5th ed. 2013) (“Thus, the court will likely find that the statute was tolled until he was denied admission and therefore conclude that Tyler’s claim is not time-barred.”); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 384 (5th ed. 2010) (“On the facts as we presently understand them, a court would probably rule that Buckley did not misrepresent her age.”); MARY BARNARD RAY, *THE BASICS OF LEGAL WRITING* 125 (2006) (“In light of these facts, a court is likely to conclude that Abbott should have known his conduct was so egregious that it created a substantial risk of significant harm to others.”).

⁶ See, e.g., OATES & ENQUIST, *supra* note 4, at 193 (“In a one-issue memorandum, the conclusion is used to predict how the issue will be decided and to summarize the reasons supporting that prediction.”); BEAZLEY & SMITH, *supra* note 1, at 11 (“Some legal writing is *predictive*: it predicts how a court will apply a particular law to a particular set of facts. Examples of this kind of writing include *office memos*, *opinion letters*, and *law review articles*.”); TERESA J. REID RAMBO & LEANNE J.

Numerous legal writing texts instruct writers to conceptualize legal conclusions as predictions,⁶ and some even go so far as to offer examples of predictively-oriented subsection headings in analytical memoranda.⁷ This characterization—that a conclusion to a legal analysis is a prediction—is misleading and inaccurate.

Here’s the problem: to make a prediction about the outcome of a particular decision, the predictor should take account of any and all factors that may influence the decisionmaker. Certainly, *legal analysis*—how a body of law applies to a set of facts—weighs heavily on how a court will decide a particular legal issue. However, numerous *extralegal factors* may also influence the decision. If the author of an analysis hasn’t accounted for extralegal factors that may influence the decisionmaker, they have no business predicting what “the court” is likely to do.

Take a hypothetical office memo assignment. The client is a restaurant in Iowa, and the restaurant is considering suing a competitor for misappropriating its smoothie recipes. A junior attorney is assigned to write an analytical memo assessing whether the restaurant’s smoothie recipes are protected trade secrets under Iowa state law. Let’s say the junior attorney researches the law and finds that Iowa has a statute that protects trade secrets, and the statute helpfully defines trade secrets. The junior attorney researches cases from Iowa and elsewhere and finds no case law involving a claim that smoothie recipes are trade secrets. However, she finds case law that protects other types of recipes as trade secrets, and she determines that those other cases are fairly analogous to the client’s situation with the smoothie recipes. Thus, the junior attorney is decently confident that the restaurant’s smoothie recipes are protected trade secrets under Iowa law. Simple enough.

What our junior attorney has done is a *legal analysis*. She has determined how a body of law applies to a set of facts. The conclusion of a

PFLAUM, *LEGAL WRITING BY DESIGN: A GUIDE TO GREAT BRIEFS AND MEMOS* 158 (2d ed. 2013) (“Legal memos are result oriented; through them, we predict a likely outcome to a legal problem and advise our client accordingly.”); DERNBACH ET AL., *supra* note 5, at 268 (“Legal memos are written to predict outcomes, and your prediction is reflected in your conclusion.”); TERRILL POLLMAN, JUDITH M. STINSON, RICHARD K. NEUMANN, JR. & ELIZABETH POLLMAN, *LEGAL WRITING: EXAMPLES & EXPLANATIONS* 19 (2011) (“Typically, an office memo is predictive—it answers a question about how the law would likely apply to a particular set of facts and predicts the outcome.”); EDWARDS, *supra* note 5, at 155 (“Making an accurate prediction, then, is the function of an office memo.”); MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, *LEGAL WRITING AND ANALYSIS* 185 (2009) (labeling office memoranda “objective (or predictive) legal documents”); DEBORAH A. SCHEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING, AND WRITING* 134 (3d ed. 2007) (noting that “predicting how the legal system would respond to the client’s situation” is one function of a legal memorandum); CATHY GLASER, JETHRO K. LIEBERMAN, ROBERT A. RUESCHER & LYNN BOEPPLE SU, *THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 111 (2002) (“If the memo writer does not make a prediction and support it with carefully presented legal analysis, the writer might just as well have not written the memo.”).

⁷ See, e.g., RAMBO & PFLAUM, *supra* note 6, at 546 (“The court will likely conclude that Lionell sufficiently alleged that Walker’s conduct was extreme and outrageous.”).

legal analysis should be a statement about the law, not a prediction about the decisionmaker. For example, based on her legal analysis, our junior attorney could accurately write the following *legal* conclusion:

Iowa law likely protects the restaurant's smoothie recipes as trade secrets.

This legal conclusion is focused on the present; it states how the law applies to a particular set of facts. The law itself is the actor; it either protects the recipes as trade secrets or it does not. But based only on her legal analysis, it would be inaccurate for our junior attorney to write the following *predictive* conclusion:

The court is likely to find that the restaurant's smoothie recipes are protected as trade secrets under Iowa law.

Our junior attorney hasn't assessed any extralegal factors that may sway the outcome. She hasn't analyzed the potential prejudices of the decisionmaker or the reputations of the parties. She simply is in no position to offer a prediction about what "the court" is likely to do or not do.⁸ Sure, she has one big chunk of the puzzle—the proper legal analysis—but proper legal analysis does not always dictate outcomes.⁹ In short, "the master of law" and "the master of prediction" would not always reach the same outcome.¹⁰

Extralegal analysis involves consideration of anything, other than the law, that could affect the outcome.¹¹ Anyone who thinks that cases are decided by the law alone is "fooling themselves."¹² Judges are "not moral or

8 Professor Mark Osbeck recently chronicled, in impressive detail, the shortcomings of traditional element-based analysis as a predictive tool. Osbeck, *supra* note 1, at 65–77.

9 In his article, Osbeck identified that lawyers have principally relied on three tools to create their predictions, and legal analysis is only one of those tools. Osbeck, *supra* note 1, at 45, 53–64. Lawyerly experience and empirical information are the other two. *Id.*

10 Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 783 (1998). Schauer gave the following example of how a predictor might blend together consideration of relevant factors, some legal and some not:

Suppose we were to ask someone to predict a future judicial decision under the "best interests of the child" standard. My suspicion is that the predictor would first ask about the features of the dispute whose resolution she is being asked to predict. She would want to know the characteristics of the parents, the characteristics of the child, and related matters. But when it came down to prediction, she would predict on the basis of these characteristics by knowing which of these characteristics were likely important in this court, based on an analysis of past decisions by this court.

Id. at 787.

11 Osbeck observed that, when predicting an outcome:

[A]n experienced lawyer may take into account the background and perceived predilections of the individual judge(s) involved in the case particularly if the lawyer has personal experiences to draw on with respect to these variables. The experienced lawyer may also factor in non-doxtrinal considerations such as the equities of the lawsuit, the sympathetic or not-so-sympathetic nature of the parties, the reputation of the opposing counsel, etc.

Osbeck, *supra* note 1, at 59–60 (internal citations omitted).

intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work.”¹³ Simply put, they “are not machines, and they cannot be counted on to apply legal rules to the facts in a purely mechanical manner.”¹⁴ Judges bring their *priors*, “the expectations, formed by background, experience, and temperament, that every decision maker brings to a dispute that he is asked to resolve.”¹⁵ And they often also face significant docket pressure, especially at the trial level, and need to weigh the costs of taking the time to arrive at the “right” outcome against the sheer need to efficiently dispose of cases.¹⁶ As such, they are prone to mistakes, abuses, and neglects.¹⁷

There are hosts of extralegal issues that—rightfully or not—may influence decisionmaking: prejudice based on certain characteristics of the parties or the parties’ attorneys, the financial resources of the parties, the publicity surrounding a case, public opinion, social trends, and on and on.¹⁸ Indeed, matters so seemingly trivial as the length of time since the judge’s latest food break may influence the decision.¹⁹

A junior attorney or a law student certainly *could* attempt to write a memorandum that contains full consideration of both the legal analysis and the extralegal analysis and venture a prediction of the likely outcome of a future motion or legal proceeding. Tools exist—and costly legal consultants exist—to aid in discerning a decisionmaker’s tendencies.²⁰ Judicial analytics may help discover whether a particular judge is likely to

12 RICHARD A. POSNER, REFLECTIONS ON JUDGING 130 (2013) [hereinafter POSNER, REFLECTIONS ON JUDGING]; *see also* RICHARD A. POSNER, HOW JUDGES THINK 72 (2008) [hereinafter POSNER, HOW JUDGES THINK]; E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES 24 (2005) (“As a description of the incremental, intuitive decision-making of judges in general, the title to this chapter [‘Muddling along’] is not unduly harsh.”).

13 POSNER, HOW JUDGES THINK, *supra* note 12, at 7.

14 Osbeck, *supra* note 1, at 71–72.

15 POSNER, REFLECTIONS ON JUDGING, *supra* note 12, at 129–30.

16 *See* Henry J. Friendly, *The “Law of the Circuit” and All That*, 46 ST. JOHN’S L. REV. 406, 407 n.6 (1972) (opining that the “greatest district judges [are not] those who stew for months and then write a long opinion on a novel point of law concerning which they are almost certain not to have the last word”); *see also* POSNER, HOW JUDGES THINK, *supra* note 12, at 141 (“Because judges are sensitive to both backlogs and reversal, they will not, by making precipitate rulings, allow their backlogs to grow to inordinate length merely to reduce the probability of reversal, or their reversal rates to soar merely to eliminate their backlogs.”).

17 It likely goes without saying that juries similarly bring their priors and biases to decisionmaking. *See, e.g.*, POSNER, REFLECTIONS ON JUDGING, *supra* note 12, at 304–06.

18 *See, e.g., id.* at 115; POSNER, HOW JUDGES THINK, *supra* note 12, at 69–70.

19 *See* Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889 (2011). *But see* Keren Weinshall-Margel & John Shapard, *Overlooked Factors in the Analysis of Parole Decisions*, 108 PNAS E833 (2011) (criticizing the previously cited study).

20 Widely available commercial services like Bloomberg Law and Westlaw can generate fairly detailed analytics about parties, lawyers, law firms, judges, and courts. *See, e.g.*, BLOOMBERG LAW, <https://www.bna.com/litigation-analytics/> (last visited Sept. 24, 2018).

dispose of a trade secrets lawsuit at the summary judgment stage, or whether a court tends to rule in favor of corporate defendants or individual plaintiffs. However, the analytical documents that are assigned to junior attorneys and law students rarely ask them to take account of extralegal factors.²¹ Overwhelmingly, these documents only call for—and only contain—legal analysis.²² As such, professors and legal supervisors should instruct their charges to arrive at a legal conclusion, not a predictive one.²³

Simply put, there is a meaningful difference between legal analysis and prediction. In a world where extralegal analysis and litigation consultants are increasingly part of litigation practice and detailed analytics are available at the click of a button,²⁴ it is at best mildly misleading and at worst downright inaccurate for a legal writer to conclude what “the court” is likely to find unless the writer has incorporated extralegal factors into the analysis.²⁵ Moreover, there may be times when a law student or a junior attorney is called upon to incorporate analytics and actually make a prediction about what a particular decisionmaker will do. If we’ve already taught them that legal analysis is inherently predictive, we won’t have any vocabulary left to describe the act of combining legal analysis with extralegal analysis to forecast how a judge or court will decide an issue in the future.

Additionally, it is exceedingly strange to phrase a conclusion about something that has already occurred as a future prediction. Returning to the trade secrets example, either the law protects the recipes as trade secrets or it does not. If it does, then that protection arose sometime in the

21 For example, one legal writing text includes a very thoughtful list of “How to Test Your Writing for Predictiveness” without ever mentioning the relevance of extralegal factors or characteristics of the decisionmaker. See NEUMANN & TISCIONE, *supra* note 3, at 72–74. Analysis of extralegal considerations simply isn’t part of introductory instruction in legal writing.

22 To clarify, writers of legal analyses should do their best to set aside their own prejudices, priors, and other extralegal influences. Just like judges, they should endeavor to apply the law in a neutral (some would say “objective”) way divorced from their personal preferences. But just like judges, writers of legal analyses are all too human and will inevitably fail to achieve complete neutrality. Nonetheless, the goal of a legal analysis should be to get as close as possible to a neutral application of the law to the facts.

23 To be clear, I am not recommending that the law school legal writing curriculum should be overhauled to incorporate extralegal analysis into assignments geared at first-year law students. Legal analysis is generally enough for them to wrestle with.

24 See Osbeck, *supra* note 1, at 61 (“[E]mpirical information is likely to become increasingly important in this age of data analytics . . .”). Osbeck explains how data science is currently used in the practice of law and the increasing role it may play in prediction in the future. *Id.* at 85–101.

25 Perhaps some supervisory attorneys understand that predictive language is not meant literally, and they interpret the phrase “the court will likely find X” to instead mean “the court *should* likely find X,” or, “if the court *properly applies the existing law*, it will likely find X.” See, e.g., *id.* at 59 (“Seasoned lawyers instinctively temper the predictive analysis of an associate’s legal memorandum with their own experience in assessing the likely outcome of cases.”). I can’t say whether and to what extent this occurs. Regardless, I see no reason to perpetuate this type of inaccuracy when reporting the results of a legal analysis—and this is especially true in today’s legal culture where extralegal analyses are becoming increasingly common.

past—likely at the moment that the recipes were created. The law’s protection is something that has already occurred, not something that occurs only once a future judge reveals it to be so.

To take another example, consider an analysis of whether a neighbor committed a trespass or not. The trespass either occurred or it didn’t occur in the past—at the moment of the disputed incident between the two neighbors. The analysis is backward looking; its focus should be on how the law applies to the past event. Thus, it is downright odd to couch the statement of conclusion in terms of a prediction about a future event, but that is exactly what happens when the conclusion is written as a prediction about what the court is likely to find or not find. Whether a trespass occurred does not depend on a later court declaring it as such. Either the incident that occurred was a trespass or it wasn’t a trespass in a legal sense, even if no court ever rules on the issue. To avoid the oddity of writing about a past event as a future prediction, our junior attorney should write a statement of conclusion that focuses on the legal determination as a past event rather than on some future decisionmaker’s analysis of the past event.

Thus, law professors and attorney supervisors shouldn’t be instructing new legal writers to couch the conclusions of their legal analyses in predictive terms when they haven’t truly done a predictive analysis.²⁶ Predictive language should be reserved for actual predictions.

II. Predictive Conclusions are (Rightfully) Daunting to New Legal Writers

Although they may not be able to put their finger on it with specificity, new legal writers sense that predictive conclusions are inaccurate, and it makes some of them quite uncomfortable.²⁷ Numerous new law students over the years have expressed to me that they are intimidated by the prospect of making legal predictions.²⁸ When assigned to answer a legal question, they avoid the task: their “analysis” consists of a list of

²⁶ Predictions about what the parties are likely to do should likewise be avoided, unless the writer has truly considered how characteristics of the party are likely to influence their actions. *See, e.g., GLASER ET AL., supra* note 6, at 401 (“The prosecution is likely to prove that Dunn used or exhibited a deadly weapon . . .”). A writer should not be assessing what a prosecutor is likely to prove without considering all sorts of considerations about the prosecutor’s competence and habits.

²⁷ *See, e.g., Andrew J. Turner, Helping Students Grow Professionally and Overcome Fear: The Benefits of Teaching Unqualified Brief Answers*, 25 PERSP. 3, 4 (2016) (“My students often object to unqualified brief answers for a simple reason: Who really knows what a judge or jury will decide? Unqualified brief answers, they protest, overstate a lawyer’s ability to predict outcomes.”).

²⁸ *See GLASER ET AL., supra* note 6, at 111 (“Predicting the outcome of a legal question is one of the most difficult challenges facing the novice legal memo writer.”)

reasons why the outcome may be “yes” and a list of reasons why the outcome may be “no,” and then concludes with a statement that “ultimately it will be up to the court to decide.” Then we have an exchange like the following:

“You failed to state a conclusion,” I say, “No one is going to pay you a lot of money to tell them that ‘it is up to the court to decide.’”

They respond, “How should I know what the court will do? I only started law school a month ago. What if I’m wrong and the court doesn’t do what I say it is going to do?”

“Fair enough,” I say, “but don’t think of your job as predicting what the court will do. Courts do bizarre things sometimes. Courts also make mistakes. I’m not asking you to try to guess what a hypothetical judge would do. I want you to take on the role of judge and tell me how you would decide the case if you properly applied the law to the facts in front of you. In that situation, what would the conclusion be?”²⁹

Freed from the shackles of predicting what some hypothetical “court” is likely to do, these students are now up to the task. Conceptualizing the question as “how would *you* apply the law to the facts” puts new legal writers much more at ease. They now inhabit the role of the decisionmaker. And, as decisionmaker, they recognize the importance of actually reaching a decision rather than abdicating the final analysis to some other later “court” to figure out. They are the decisionmaker, so they must decide: do the facts satisfy the legal test, or do they not?³⁰

Inhabiting the role of the decisionmaker also breeds confidence. A prediction is provable as right or wrong. A junior attorney who writes that “the court is likely to find that the smoothie recipes are protected as trade secrets” will appear to be “right” or “wrong” depending on the court’s decision. The prospect of being branded as “wrong” can be a significant hurdle for some people, especially in the anxiety-inducing world of high-stakes litigation. Legal writers should not be pushed into making a prediction unless they truly have the tools to conduct the extralegal analyses necessary to support a prediction.

²⁹ See also DERNBACH ET AL., *supra* note 5, at 268 (encouraging students to “think like a judge” when writing legal memoranda: “Put yourself in the position of the judge who will resolve this case after weighing all competing arguments. What law and what facts would you, as the judge, rely on? What would you decide as a judge?”).

³⁰ Casting the student in the role of the judge does not necessarily mean that the conclusion must be stated with unqualified certainty. However, qualifying a conclusion with words such as “likely” and “probably” should not be the product of a student’s lack of confidence in her budding analytical abilities or of her inability to know what some third-party decisionmaker is going to do. Rather, it should reflect the unsettled nature of the law in certain areas. See Turner, *supra* note 27, at 6.

Instead, new legal writers should be taught to respect the limits of their analyses. If they have done a legal analysis, then a legal conclusion is appropriate. For example, a junior attorney who concludes that “the smoothie recipes are likely protected as trade secrets” isn’t necessarily “wrong” if the court ultimately rules the other way. Maybe it is *the court that was wrong*. The junior and senior attorney can then bond over their shared dissatisfaction with the court’s analysis. That is a much better outcome than the junior attorney fearing that she will be blamed for her wrong prediction. After all, if every court got every decision right, appellate opinions would be dreadfully boring to read.³¹ Matching the appropriate conclusion to the appropriate type of analysis creates comfort and can ultimately lead to a better work product.

III. Conclusion

Predicting what a court is likely to do is a tall task and involves innumerable calculations, not the least of which is sussing out the decisionmaker’s prejudices and tendencies and sorting through any attendant social pressures to rule in a particular way. Rightfully, this type of extralegal analysis is not a task that novice legal writers are generally called upon to do. Instead, law students and most of the junior attorneys they emulate conduct solely *legal* analyses. They apply bodies of law to sets of facts to arrive at legal conclusions. As such, we should not instruct them that they are authoring “predictive documents” that end with conclusions espousing what “the court” is likely to do. Their conclusions should reflect the limits of their analyses, and they simply aren’t in the position to confidently posit predictions about a hypothetical decisionmaker’s future behavior. Thus, we should take the focus off the decisionmaker and put it on the decision. Novice legal writers are not predicting anything; they are only analyzing.

Moreover, forcing new legal writers into making predictions about decisionmakers can be intimidating, especially when the writer senses that the prediction is misleading. Instead, law students and junior attorneys should be instructed to don the decisionmaker’s cap for themselves and

³¹ Not only that, but we wouldn’t need attorneys in the first place. In the law school setting, students should learn early and often that courts do not always engage in perfect legal analysis and not every precedent can be reconciled with every other precedent. See *supra* section 1. As recounted in one federal judge’s own story of coming to terms with this hard truth, it is simply not accurate or useful for law students or recent graduates to regard judges as robotic engines of legal application. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 274–79 (1924) (chronicling Judge Hutcheson’s journey from a law graduate who believed that judges “coldly and logically determined the relation of the facts of a particular case to [the] established precedents” to a seasoned practitioner and later judge who came to the realization that “hunches” and intuition play a major role in process of judicial decisionmaking).

determine the appropriate legal conclusion. Law professors and attorney supervisors need to recognize—and convey—that their junior colleagues function as informers, not predictors. We ask them to discover how the law, as it currently exists, correctly applies to a set of facts. We ask them to apprise us of this information so that we may use it to advise the client.

We should not ask them to foresee the outcome of a third-party's future decision based solely on legal analysis. Legal analysis is a necessary-but-insufficient input in predicting a decisionmaker's behavior. Thus, we should expect statements of the writer's conclusions to reflect this distinction and to accurately convey the limits of their analyses. While that distinction may feel relatively minor, it can make all the difference when shepherding novice legal writers toward reaching a conclusion and stating it plainly.

“A Court Would Likely (60-75%) Find . . .”

Defining Verbal Probability Expressions in Predictive Legal Analysis

Joe Fore*

I. Introduction

As advisors, lawyers continually predict the likelihood of legal outcomes for their clients.¹ Criminal defense attorneys must assess the chances of winning a not-guilty verdict to help clients decide whether to accept a plea deal.² Civil litigators must evaluate the prospects of surviving a motion to dismiss or summary judgment when advising a client to file, press, or settle a lawsuit.³ Tax counsel must predict whether a given position will pass muster with the IRS.⁴ Prediction is so central to

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¹ See RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19:12 (2009) (“The advisor should counsel the client about the likely state of the law, and the possible consequences of a particular action.”); Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN. ST. L. REV. 41, 43 (2018) (“One of the most important tasks lawyers undertake in furtherance of this advisory role is outcome prediction: that is, advising the client as to the likely outcome of various legal proceedings.”).

² Mark K. Osbeck, *Using Data Analytics Tools to Supplement Traditional Research and Analysis in Forecasting Case Outcomes*, 20 LEGAL WRITING 33, 33 (2015); Alan J. Gocha, Note, *A Call for Realism in the Justice System: Why Criminal Defense Attorneys Should Take Race into Account When Advising Clients*, 28 GEO. J. LEGAL ETHICS 547, 559 (2015).

³ See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL' & LAW 133, 133 (2010) (noting that “judgments and meta-judgments of future goals are an important aspect of a wide range of litigation-related decisions”); Osbeck, *supra* note 2, at 33 (“Predictive analysis is no less important in the civil arena. To properly evaluate settlement prospects, a lawyer must be able to assess the rough odds of winning at trial, and the potential exposure should the case proceed to trial.”); see generally Osbeck, *supra* note 1, at 46–51 (discussing the importance of outcome prediction to selecting cases and to accepting plea agreements or settlements).

⁴ See Osbeck, *supra* note 1, at 44, 51–52; Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241, 274 (2013).

lawyering that teaching objective, predictive analysis—conducting research to predict how the courts of a given jurisdiction would rule on a legal issue⁵—takes up a considerable part of almost all first-year legal writing courses.⁶

Because clients generally lack the lawyer’s specialized training and knowledge, “[c]lients’ choices and outcomes . . . depend on the abilities of their counsel to make reasonably accurate forecasts concerning [legal] outcomes.”⁷ Accurately assessing the probability of various outcomes is crucial for lawyers, clients, and the legal system, as a whole. If a lawyer misjudges the client’s chances of winning in litigation, for example, the client might press a losing case or reject a settlement proposal—wasting the client’s own time and resources, as well as the opposing party’s and the entire judiciary’s.⁸

Making predictions carries not only practical consequences for clients and attorneys—but also ethical ones. Both the ABA Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers require lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁹ And a comment to Model Rule 1.4 states that, at least in the litigation context, “a lawyer should explain the general strategy *and prospects of success* . . .”¹⁰ Lawyers need not be clairvoyant; they’re not liable for well-reasoned predictions that turn out to be wrong.¹¹ But lawyers *do* have an obligation to explain their professional judgments in ways that allow clients to understand the likelihood of various outcomes.¹²

⁵ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. c (2000) (“Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes . . . the lawyer’s professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation.”).

⁶ Ted Becker, *What We Still Don’t Know about What Persuades Judges — And Some Ways We Might Find Out*, 22 LEG. WRITING 41, 47 (2018) (recognizing that “the first semester of many an LRW course is devoted to how lawyers communicate [legal] predictions to supervisors and clients”); see also ALWD/LWI ANNUAL LEGAL WRITING SURVEY REPORT OF THE 2016–2017 SURVEY 21, <https://www.lwionline.org/sites/default/files/Report-of-the-2016-2017-Survey.pdf> (noting that 96.7% of responding programs have a required legal writing course “focusing principally on objective (including predictive) legal analysis and writing”).

⁷ Goodman-Delahanty et al., *supra* note 3, at 134.

⁸ See Osbeck, *supra* note 1, at 50–51 (describing the impact of accurate predictions to case resolution and concluding that “the ability to make reasonably accurate predictions regarding litigation outcomes is key to the efficiency of our litigation system as a whole”); Goodman-Delahanty, *supra* note 3, at 134 (“The consequences of judgmental errors by lawyers can be costly for lawyers and their clients, as well as an unnecessary burden on an already overloaded justice system.”).

⁹ MODEL R. PROF’L CONDUCT 1.4(b) (AM. BAR ASS’N 2018); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20(3) (2000).

¹⁰ MODEL R. PROF’L CONDUCT 1.4(b) cmt. 5 (AM. BAR ASS’N 2018) (emphasis added).

¹¹ See MALLIN & SMITH, *supra* note 1, § 19:1 (“[T]he rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized.”).

¹² See *infra* notes 65–68 and accompanying text.

Like other professionals, lawyers often render predictions in the face of considerable uncertainty.¹³ Limited or vague authority or a changing legal landscape can create uncertainty.¹⁴ Or even when precedent exists, unless that precedent is perfectly on-point, there remains the tough task of determining how established legal rules would apply to the client's factual situation.¹⁵

The human element adds another layer of uncertainty. A lawyer's prediction about how a court would rule assumes the court (a) has complete knowledge of all relevant facts and law and (b) applies that law consistently with how previous judges have applied the law in similar situations—which may not always be the case.¹⁶ Trying to account for differences between individual judges or for the possibility of a judge just plain getting it wrong—hopefully, a rare occurrence—further complicates the task of giving clients accurate predictions.¹⁷ And lawyers themselves have intrinsic traits that make it difficult to accurately predict legal outcomes.¹⁸ For example, studies suggest that lawyers, like other professionals, suffer from systematic "optimism bias"—adopting "too favorable a view of the merits of the cases that they argue," and, therefore, overestimating the client's likelihood of success.¹⁹

13 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. c (2000) ("Lawyers are occupationally engaged in advising clients about activities on which law has an often uncertain bearing."); MALLEN & SMITH, *supra* note 1, § 19:1 ("The professional is distinguished from other skilled and knowledgeable individuals because undertakings usually require the exercise of judgment to resolve issues that are uncertain and subject to disagreement even among the most learned."); Andrew J. Turner, *Helping Students Grow Professionally and Overcome Fear: The Benefits of Teaching Unqualified Brief Answers*, 25 PERSPS. 3, 3–4 (2016) (noting that lawyers making predictions face "a bundle of uncertainties including legal uncertainty, outcome uncertainty, factual uncertainty, analytical uncertainty, and emotional uncertainty").

14 See MALLEN & SMITH, *supra* note 1, § 19:8; Osbeck, *supra* note 1, at 66–68.

15 See Osbeck, *supra* note 2, at 34 ("A legal rule that seems relatively clear within the factual context of a particular precedent may not readily lend itself to application in a different factual context.").

16 Osbeck, *supra* note 1, at 71–72 (describing the influence of various "non-doctrinal considerations" on case outcomes and noting that "[j]udges and juries are not machines, and they cannot be counted on to apply legal rules to the facts in a purely mechanical manner"); Jasper L. Cummings, Jr., *The Range of Legal Tax Opinions, with Emphasis on the "Should" Opinion*, 98 TAX NOTES TODAY 1125, 1125 (Feb. 17, 2003) ("[O]pinions are understood to assume that the arbiter has all of the relevant facts, and will properly apply the law to the facts; that is, an opinion is based on a hypothetical perfect judge and is not a warranty that a judge won't go off . . . and make an unsupported decision.").

17 See Kevin Bennardo, *Abandoning Predictions*, 16 LEGAL COMM. & RHETORIC: JALWD 39 (2019) (suggesting that "extralegal factors"—including a judge's prior beliefs and biases, time constraints, and public opinion—can exert significant influence on judicial outcomes); Osbeck, *supra* note 2, at 35 (explaining that lawyers trying to predict case outcomes "typically [have] little meaningful information to rely on in assessing how differences between judges might affect the possible outcome").

18 Osbeck, *supra* note 1, at 71 (discussing "cognitive biases [that] may skew a lawyer's predictions").

19 Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype, and Should They? A Natural Experiment*, 41 J. LEGAL STUD. 239, 239–40 (2012); see also Becker, *supra* note 6, at 47–48 ("Similar studies about lawyers—by non-legal writing scholars—reach similar results: experienced attorneys overpredict the chances of a successful result in ways that mirror the position of their clients.").

Given these sources of uncertainty, many legal questions can't be answered with a definitive "yes" or "no."²⁰ So lawyers often employ qualitative probability expressions—words like "unlikely," "likely," "probably," or "almost certainly"—to give the reader an approximate sense of the chances of achieving a desired legal outcome.²¹ Legal writing guides routinely encourage and model the use of such modifiers.²² (1.1)

1.1: Most common probability expressions in legal writing guides²³

Word / Phrase	Guides Mentioning Expression or Using in Sample Documents
Probably/probably [yes/no/not]	13
Likely [yes/no]	7
Should	3
Most likely [not]	3
Probable	3
Unlikely	3
Almost certainly	2
Maybe	2
Possible/possibly	2
Will [not]	2
Cannot	1
Reasonably	1
Plausibly	1
Certain	1

20 See TERESA J. REID RAMBO & LEANNE J. PFLAUM, *LEGAL WRITING BY DESIGN* 177 (2d ed. 2013) ("In our combined legal experience (over fifty years including law school, clerking, practicing law, and teaching!), we know that *few* legal questions have easy 'yes' or 'no' answers.").

21 See Osbeck, *supra* note 1, at 56 (noting that lawyers "tend to qualify their determinations broadly (e.g., it is 'highly likely' or just 'more likely than not' that the jury will find the conduct to be outrageous)"); Turner, *supra* note 13, at 3 ("Qualified brief answers are the standard among students, professors, and practitioners alike and for good reason. Legal questions are typically complex and the law often uncertain. Qualifiers allow writers to express and quantify that uncertainty, adding the necessary nuance that a simple 'yes' or 'no' cannot."); CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 242 (3d ed. 2018) (suggesting language that lawyers can use to convey degrees of certainty, including "likely," "probably not," and "cannot").

22 See, e.g., ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 393 (2016) ("There is nothing stylistically wrong with using tempering qualifiers, and sometimes you should use them to ensure the accuracy of your claims."); HEIDI K. BROWN, *THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE WRITING* 166 (2015) (suggesting legal writers phrase conclusions using phrases like "A court likely/unlikely will find . . ." and "A court probably will find . . ."); BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* §16.3(d), at 400 (4th ed. 2018) (noting, in the context of a predictive memorandum, that "[s]ometimes the brief answer must be 'probably' or 'it depends' rather than 'yes' or 'no'"); RAMBO & PFLAUM, *supra* note 20, at 178 (encouraging students to "employ the covering our . . . 'options' theory and err on the side of 'hedging' with a 'probably' [a]nswer"); COUGHLIN, *supra* note 21, at 242 (listing suggested phrases to use when providing estimated likelihood of a given outcome). *But see* Turner, *supra* note 13 (advocating for legal writing professors to encourage students to give unqualified brief answers in memo assignments—that is, without probability expressions).

23 This list was assembled from the following sources: CHEW & PRYAL, *supra* note 22, at 112, 122, 147, 393, 394; BROWN, *supra* note 22, at 166, 182; HELENE SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 162, 164, 290, 488 (7th ed. 2018); AMY VORENBERG, *PREPARING FOR PRACTICE: LEGAL ANALYSIS AND WRITING IN LAW SCHOOL'S FIRST YEAR* 79, 163

Some legal writing guides rightly caution against over-hedging when rendering opinions, noting that equivocation does a client or supervisor no favors.²⁴ But there's a more fundamental problem with using qualitative probability expressions in legal writing: they don't have generally accepted meanings.²⁵ Do "likely" and "more likely than not" mean the same thing? Does "unlikely" mean a 49% chance of success? 33%? 20%? This ambiguity poses a serious challenge to lawyers when advising their clients. After all, *making* legal predictions is hard enough;²⁶ *communicating* those predictions in a way that's prone to misinterpretation only compounds the problem.²⁷

The uses and meanings of verbal probabilities have received considerable scholarly attention in fields like medicine, national intelligence, and climate science.²⁸ But "[t]here has been only limited social science inquiry on translating *legal*, verbal probability statements into numeric estimates."²⁹ To be sure, legal commentators have thoroughly examined related issues of how legal actors interpret qualitative legal standards—for example, the way that judges, jurors, and attorneys interpret qualitative burdens of proof like "probable cause," "clear and convincing evidence," or "beyond a reasonable doubt."³⁰ Similarly, there has also been considerable

(2014); LINDA EDWARDS, *LEGAL WRITING AND ANALYSIS* 139, 140, 141, 313 (4th ed. 2015); CATHY GLASER ET AL., *THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 166, 401, 409, 417 (2002); JILL BARTON & RACHEL H. SMITH, *THE HANDBOOK FOR THE NEW LEGAL WRITER* 38 (2014); TERRILL POLLMAN ET AL., *EXAMPLES AND EXPLANATIONS: LEGAL WRITING* 24, 178, 179, 181, 182, 187 (3d ed. 2018); RAMBO & PFLAUM, *supra* note 20, at 177–79; VEDA R. CHARROW ET AL., *CLEAR AND EFFECTIVE LEGAL WRITING* 248, 265 (4th ed. 2007); TRACY TURNER, *LEGAL WRITING FROM THE GROUND UP* 245, 351 (2015); COUGHLIN, *supra* note 2121, at 231, 241, 242, 373, 383, 397; GARNER, *supra* note 22, at 405, 410; BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 158, 177, 178, 222 (2001); MARY BETH BEAZLEY & MONTE SMITH, *LEGAL WRITING FOR LEGAL READERS* 181–82 (2d ed. 2019); RICHARD K. NEUMANN, JR. ET AL., *LEGAL WRITING* 125, 133, 136, 138, 364, 374 (3d ed. 2015).

24 See, e.g., CHEW & PRYAL, *supra* note 22, at 393–94 (warning that "overuse of tempering qualifiers can clog up your language and make your meaning difficult to parse"); BROWN, *supra* note 22, at 166 (discouraging the use of the phrase "[i]t is possible . . ." in the conclusion of a legal memorandum and describing the phrase as "wishy-washy"); COUGHLIN, *supra* note 21, at 181 ("[S]imply saying that a court could decide one way or a court could decide another way is not helpful to your colleague who has asked you to research a legal question.").

25 See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 417 (1997) ("[T]here is not even a clearly defined common understanding within the profession about what the locutions mean (e.g., what degree of confidence is represented by the term 'highly unlikely').").

26 See *supra* notes 13–19 and accompanying text.

27 See Detlev F. Vagts, *Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?*, 34 BUS. LAW. 421, 422 (1979) ("The consequence of making [legal] predictions but . . . keeping them in strictly verbal form is that such statements tend not only to be even more imprecise than the uncertain character of the actions predicted requires but that they can be downright confusing and misleading.").

28 See *infra* section 3.2.

29 Richard Seltzer et al., *Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Gold*, 100 JUDICATURE 56, 59 (2016) (emphasis added).

30 See, e.g., *id.*; Mandeep K. Dhimi et al., *Instructions on Reasonable Doubt: Defining the Standard of Proof and the Juror's Task*, 21 PSYCHOL. PUB. POL'Y & L. 169 (2015); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982).

scholarship on the ways that expert witnesses convey the significance of scientific evidence to fact-finders.³¹ And scholars have long discussed how clinicians can or should communicate likelihoods of future violent behavior in the context of mental health law and involuntary commitment proceedings.³² But the specific issue of the meanings of verbal probabilities in advising *clients* has received little systematic inquiry in legal scholarship³³ and even less in legal writing scholarship.³⁴

This article seeks to expand that inquiry. Drawing on previous social science research and perspectives from other professional fields, section 2 provides background on communicating probability estimates, including the use of both quantitative and qualitative approaches, as well as the use of specialized lexicons to standardize probability expressions. Section 3 examines several specific disciplines—both legal and non-legal—that have attempted to create their own probability lexicons to reduce ambiguity in communicating predictions and, then, constructs a proposed probability lexicon for general, predictive legal writing. Section 4 offers recommendations for how scholars and practitioners can continue to explore the topic of clearly and accurately conveying likelihood in legal analysis.

II. Communicating likelihood estimates

When giving guidance to decisionmakers, analysts must assess the chances of various events occurring, “which then need to be communicated to decision makers . . . in ways that can be understood and appreciated.”³⁵ In fields like law, finance, national intelligence, and

³¹ See, e.g., Kristy A. Martire et al., *The Expression and Interpretation of Uncertain Forensic Science Evidence: Verbal Equivalence, Evidence Strength, and the Weak Evidence Effect*, 37 L. & HUM. BEHAV. 197 (2013).

³² See, e.g., Jefferson C. Knighton et al., *How Likely Is “Likely to Reoffend” in Sex Offender Civil Commitment Trials?*, 38 L. & HUM. BEHAV. 293 (2014); John Monahan & Henry J. Steadman, *Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law*, 51 AM. PSYCHOLOGIST 931 (1996).

³³ As discussed below, there have been articles discussing the use of verbal probabilities in the specific areas of business and real estate closing opinions, auditor inquiry responses, and tax advising, see *infra* section 3.1, but almost none discussing the verbal probability phrases suggested most often in general legal writing. Indeed, the author is aware of only a few anecdotal mentions or guesses—made without empirical grounding or significant discussion—of the numerical meanings of the most common verbal probabilities referenced in legal writing guides. See, e.g., THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 238 (1978) (providing a table that defines words like “usual,” “unlikely,” “rare,” and “vast majority” in percentage terms as used throughout the book); Langevoort & Rasmussen, *supra* note 25, at 418 (proposing a hypothetical legal-advising situation where, “if ‘uncertain’ was a fifty percent chance, ‘likely’ a seventy percent chance and ‘highly likely’ a ninety percent chance, then a seventy-five percent assessment would be characterized as likely”); Vagts, *supra* note 27, at 422 (positing that “[p]robable” seems to convey a likelihood appreciably greater than 50:50; ‘reasonably certain’ on the other hand suggests odds in the range of 80:20 to 90:10 . . .”).

³⁴ Perhaps the most detailed exploration of the use—or non-use—of verbal probabilities in the legal writing literature is Andrew Turner’s 2016 *Perspectives* article, which urges legal writing professors to encourage students to *avoid* using such verbal probabilities and to give unqualified brief answers in assignments. Turner, *supra* note 13.

³⁵ Scott Ferson et al., *Natural Language of Uncertainty: Numeric Hedge Words*, 57 INT’L J. APPROXIMATE REASONING 19, 32 (2015).

politics—where predictions often can't be rendered with scientific precision—analysts must instead rely on providing decisionmakers with subjective probabilities.³⁶ These probabilities can either be conveyed qualitatively (for example, saying that something is “unlikely,” “likely” or “very likely” to occur) or quantitatively (as odds or percentages or ranges of percentages).³⁷

This section explores the advantages and disadvantages of each approach. Qualitative probabilities feel natural to use, but they are subject to very large interpersonal variation in interpretations, creating the possibility for serious misunderstandings between analysts and decisionmakers. Quantitative probabilities reduce ambiguity, but they, too, can be misunderstood by an audience, and many subjective fields, including law, have long resisted assigning numbers to predictions. Ultimately, given the unease that many professionals have about using numerical probabilities, the most promising approach for reducing ambiguity might be to use a hybrid approach: a standardized “probability lexicon” that defines verbal probabilities using specific numerical probabilities or probability ranges.

A. Qualitative/verbal probability expressions

Qualitative probability expressions—sometimes called “verbal probabilities,” “verbal probability phrases,” or “words of estimative probability”³⁸—are common in both everyday speech and professional settings as an “intuitive and natural” way of conveying likelihood.³⁹ But they suffer from a serious and inherent flaw: they are interpreted differently by individuals and groups in different contexts. Research reveals several key points about people’s understandings of verbal probabilities.

Different people interpret verbal probabilities differently.

Individuals tend to have clear and consistent ideas, for themselves, of what they mean when they use various probability phrases.⁴⁰ As Humpty Dumpty says in *Through the Looking Glass and What Alice Found There*, “When I use a word . . . it means just what I choose it to mean—neither



³⁶ Jeffrey A. Friedman & Richard Zeckhauser, *Handling and Mishandling Estimative Probability: Likelihood, Confidence, and the Search for Bin Laden*, 30 J. INTELLIGENCE & NAT’L SEC. 77, 80 (2014).

³⁷ Tzur M. Karelitz & David V. Budescu, *You Say “Probable” and I Say “Likely”: Improving Interpersonal Communication with Verbal Probability Phrases*, 10 J. EXPERIMENTAL PSYCHOL. 25, 25 (2004); Emily H. Ho et al., *Improving the Communication of Uncertainty in Climate Science and Intelligence Analysis*, 1 BEHAV. SCI. & POLICY 53, 54 (2015).

³⁸ See generally Karelitz & Budescu, *supra* note 37; Sherman Kent, *Words of Estimative Probability*, 8 STUD. INTELLIGENCE 49, 56–57 (1964).

³⁹ Ho et al., *supra* note 37, at 54; Seltzer et al., *supra* note 29, at 59.

⁴⁰ Karelitz & Budescu, *supra* note 37, at 27 (noting that “most people perceive the meanings of verbal probabilities consistently and reliably”).

more nor less.”⁴¹ And because verbal probabilities have a clear meaning in people’s own minds, people “naively assume that others share their interpretation of the phrases they use to convey uncertainty. But research shows that interpretations of [verbal probabilities] vary greatly across individuals.”⁴² Indeed, there are even considerable differences *between* mean results of different studies.⁴³ A meta-analysis of previous studies of probability phrase interpretation showed that, over six different studies, the word “unlikely” had been interpreted, on average, as low as 14% or as high as 31%.⁴⁴ The word “possible” had a 28-percentage-point spread, with mean interpretations as low as 27% and as high as 55%.⁴⁵ Figure 2.1 summarizes the results of two reviews of the empirical literature.^[2.1]

2.1: Numerical estimates of verbal probabilities from reviews of empirical research

	Mean Numeric Probability / Range	
	Theil (2002) ⁴⁶	Mosteller & Youtz (1990) ⁴⁷
Very probable	79-87%	85%
Probable	64.5-74.66	69
Likely	63-77	69
Possible	27-55	37
Unlikely	14-31.42	16
Very unlikely	9-28.44	8
Rare[ly]	5-14	7

Even experts interpret probability words differently. “Numerous studies have found considerable interpersonal variability in interpreting probability phrases not only among lay people but among experts within their professional domains.”⁴⁸ For example, in one study that asked

41 LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 168 (rev. ed. 1897), *quoted in* DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER & FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS § 1.4 n.1 (3d ed. 2015).

42 Ho et al., *supra* note 37, at 54.

43 Michael Theil, *The Role of Translations of Verbal into Numerical Probability Expressions in Risk Management: A Meta-Analysis*, 5 J. RISK RESEARCH 177, 184 (2002).

44 *Id.* at 181.

45 *Id.*

46 *Id.*

47 Frederick Mosteller & Cleo Youtz, *Quantifying Probabilistic Expressions*, 5 STATISTICAL SCI. 2, 4 (1990). The figures listed in this column are weighted averages. There is some overlap in the data sources for these two surveys, as three out of the ten studies surveyed in the Theil meta-analysis were also included in the Mosteller & Youtz survey.

48 Karelitz & Budescu, *supra* note 37, at 27; *see also* Chad S. Dodson & David G. Doboelyi, *Misinterpreting Eyewitness Expressions of Confidence: The Featural Justification Effect*, 39 L. & HUM. BEHAV. 266, 278 (2015) (“[E]xpertise does not eliminate interpersonal variability in the interpretation of verbal expressions of certainty.”); Ruth Beyth-Marom, *How Probable is Probable? A Numerical Translation of Verbal Probability Expression*, 1 J. FORECASTING 257, 264 (1982).

financial analysts to assign numerical likelihoods to qualitative probability expressions, the phrase "fair chance" was given probabilities ranging from 18% to 66%, while the word "unlikely" was rated as low as 5% and as high as 45%.⁴⁹ In another study that asked Israeli expert forecasters to assign percentages to probability expressions, the Hebrew translation for "likely" was assigned percentages as low as 42% and as high as 81%.⁵⁰ Even seemingly clear phrases were interpreted very differently; "nearly certain" was rated as low as 76% by some participants, and "very low chance" was interpreted as high as 23%.⁵¹

Interpretations of verbal probabilities vary with context. Verbal probability expressions can be interpreted differently when used in different contexts.⁵² Indeed, some studies suggest that such words are subject to even "greater variability among individuals' interpretations of probability phrases *when phrases occur within a context* than when they occur in isolation."⁵³ The frequency of previous occurrences of the event (the "base rate"), the event's desirability, and the severity of the event's consequences can all affect interpretations of probability expressions.⁵⁴ For example, in one survey of jurors, *more than half* of respondents said that a hypothetical sexual offender with a stated probability of recidivism of just 1% would be "likely" to reoffend; the grave consequences of a repeat incident may have led jurors to find even an objectively low-probability event to be "likely."⁵⁵ These context effects can create issues when experts in a given field attempt to use probability expressions in a particular way, as meanings intended by these experts may not match the way that lay audiences will intuitively view them in that context.⁵⁶

49 Madjid Tavana et al., *An Applied Study Using the Analytic Hierarchy Process to Translate Common Verbal Phrases to Numerical Probabilities*, 10 J. BEHAV. DECISION MAKING 133, 138 (1997).

50 Beyth-Marom, *supra* note 48, at 261.

51 *Id.*; see also Bernie J. O'Brien, *Words or Numbers? The Evaluation of Probability Expressions in General Practice*, 39 J. ROYAL C. GEN. PRAC. 98, 99 (1989) (reporting physicians' estimates of various verbal probability expressions).

52 See Karelitz & Budescu, *supra* note 37, at 26 ("Context effects on the interpretation of probability terms are pervasive.").

53 See Dodson & Dobolyi, *supra* note 48, at 267 (emphasis added).

54 See Karelitz & Budescu, *supra* note 37, at 26; see also Karl H. Teigen & Wibecke Brun, *Verbal Expressions of Uncertainty and Probability*, in THINKING: PSYCHOLOGICAL PERSPECTIVES ON REASONING, JUDGEMENT AND DECISION MAKING, 125, 127–28 (David Hardman & Laura Macchi eds., 2003) ("[I]nterpretations of probability terms are influenced by prior probabilities, or base rates; for instance, a "likely" snowfall in December will be assigned a higher probability than a "likely" snowfall in October. Interpretations are also affected by outcome severity.") (internal citation omitted); Adam J. L. Harris & Adam Corner, *Communicating Environmental Risks: Clarifying the Severity Effect in Interpretations of Verbal Probability Expressions*, 37 No. 6 J. EXPERIMENTAL PSYCHOL. 1571, 1576 (2011) (reporting results of a study "finding that increasing outcome severity led to higher interpretations of verbal probability expressions"); Beyth-Marom, *supra* note 48, at 266 (noting that previous research has concluded that "the desirability of an event influences its judged probability").

55 Knighton et al., *supra* note 32, at 300–01; cf. Jacquelyn Burkell, *What Are the Chances? Evaluating Risk and Benefit Information in Consumer Health Materials*, 92 J. MED. LIBR. ASS'N 200, 202 (2004) (discussing context effects on the interpretation of probability phrases and the potential confusion caused by using labels like "high risk" for serious medical issues that have objectively low probabilities).

56 Ho et al., *supra* note 37, at 54.

Certain words and phrases are more susceptible to interpretive variability than others. All verbal probabilities are vague, but some are more vague than others. For example, the previously described meta-analysis of studies found that “possible,” “unlikely,” “good chance,” and “very probable” showed more variability in how they were interpreted, whereas “likely,” “probable,” and “very unlikely” had comparatively more consensus in how they were interpreted.⁵⁷ Phrases that “indicate only that a probability is *not* zero, but say little about how probable it is”⁵⁸—such as “one must consider,” “one can’t rule it out entirely,” “not inevitable” or “uncertain”⁵⁹—are, unsurprisingly, prone to particularly wide variations in interpretation. There is also the problem of verbal probabilities that conflate “the strength of the probability and the desirability of the associated outcome”—such as a phrase like “good chance.”⁶⁰

Taken together, this research shows there is a high likelihood that decisionmakers receiving predictions in the form of verbal probabilities “may interpret the event probability very differently from the way the forecaster intended[] and may base an important decision on an erroneous interpretation.”⁶¹ Indeed, misunderstandings about the meaning of verbal probabilities have had disastrous, real-world consequences. For example, NASA’s process of translating qualitative probabilities of equipment failure into quantitative ones may have contributed to the explosion of the Space Shuttle Challenger.⁶² And different understandings of the phrase “fair chance of success” may have played a role in President Kennedy’s decision to launch the doomed Bay of Pigs invasion.⁶³

The anecdotal and empirical evidence discussed in this section has sobering consequences for lawyers. Imagine a scenario where a criminal defense lawyer tells a client that he has a “fair chance of success” at trial. The empirical research suggests a high likelihood that the client will understand his chances differently than the lawyer intended to commu-

⁵⁷ Theil, *supra* note 43, at 182.

⁵⁸ Beyth-Marom, *supra* note 48, at 268.

⁵⁹ *Id.*; Teigen & Brun, *supra* note 54, at 126–27; see also Mosteller & Youtz, *supra* note 47, at 10 (collecting results from previous empirical studies and suggesting certain verbal probabilities to avoid due to high interpretive variability, including “liable to happen,” “sometimes,” “not infrequent,” “not unreasonable,” “might happen,” and “possible”).

⁶⁰ Beyth-Marom, *supra* note 48, at 268 (“A 10 per cent chance to recover from an operation may be a ‘good’ one if the patient would otherwise die. However, the same 10 per cent chance is ‘bad’ if the operation is not essential and the person is healthy.”).

⁶¹ *Id.* at 266; see also Ho et al., *supra* note 37, at 55–56.

⁶² Elliot Marshall, *Feynman Issues His Own Shuttle Report, Attacking NASA’s Risk Estimates*, 232 SCI. 1596, 1596 (1986), cited in Karelitz & Budescu, *supra* note 37, at 25.

⁶³ Jeffrey A. Friedman et al., *The Value of Precision in Probability Assessment: Evidence from a Large-Scale Geopolitical Forecasting Tournament*, 62 INT’L STUD. Q. 410, 410 (2018), <https://doi.org/10.1093/isq/sqx078> (citing PETER H. WYDEN, BAY OF PIGS: THE UNTOLD STORY 88–90 (1979)); see also Karelitz & Budescu, *supra* note 37, at 25.

nicate.⁶⁴ This could have not only practical implications but, potentially, ethical ones as well. As noted above, ABA Model Rule of Professional Conduct 1.4(b) requires attorneys to explain matters relating to the representation—including, in litigation, the “prospects of success”—to their clients in a way that allows them to make informed decisions.⁶⁵ This raises an interesting question: can a client’s decision be truly “informed” if it is based on a misinterpretation of the “prospects of success” articulated by the lawyer? Lawyers generally have an obligation to ensure that clients accurately understand legal advice.⁶⁶ And courts have suggested that analogs to Model Rule 1.4(b) might require an attorney “to alter the way he or she communicates with a client to ensure that the client is adequately informed.”⁶⁷ Given the high variability in interpreting verbal probabilities, might that same principle discourage the use of vague verbal probabilities?

B. Quantitative/numerical probability expressions

If lawyers wanted to avoid the potentially grave consequences of using vague, qualitative probability expressions, they could use quantitative estimates—in percentages, odds, frequencies, or chances⁶⁸—since even highly subjective probability estimates can be expressed numerically.⁶⁹

64 See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 409 (3d ed. 2012) (noting that “because clients tend to draw wildly different meanings” from vague verbal probabilities, “chances are excellent that clients will misunderstand the prediction you had in mind”).

65 See *supra* notes 9–10 and accompanying text. Another potentially relevant concept is the idea of “informed consent,” which appears in various parts of the ABA Model Rules. The Model Rules provide that “informed consent” can only be obtained “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” MODEL R. PROF’L CONDUCT 1.0(e) (AM. BAR ASS’N 2018); see generally Nancy J. Moore, *Why Is There No Clear Doctrine of Informed Consent for Lawyers?*, 47 U. TOLEDO L. REV. 133, 149–51 (2015) (discussing the definition and use of “informed consent” in the ABA Model Rules and its relationship with the duties owed under Rule 1.4). In the medical context, commentators have suggested that the ways doctors communicate probabilistic information might affect the extent to which a patient’s consent is truly “informed.” See Dennis J. Mazur & Jon F. Merz, *Patients’ Interpretations of Verbal Expressions of Probability: Implications for Securing Informed Consent to Medical Interventions*, 12 BEHAV. SCI. & L. 417 (1994).

66 See California State Bar, Formal Op. 1984-77, <http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/1984-77.htm> (asserting, in the context of non-English-speaking clients, that “the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision,” and recognizing that “difficulty in communication can occur even between those who speak the same language, since a client may not immediately grasp the import of the words used by counsel”); see also MELISSA WERESH, *LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS* 64 (2d ed. 2009) (discussing Model Rule 1.4 and noting, in the context of delivering advice via client letters, that the lawyer should communicate “in a style and format that the client understands”).

67 Attorney Grievance Comm’n of Md. v. Framm, 144 A.3d 827, 845 (Md. 2016) (affirming finding that a lawyer violated Maryland’s version of Model Rule 1.4 by failing to put advice into writing when the lawyer knew that the client had “difficulty understanding and retaining information”).

68 See, e.g., Mariko Carey et al., *Exploring Health Literacy and Preferences for Risk Communication Among Medical Oncology Patients*, 13 PLOS ONE 1, 2 (2018).

69 Jeffrey A. Friedman et al., *Behavioral Consequences of Probabilistic Precision: Experimental Evidence from National Security Professionals*, 71 INT’L ORG. 803, 804 (2017) (“Analysts always have a coherent conceptual basis for quantifying probability estimates, no matter how subjective those estimates might be.”).

Providing quantitative estimates wouldn't necessarily improve the *accuracy* of their predictions, but it would at least reduce the chances of miscommunication.⁷⁰

Despite the potential benefits of numeric probabilities, professionals in many different fields that rely on subjective probabilities, including law, generally resist expressing their predictions quantitatively.⁷¹ Why? On the self-serving side, using verbal probabilities can be a way to avoid accountability.⁷² But there are also more principled reasons to be wary of quantitative estimates.

First, there is the inherent comfort in using words to communicate subjective probabilities. “[R]esearch has shown that people overwhelmingly prefer to communicate uncertainty using vague verbal terms . . . because these terms are perceived to be more intuitive and natural.”⁷³ In particular, professionals engaged in fields grounded in the humanities—such as law and intelligence—may simply be more comfortable (and better at) expressing ideas in words rather than in numbers.⁷⁴ For professionals accustomed to dealing in words, translating their assessments into numbers could be like trying to think or communicate in a foreign language, which could introduce its own potential for error.⁷⁵

70 *Id.* (“If analysts conveyed probability assessments using numbers, then these assessments might not always be accurate, but at least they would be clear.”); Karelitz & Budescu, *supra* note 37, at 26 (“Undoubtedly, one could reduce the communication errors that result from the different meanings people attribute to probability phrases by avoiding words and using only numerical probabilities.”); Ronald David Greenberg, *The Lawyer’s Use of Quantitative Analysis in Settlement Negotiations*, 38 BUS. LAW. 1557, 1583 (1983) (“[T]he use of quantitative analysis in settlement negotiations will not yield mystically accurate estimates, but a lawyer’s use of quantitative techniques in counseling could lead to . . . more effective communication between lawyers and clients . . .”).

71 Osbeck, *supra* note 1, at 56 (noting that “lawyers typically don’t assign percentages” to their predictions about whether various elements of a cause of action are likely to be satisfied); Friedman et al., *supra* note 63, at 410 (noting that an “aversion to clear probabilistic reasoning is common throughout foreign policy”).

72 See Ho et al., *supra* note 37, at 54 (noting that conveying likelihoods in numeric values “may impose greater accountability and expose errors in judgment”); Langevoort & Rasmussen, *supra* note 25, at 418 (noting that the use of verbal probabilities to give legal advice could be “self-serving,” since “the vagueness of the representations makes it more difficult to second-guess the advice when there has been a bad outcome”).

73 Ho et al., *supra* note 37, at 54.

74 Legendary CIA figure Sherman Kent derided intelligence analysts with this mindset as “poets,” as opposed to the “mathematicians,” who were more comfortable with quantitative estimates. Kent, *supra* note 38, at 56–57. Harvard law professor Detlev Vagts was a bit less charitable to both sides in the title of a 1979 article, suggesting that lawyers’ methods of rendering predictions resembled either “haruspex”—ancient soothsayers who divined the future by reading animal entrails—or “bookies.” See Vagts, *supra* note 27; Merriam-Webster, *Haruspex*, <https://www.merriam-webster.com/dictionary/haruspex>.

75 Friedman, *supra* note 69, at 809 (“Some scholars argue that analysts naturally think about uncertainty qualitatively This perspective implies that quantifying probability assessments is like expressing complex ideas in a second language, conveying information in a format that induces avoidable errors in judgment.”); Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 326 (2011) (arguing that lawyers avoid making quantitative predictions, in part, because “many lawyers . . . tend to think more in qualitative than in quantitative terms”); McCauliff, *supra* note 30, at 1332 (noting, in reporting survey results where judges were asked to quantify burdens of proof, that some judges noted that percentages “are not the terms in which judges think”). As Greg Mitchell points out, however, the process of forcing analysts to think in unfamiliar, quantitative ways could actually *improve* the deliberative process. For example, in the context of jurors applying burdens of proof, “framing the jurors’ task in quantitative terms may activate a more deliberate, rational evaluation of the evidence.” Gregory

Second, decisionmakers who *receive* estimates may, similarly, be better equipped to assess qualitative estimate. As one senior CIA officer explained about intelligence reports, “most consumers of intelligence aren’t particularly sophisticated when it comes to probabilistic analysis. They like words and pictures, too. My experience is that [they] prefer briefings that don’t center on numerical calculation.”⁷⁶ While study participants often express a preference for receiving probabilistic information quantitatively,⁷⁷ decisionmakers face impediments to actually using numerical probabilities effectively. Evidence suggests that large swaths of the population have low functional numeracy—“the ability to comprehend, use, and attach meaning to numbers”⁷⁸—leaving even well-educated people often unable to fully understand numeric probabilities.⁷⁹ And quantitative probabilities are not free from context effects; the framing of a numerical probability—for example, expressing a medical risk in terms of the likelihood of survival or death—can affect how it is interpreted.⁸⁰

Another concern is that using numbers to express likelihoods could create a false sense that such predictions are inherently better or more accurate than qualitative assessments.⁸¹ Because people tend to associate numerical probabilities with precision,⁸² “quantifying probability assessments [could] cause decision makers to see these estimates as being more scientific than they really are.”⁸³ This could lead decisionmakers to

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Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 720–21 (2009). Precisely “because communicating a vote quantitatively is less natural and more difficult than expressing a vote in a verbal format, a juror who must communicate his or her vote numerically is likely to experience greater metacognitive discomfort during deliberations,” leading the juror to be “more likely to engage in greater monitoring of his or her information processing.” *Id.* at 721; cf. Greenberg, *supra* note 70, at 1585 (suggesting that a lawyer who uses quantitative analysis and communication “will be forced to think more precisely about each aspect of the case, and thus his judgment about the whole case should become more acute”).

76 Michael Schrage, *What Percent is ‘Slam Dunk’?*, WASH. POST, Feb. 20, 2005, at B01; see also N. Zoe Hilton et al., *Communicating the Risk of Violent and Offending Behavior: Review and Introduction to this Special Issue*, 33 BEHAV. SCI. & L. 1, 8 (2015) (noting, in the context of legal cases involving risk of future violent conduct, “[f]orensic practitioners, judges, and jurors alike typically prefer nominal labels over quantitative information”).

77 See, e.g., Thomas S. Wallsten et al., *Preferences and Reasons for Communicating Probabilistic Information in Verbal or Numeric Terms*, 31 BULL. PSYCHONOMIC SOC’Y 135, 137–38 (1993).

78 Wendy Nelson et al., *Clinical Implications of Numeracy: Theory and Practice*, 35 ANNALS BEHAV. MED. 261, 263 (2008).

79 See, e.g., Angela Fagerlin, *Quantity Information*, in U.S. FOOD & DRUG ADMIN., COMMUNICATING RISKS AND BENEFITS: AN EVIDENCE-BASED USER’S GUIDE 53 (Baruch Fischhoff, Noel T. Brewer & Julie S. Downs eds., 2011) (“Approximately 50% of Americans cannot accurately calculate a tip. Almost a quarter of college educated adults do not know what is a higher risk: 1%, 5%, or 10%.”).

80 See, e.g., MICHAEL D. MASTRANDREA ET AL., GUIDANCE NOTE FOR LEAD AUTHORS OF THE IPCC FIFTH ASSESSMENT REPORT ON CONSISTENT TREATMENT OF UNCERTAINTIES 2 (2010), https://wg1.ipcc.ch/AR6/documents/AR5_Uncertainty_Guidance_Note.pdf (suggesting that “a 10% chance of dying is interpreted more negatively than a 90% chance of surviving”) [hereinafter IPCC GUIDANCE NOTE].

81 Ho et al., *supra* note 37, at 54.

82 Ferson, *supra* note 35, at 31 (“Numbers expressed without hedge words are very likely to be commonly misunderstood as being more precise [than] they actually are.”); Wallsten, *supra* note 77, at 137.

83 Friedman, *supra* note 69, at 804; cf. Paul Slovic et al., *Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats*, 24 L. & HUM. BEHAV. 271, 272 (2000) (noting one reason for clinicians’ reluctance to use numerical probabilities is “their view that ‘the state of the research literature doesn’t justify using specific numbers’”).

wrongly believe that they “possess a stronger evidentiary basis for evaluating choices under uncertainty.”⁸⁴ Indeed, when dealing with truly subjective probabilities—where, as in law, the process of arriving at the prediction typically can’t be done with mathematic or scientific rigor⁸⁵—some question the very idea of trying to quantify predictions:

[T]he nuances involved in making judgment calls on [legal] issues do not really lend themselves to odds-making; the use of numbers suggests a level of precision that is inconsistent with the basic process. Also, since, by definition, there can be no repeatability in a large number of independent trials, the concept of probability is not very meaningful.⁸⁶

But just because legal predictions are subjective doesn’t mean they can’t be expressed quantitatively. While it’s true that “[s]ubjective probabilities can rarely be calibrated with the precision of gambling odds or actuarial tables, . . . they can always be quantified,”⁸⁷ whether as a range (50-80%) or boiled down to a single point estimate (65%).⁸⁸ Moreover, because legal opinions are widely understood to be subjective and highly uncertain, there may be less risk that a client would interpret numerical

⁸⁴ Friedman, *supra* note 69, at 807; *see also* BINDER ET AL., *supra* note 64, at 410 (cautioning lawyers to “[r]efer to percentages only if you can reasonably estimate what they are” because “percentages may falsely imply more expertise or certainty than you truly possess”); Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 20–21 (2008) (“A conclusion regarding the legal strength of a position represents a reasoned and considered judgment rather than a mathematical certainty. Since it is based in no small measure on the experience and knowledge of the appraiser, assigning a specific percentage probability to such an assessment arguably misleads the client regarding the underlying basis and actual certitude of the appraisal.”).

⁸⁵ While this has traditionally been the case in predicting legal outcomes, new computing tools may allow lawyers to evaluate large numbers of past cases in a way that could make predictions more mathematically rigorous. *See generally* Osbeck, *supra* note 1, at 81–101 (discussing emerging technological tools and the prospects of using computer-driven data analytics to predict judicial outcomes).

⁸⁶ Rothman, *supra* note 75, at 326; *see also* Langevoort & Rasmussen, *supra* note 25, at 417 (noting that most lawyers avoid giving quantitative probabilities, “[c]iting long-standing custom . . . that the process of legal inference is too imprecise to quote odds in mathematical form”).

⁸⁷ Friedman & Zeckhauser, *supra* note 36, at 80; Beyth-Marom, *supra* note 48, at 258.

⁸⁸ Even if the best an attorney could do is provide a *range* of quantitative probabilities, it would still eliminate the ambiguity associated with interpreting verbal probabilities. Beyth-Marom, *supra* note 48, at 258. Moreover, numerical ranges can be distilled to point estimates for decisionmaking purposes. *See* Friedman & Zeckhauser, *supra* note 36, at 90 (“Absent additional information to say whether any parts of a range are more plausible than others, decision makers should treat an estimate that some event is ‘between 40 and 80 per cent likely to occur’ just the same as an estimate that the event is 60 per cent likely to occur . . .”).

⁸⁹ Lavoie, *supra* note 84, at 21; *id.* (suggesting that, in the legal context, numerical predictions are “a short hand to succinctly convey that assessment to others” and that “[v]iewed in this light, it makes little difference whether words or percentages are used to express these probability assessments”); Vagts, *supra* note 27, at 427 (“The fact that [particular legal matters] are fraught with uncertainty is not an item of news to the sophisticated client and it is hard to see how attaching numbers to that uncertainty would corrupt such a party.”); ABA, *Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information*, 31 BUS. LAW. 1709, 1722 (1976) (asserting that when lawyers provide numerical estimates about the likelihood of success in a matter, “the quantification is generally only undertaken in an effort to make meaningful, for limited purposes, a whole host of judgmental factors applicable at a particular time, without any intention to depict ‘probability’ in any statistical, scientific or empirically-grounded sense”).

probabilities as “absolute and precise strength assessments”—especially when dealing with sophisticated clients.⁸⁹

Still, while there have been some calls for lawyers to quantify their legal opinions,⁹⁰ and “[n]o doubt it is the way some lawyers do counsel their clients,”⁹¹ lawyers generally avoid doing so.⁹² Indeed, some commentators imply that attaching numbers to legal advice would be unseemly—akin to bookmaking.⁹³

C. A hybrid approach: standardized probability lexicons

So where does that leave us? Qualitative probability words feel natural, but they’re vague. Quantitative probabilities are more precise, but they’re also susceptible to misunderstanding and, besides, they’re a non-starter for many professionals, including lawyers. Fortunately, a third, hybrid approach exists: the standardized probability lexicon.⁹⁴ In this approach, analysts adopt specific, qualitative terms for likelihoods, assign those terms relative or numerical values—often as ranges of percentages—and then explain the assigned meanings to the audience.⁹⁵ Such lexicons have been attempted in many technical areas.⁹⁶

⁹⁰ See BINDER ET AL., *supra* note 64, at 409 (urging lawyers to “state predictions as numerical probabilities when practical”); Greenberg, *supra* note 70, at 1579–86 (advocating for lawyers to use quantitative techniques and terminology when counseling clients).

⁹¹ Langevoort & Rasmussen, *supra* note 25, at 417; see also SHAPO ET AL., *supra* note 23, at 302 (“Some lawyers suggest that stating the percentage likelihood of success is easier for the client to evaluate [*You have a 70% likelihood of success if you go to trial.*] than a general statement [*You have a pretty good chance to win if you go to trial.*]”); Lavoie, *supra* note 84, at 5 n.19 (“While historically tax practitioners were reluctant to undertake such quantifications of their opinions, most tax practitioners now routinely use such percentages in describing their assessments.”).

⁹² Langevoort & Rasmussen, *supra* note 25, at 417 (noting that “most” lawyers “resist giving probabilistic advice”); Osbeck, *supra* note 1, at 56; Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L. J. 619, 654 n.159 (2006) (“[M]ost lawyers do not quantify the chances of success.”); Vagts, *supra* note 27, at 423 (asserting that giving legal opinions with numerical probabilities “is not generally done”); ABA, *supra* note 89, at 1722 (recognizing that “[l]awyers do not generally quantify for clients the ‘odds’ [of success in litigation] in numerical terms . . .”).

⁹³ RAMBO & PFLAUM, *supra* note 20, at 178 (“[W]e say the court ‘probably’ will do so and so, *not* that there’s a ‘75% chance’ of it doing so and so. We’re lawyers, not bookies.”); see also Rothman, *supra* note 75, at 326 (noting that tax lawyers avoid quantifying uncertainty because they “like to believe (or at least like to give the impression to our clients) that what we do is different than handicapping racehorses”); Langevoort & Rasmussen, *supra* note 25, at 417 (noting that some lawyers suggest that using numerical probabilities would “raise ethical concerns about equating legal advice with betting odds”).

⁹⁴ See Mandeep K. Dhami, *Towards an Evidence-Based Approach to Communicating Uncertainty in Intelligence Analysis*, 33 INTELLIGENCE & NAT’L SEC. 257, 258 (2018); Ho et al., *supra* note 37, at 54.

⁹⁵ See Ho et al., *supra* note 37, at 54 (describing the use of standardized probability lexicons that “tie the verbal terms to specific numerical values or ranges”); Dianne C. Berry et al., *Patients’ Understanding of Risk Associated with Medication Use Impact of European Commission Guidelines and Other Risk Scales*, 26 DRUG SAFETY 1, 2 (2003) (“One approach to simplifying and standardiz[ing] the presentation of probabilistic information (such as when informing patients about the benefits and risks associated with particular medicines) has been to produce sets of verbal descriptors that correspond to specific probability ranges.”).

⁹⁶ Ferson, *supra* note 35, at 23.

The probability-lexicon approach seeks to combine the intuitive feel of verbal probabilities with the clarity of numerical probabilities.⁹⁷ But even this approach has potential pitfalls. First, standardized lexicons with established ranges may not be fine-grained enough to allow for discrimination within the ranges—a particular problem when trying to convey very small or very large probabilities. For example, if a probability lexicon uses the term “remote” to describe anything between 0 and 10 percent probability, that word “could be one in ten, one in a hundred, or one in a million, and [the standardized lexicon] provides no way to tell these estimates apart.”⁹⁸

Second, because probability lexicons are typically developed by relatively small groups of experts based on the intuition and experience of group members, the lexicons may not reflect how audiences—who may differ in important ways from the lexicon creators—will naturally view prescribed expressions.⁹⁹ Indeed, research shows that “[e]ven when [audiences] receive explicit lexicons, they often still interpret those terms in ways that authors did not intend.”¹⁰⁰

Still, given lawyers’ antipathy toward expressing predictions solely in quantitative terms, standardized probability lexicons seem like a promising option for reducing ambiguity when conveying legal uncertainty. So how would one go about constructing such a lexicon for general, predictive legal writing? The next section surveys legal and non-legal fields in an effort to answer that question.

III. Developing a general legal writing probability lexicon

To help define the vague verbal probabilities used most often in legal writing, this section surveys a number of legal and non-legal fields that have attempted to create standardized probability lexicons. This section then uses these previous examples—along with empirical research—to propose a probability lexicon for general, predictive legal writing.

⁹⁷ See Dhami, *supra* note 94, at 267 (calling the use of a “standardized uncertainty lexicon” in intelligence fields a “compromise” between those that favor qualitative probability expressions and those that argue for numerical expressions); see also Beyth-Marom, *supra* note 48, at 268; Tavana et al., *supra* note 49, at 134.

⁹⁸ Friedman & Zeckhauser, *supra* note 36, at 91.

⁹⁹ Ho et al., *supra* note 37, at 54 (explaining that because probability lexicons often “are developed by fiat and reflect the perceptions, perspectives, and experiences of small committees of experts in a given field . . . [r]arely do they adequately consider the wide diversity of backgrounds and perspectives of target audiences”); *id.* at 51 (noting that probability lexicons “tend to be developed ‘in house,’ often based on whatever seems to make sense at the time”); see also Dhami, *supra* note 94, at 267 (noting that one barrier to creating a standardized probability lexicon is that “people find it difficult to suppress their normal meanings of linguistic probabilities i.e., how they would use a phrase in an everyday context . . .”).

¹⁰⁰ Jeffrey A. Friedman et al., Why Quantitative Probability Assessments Are Empirically Justifiable in Foreign Policy Analysis 5 (Dec. 11, 2015) (unpublished manuscript), https://pdfs.semanticscholar.org/3d11/ba65cc4874358c2e2f9e66643040d23a574.pdf?_ga=2.229490328.589622241.1526304791-1383481732.1526304791.

A. Probability lexicons in legal contexts

While all lawyers render predictions in their roles as advisors, some practice areas have adopted standardized terminology to convey predictions about legal outcomes. This section examines three areas of law—closing opinion practice, auditor inquiry responses, and tax opinion practice—that have done just that, either through regulatory edict, customary practice, or a combination. While these experiences offer hope for the possibility of adopting widely accepted, standardized terminology, they also highlight the difficulty in generating consistent meanings among lawyers and their audiences.

1. Closing opinions

One specialized legal context for delivering opinions is the formal “closing opinion”—often delivered in the context of a business or real estate transaction to third parties as an assurance that certain preconditions for the deal are or will be present.¹⁰¹ The norms of closing opinions—including the language used to convey predictions about uncertain events—are governed largely by customary practice and often codified in reports drafted by bar association committees.¹⁰²

Unlike many other types of legal opinions, closing opinions typically lack an explanation of the analysis supporting the opinion.¹⁰³ Still, “opinion givers may include their legal analysis in an opinion when they believe it involves a difficult or uncertain question of professional judgment.”¹⁰⁴ Such opinions—called “reasoned” or “explained” opinions—include “a discussion of relevant statutory and judicial authorities, an analysis and application of the authorities to the facts and issues involved in the transaction, and a prediction of the likely judicial resolution of the matter if the issues were appropriately presented to a court.”¹⁰⁵ But, like all legal opinions, closing opinions “are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.”¹⁰⁶

101 See GLAZER & FITZGIBBON, *supra* note 41, § 1.1; ABA Joint Drafting Comm., *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L.J. 213, 217 (2012).

102 GLAZER & FITZGIBBON, *supra* note 41, § 1.6.1 (noting that “opinion preparers should treat customary practice as their starting point” and that customary practice can be established by looking to “bar association reports, treatises, and articles” (internal quotation marks omitted)).

103 *Id.* § 3.3.

104 ABA Comm. on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 345, 349 (2001).

105 Joint Comm. of the Real Prop. Law Section of the State Bar of Cal. and the Real Prop. Section of the L.A. Cty. Bar Ass’n, *Legal Opinions in California Real Estate Transactions*, 42 BUS. LAW. 1139, 1151 (1987) [hereinafter *Legal Opinions in California Real Estate*]; see also ABA Joint Drafting Comm., *supra* note 101, at 247 (noting that a reasoned opinion “requires additional factual assumptions and an analysis of statutes, cases, and other law in the Opinion Jurisdictions and perhaps other sources, such as Restatements”).

106 ABA Comm. on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831, 832 (1998).

Closing opinions employ fairly standardized terminology to communicate likelihood. Traditionally, the strongest commonly accepted verbal probability has been “would”—as in, “*a court would hold [X]*”—which is appropriate when “no reasonable argument supports a contrary conclusion” or when binding precedent on the issue exists.¹⁰⁷ There is some debate as to whether the word “should” conveys a lower degree of certainty,¹⁰⁸ but more recent authorities suggest the modern trend is to treat the two terms equivalently.¹⁰⁹ “Should” or “would” opinions can also be modified by adding the lead-in phrase “*although the matter is not free from doubt.*”¹¹⁰ Including this phrase may convey a lower level of certainty by the lawyer, although “how much lower is an open question.”¹¹¹ The lowest level of certainty in common use appears to be the “more likely than not” reasoned opinion, which “may be appropriate where the relevant authorities are divided, unclear or not directly on point.”¹¹²

2. Auditor inquiry responses

Another legal area that uses specific probability language is the practice of responding to inquiries from accountants who are auditing a lawyer’s corporate client. When conducting audits, accountants routinely ask attorneys about matters that could affect a company’s finances, including “information regarding any pending litigation or unasserted claims,” and, more specifically, “[t]he degree of probability of an unfavorable outcome” in any such matter.¹¹³ But this practice creates ethical tensions between the lawyer’s need to maintain confidentiality about client matters and the accountant’s need to promote “public confidence in published financial statements.”¹¹⁴

To reconcile these competing needs, in 1976, the ABA adopted its *Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for*

107 *Legal Opinions in California Real Estate*, *supra* note 105, at 1152.

108 *Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012*, 51 REAL PROP. TR. & EST. L.J. 167, 214 n.93 (2016) (“Practitioners differ on whether the two words have different meanings in the context of such an opinion.”).

109 COMM. ON CORPS., STATE BAR OF CAL., REPORT OF THE COMMITTEE ON CORPORATIONS REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS 19 (2007 rev. ed.); GLAZER & FITZGIBBON, *supra* note 41, § 3.3 n.9.

110 *Legal Opinions in California Real Estate*, *supra* note 105, at 1152.

111 GLAZER & FITZGIBBON, *supra* note 41, § 3.3.

112 COMM. ON CORPS., *supra* note 109, at 19; *see also Legal Opinions in California Real Estate*, *supra* note 105, at 1152–53 (“[I]f the authority is divided or if reasonable contrary arguments exist, the lawyer may be required to analyze and balance many competing factors and a ‘more likely than not’ opinion may best express the lawyer’s conclusions.”).

113 R. Alexander Swider, Note, *Toeing the Line: The Delicate Balance Attorneys Must Maintain When Responding to Auditor Inquiry Request Letters*, 50 IND. L. REV. 969, 972 (2017); *see also* MORGAN ET AL., PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 378–79 (13th ed. 2018).

114 ABA, *supra* note 89, at 1710; *see also* Swider, *supra* note 113, at 971–72.

*Information*¹¹⁵—sometimes referred to as a “treaty” between lawyers and accountants.¹¹⁶ The policy provides that lawyers should only offer predictions in the “relatively few clear cases where it appears to the lawyer that an unfavorable outcome is either ‘probable’ or ‘remote.’”¹¹⁷ The policy does not quantify the meanings of “probable” or “remote”; indeed, the policy downplays the very idea of predicting legal outcomes in numeric form, insisting that “as a general rule, it should not be anticipated that meaningful quantifications of ‘probability’ of outcome . . . can be given by lawyers in assessing litigation.”¹¹⁸ Instead, the policy uses other vague, verbal probabilities to define these terms. An unfavorable outcome is “probable” when it is “extremely doubtful that the client will prevail” and the chances of the client succeeding are “slight.”¹¹⁹ Conversely, an unfavorable outcome is “remote” when it is “extremely doubtful” the client will lose—or, in other words, when “the client may confidently expect to prevail on a motion for summary judgment.”¹²⁰ Interestingly, the ABA’s definition of “probable” is not only vague—it also differs significantly from accounting standards, which define “probable” as “likely to occur.”¹²¹

3. Tax opinion practice

The most highly developed probability lexicon comes from tax practice. Tax lawyers frequently give formal legal opinions—either to inform a client about the tax consequences of a given course of action or to fulfill a contractual obligation associated with a pending business deal.¹²² To reflect the uncertainty that surrounds many tax opinions,¹²³ tax practice has adopted specific verbal probabilities to indicate the likelihood that a particular position will be upheld. Some of these terms derive from statutory or regulatory requirements and, therefore, have specific legal consequences.¹²⁴ Others have simply grown up as a matter of customary practice.¹²⁵ “[T]ax advisors tend to be quite precise as to the particular term they choose; in practice, the terms are most certainly not interchangeable.”¹²⁶ While “[t]ax lawyers are notoriously, and understandably, reluctant to try to quantify what their comfort levels mean,”¹²⁷ commen-

115 ABA, *supra* note 89.

116 Swider, *supra* note 113, at 977; MORGAN ET AL., *supra* note 113, at 379.

117 ABA, *supra* note 89, at 1713 (emphasis added).

118 *Id.* at 1723.

119 *Id.* at 1723, 1713.

120 *Id.* at 1723.

121 *Id.* at 1719 (citing Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 5* (1975)); Swider, *supra* note 113, at 981.

122 Rothman, *supra* note 75, at 302.

123 *Id.* at 311.

124 *Id.* at 311–12; Cummings, *supra* note 16, at 1125.

125 Rothman, *supra* note 75, at 311–12.

126 *Id.* at 311.

127 *Id.* at 314.

tators have offered relatively consistent numerical estimates for these verbal probabilities.

The ends of the certainty spectrum are largely free from debate. The strongest opinion in tax practice is the “will” opinion—a “clean or unqualified opinion of near certainty, or as certain as things can be in the tax world.”¹²⁸ While such an opinion does not amount to a “guarantee of absolute certainty,”¹²⁹ a “will” opinion is appropriate when “there is merely arguable or colorable contrary view”¹³⁰ or when “there is no material risk of being wrong.”¹³¹ On the other end of the spectrum, “the lowest level at which there is some modicum of comfort as to a position”¹³² is “not frivolous,” meaning that the desired position is “merely arguable or merely colorable.”¹³³

Some verbal probabilities have been defined in regulations because they carry specific legal consequences. The clearest example is the “more likely than not” opinion.¹³⁴ The phrase “more likely than not” clearly implies a greater-than-50% chance of being sustained¹³⁵—a fact explicitly confirmed in Treasury regulations.¹³⁶ But it need not be much higher than 50%; the phrase “is generally understood to import only a slight preponderance.”¹³⁷ Other examples of prescribed levels of certainty include:

- **Reasonable basis:** Defined in regulations as “a relatively high standard of tax reporting” that is “significantly higher than not frivolous” and more than “merely arguable” or “merely a colorable claim.”¹³⁸
- **Realistic possibility of success:** This standard—no longer in effect—was previously defined by regulations as “approximately a one in three, or greater, likelihood of being sustained on its merits.”¹³⁹
- **Substantial authority:** Defined in regulations as “less stringent” than “more likely than not” but “more stringent” than a reasonable basis.¹⁴⁰ Commentators have consistently estimated “substantial authority” as conveying somewhere around a 40% likelihood of being sustained.¹⁴¹

Apart from these codified terms, other verbal probabilities are a bit more ambiguous. For example, take the word “should,” which—despite

¹²⁸ Cummings, *supra* note 16, at 1132; Sheldon I. Banoff & Richard M. Lipton, *Tax Opinions: Weasel Words?*, 83 J. TAX’N 125, 126 (1995).

¹²⁹ Rothman, *supra* note 75, at 312.

¹³⁰ Cummings, *supra* note 16, at 1132.

¹³¹ Rothman, *supra* note 75, at 312.

¹³² *Id.* at 324.

¹³³ Cummings, *supra* note 16, at 1126.

¹³⁴ See Rothman, *supra* note 75, at 308; Cummings, *supra* note 16, at 1128.

¹³⁵ Banoff & Lipton, *supra* note 128, at 125.

¹³⁶ 26 C.F.R. § 1.6662-4(d)(2) (2019).

¹³⁷ Cummings, *supra* note 16, at 1128.

¹³⁸ 26 C.F.R. § 1.6662-3(b)(3) (2019); Rothman, *supra* note 75, at 322; Cummings, *supra* note 16, at 1126.

¹³⁹ Cummings, *supra* note 17, at 1127; Rothman, *supra* note 75, at 321.

¹⁴⁰ 26 C.F.R. § 1.6662-4(d)(2); Rothman, *supra* note 75, at 319; Cummings, *supra* note 16, at 1127–28.

sounding normative—is used in the predictive sense of what a court *is likely to do*, not what a court *ought to do*.¹⁴² There appears to be broad agreement that a “should” opinion represents something between “more likely than not” and “will.”¹⁴³ Its precise meaning is a source of debate,¹⁴⁴ but consensus seems to have developed around a 70-to-80% probability.¹⁴⁵ Lastly, some commentators suggest that the phrase “although not [entirely] free from doubt” might convey a distinct likelihood or that using it might modify the strength of a “should” opinion.¹⁴⁶ [3.1]

3.1: Quantitative estimates of verbal probabilities in tax practice¹⁴⁷

Term	AICPA ¹⁴⁸	Rothman ¹⁴⁹	Banoff ¹⁵⁰	Lavoie ¹⁵¹
Will	90+%	90-95%	99.9%	>80%
Should	70-80	70-75	70-80	>66.7
More likely than not	>50	>50	50.01	>50
Substantial authority	40	35 - 40	35-40	>40
Realistic possibility of success	33.3	33.3	33-35	>33
Reasonable basis	-	20-30	>5-10 or >20 ¹⁵²	>20
Not frivolous	-	"?"	-	>10

141 Rothman, *supra* note 75, at 327; AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, STATEMENTS ON STANDARDS FOR TAX SERVICES 3 (2010) [hereinafter AICPA STANDARDS], https://www.irs.gov/pub/irs-utl/statements_on_standards_for_tax_services.pdf; Cummings, *supra* note 16, at 1128 (citing Sheldon I. Banoff, *Dealing with the “Authorities”: Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties*, 66 TAXES 1072, 1127 (1988)); Lavoie, *supra* note 84, at 20.

142 Rothman, *supra* note 75, at 313.

143 Cummings, *supra* note 16, at 1129 (“[A] prudent reader likely would reason that a ‘should’ opinion conveys more certainty than more-likely-than-not and less than ‘will.’”); Banoff & Lipton, *supra* note 128, at 126 (describing one view among tax practitioners that “should” “comes somewhere in between ‘more likely than not’ and ‘will’”).

144 See Rothman, *supra* note 75, at 313 (“[T]he exact level of authority required to render a ‘should’ opinion is probably among the least well-defined of the various levels.”); Cummings, *supra* note 16, at 1129.

145 AICPA STANDARDS, *supra* note 141, at 3; Rothman, *supra* note 75, at 327; Lavoie *supra* note 84, at 20.

146 See Cummings, *supra* note 16, at 1128 (“Although not [entirely] free from doubt: This standard applies to a reasoned opinion that concludes at less than the highest degree of certainty, but greater than more likely than not.”). Others, however, suggest there is “no consistent practice as to the use” of the phrase. Rothman, *supra* note 75, at 325.

147 Readers who enjoy this chart may also enjoy a facetious tax probability lexicon printed in *Tax Notes* that included verbal probabilities for every percentage between 1 and 100. The scale includes such labels as “I would tell my mother to do this” (91%), “if we get the right judge” (44%), “maybe Enron would do this” (14%), and “you have got to be joking” (7%). Anonymous, *A Detailed Guide to Tax Opinion Standards*, 106 TAX NOTES 1469, 1469–71 (Mar. 21, 2005).

148 AICPA STANDARDS, *supra* note 141, at 3.

149 Rothman, *supra* note 75, at 327.

150 The predictions for “will,” “should,” and “more likely than not” come from Banoff & Lipton, *supra* note 128, at 126. The authors were not necessarily asserting their own prediction as to the quantitative meanings but, rather, opining on the beliefs of tax attorneys who saw the “should” opinion as a distinct entity between “will” and “more likely than not.” The “substantial authority” and “realistic possibility of success” standards come from Banoff, *supra* note 141, at 1127.

151 Lavoie, *supra* note 84, at 20.

152 According to Banoff, “experienced tax advisors and return preparers have stated that a “reasonable basis” could be “as low as a 5 percent or 10 percent threshold chance of success, or alternatively a higher minimum standard, e.g., 20 percent.” Banoff, *supra* note 141, at 1127.

4. Takeaways from legal contexts

The approaches taken by these practice areas offer some promise for anyone hoping to standardize or define verbal probabilities in general legal writing. First, they suggest that it *is* possible to develop a widely adopted probability lexicon and considerable agreement about the meanings of those terms. The tax context, in particular—with its consistent use of terminology and a high degree of consensus on corresponding numerical meanings—suggests that advancing a common probability lexicon, by way of enacted law or by customary practice, can be effective in standardizing terminology. The tax lexicon also suggests that an effective legal probability scale can contain a fairly large number of separate probabilities and also use fine-grained differences between levels—for example, clearly delineating between “a realistic possibility of success” at 33% and “more likely than not” at 50+%, while making room for “substantial authority” as a separate category in between.

At the same time, lingering debates about the meanings of various terms—for example, whether “would” and “should” are equivalent or the effect of the phrase “although not entirely free from doubt”—highlight the difficulty in reaching consensus in the relative meanings of certain verbal probabilities, let alone their numerical meanings. And even when *lawyers* can manage to get on the same page, there may be difficulty in getting non-lawyer audiences to adopt that same meaning, as evidenced by the lawyer’s and accountant’s competing definitions of “probable.”

B. Probability lexicons in non-legal contexts

In addition to these legal examples, we can also turn to other disciplines that have attempted to standardize the way their members convey probabilities in making predictions. The following sections survey three non-legal fields—medicine, national intelligence, and climate science—that have thought deeply about the issue.

1. Medicine

Like clients facing a legal issue, patients in a medical setting “must be able to understand the risks and benefits of the options they face in order to make informed decisions”¹⁵³ So doctors, like lawyers, also regularly make predictions—whether about the likelihood of a particular diagnosis or the chances of a new medication causing an adverse reaction.¹⁵⁴ Of course, there

153 See, e.g., Dianne C. Berry et al., *Is 15 Per Cent Very Common? Informing People About the Risks of Medication Side Effects*, 10 INT’L J. PHARMACY PRAC. 145, 145 (2002).

154 See, e.g., Mahsa Seyed-Hosseini et al., *Discussing Side Effects of Over-the-Counter Medicines: Impact of Adding Percentage Data*, 18 INT’L J. PHARMACY PRAC. 275, 275 (2010); O’Brien, *supra* note 51, at 98.

are differences between predictions in the medical field and those in the legal field. For one, risks communicated by doctors—for example, the risks of a side effect or surgical complication—are often very small, sometimes far less than 1%.¹⁵⁵ And doctors, unlike lawyers, often have a solid empirical basis for making predictions, as a result of medical trials.¹⁵⁶ Still, despite the availability of this evidence, medical providers regularly use verbal probabilities to communicate risks among themselves and to their patients.¹⁵⁷

Given the potential for miscommunication when using verbal probabilities, the medical community has taken the issue seriously and conducted many studies on the ways that medical practitioners and patients interpret verbal probabilities.¹⁵⁸ The results suggest that interpretations of verbal probabilities vary widely among medical care providers; these interpretive gaps grow even larger when medical professionals communicate with their patients.¹⁵⁹ For example, Figure 3.2 (*on the following page*) shows varying interpretations of the word “probable” from a number of medical studies.

“Because of the vagueness of terms and the possibility of confusion or miscommunication, medical practitioners have been urged by decision analysts and statisticians to quantify probabilities whenever possible, or at least [] use words and numeric estimates together.”¹⁶⁰ Commentators have also suggested that standardizing probability language in medicine could reduce ambiguity.¹⁶¹ But calls for profession-wide standardization have

¹⁵⁵Mazur & Merz, *supra* note 65, at 419.

¹⁵⁶ See Michael A. Nakao & Seymour Axelrod, *Numbers are Better than Words: Verbal Specifications of Frequency Have No Place in Medicine*, 74 AM. J. MED. 1061, 1065 (1983) (suggesting that when making estimates, doctors “should determine from the literature the reported frequency of events, and should use those numbers”).

¹⁵⁷ See, e.g., O’Brien, *supra* note 51, at 98 (“Given the many uncertainties which surround the practice of medicine, a common feature of communication is the use of expressions such as ‘likely’ or ‘probable.’”); Ruta Sawant & Sujit Sanggiry, *Communicating Risk of Medication Side-Effects: Role of Communication Format on Risk Perception*, 16 PHARMACY PRAC. 1174, 1175 (2018) (noting that “pharmacists mostly use vague word-only descriptions in their counseling session with patients”).

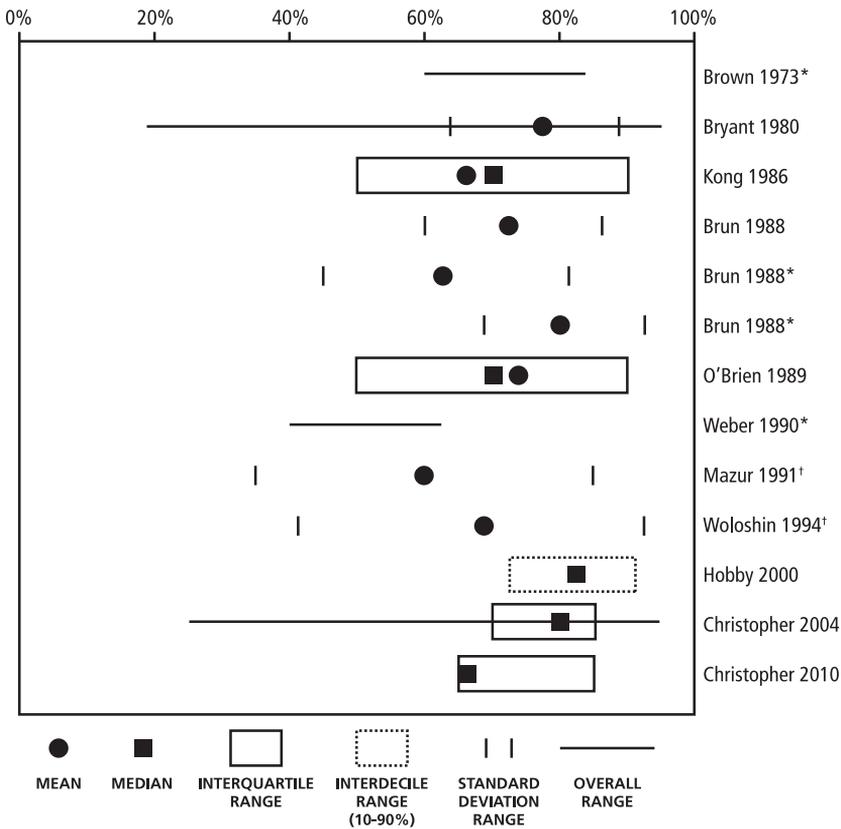
¹⁵⁸ See generally David A. Hanauer et al., *Hedging their bets: the use of uncertainty terms in clinical documents and its potential implications when sharing the documents with patients*, 2012 AMIA Annual Symposium Proceedings Archive 321, 321 (Nov. 3, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3540426> (noting and discussing “numerous attempts [that] have been made to study clinicians’ use of hedging phrases, particularly with respect to probability expressions”).

¹⁵⁹ See, e.g., Malcolm Man-Son-Hing et al., *The Effect of Qualitative vs. Quantitative Presentation of Probability Estimates on Patient Decision-Making: A Randomized Trial*, 5 HEALTH EXPECTATIONS 246, 247 (2002) (“Previous work has demonstrated that both patients and physicians give wide ranges of numerical ratings for words and phrases that denote frequency or likelihood”); Nakao & Axelrod, *supra* note 156, at 1065 (“[Our] results . . . highlight the folly of assuming that any two randomly chosen physicians are likely to have similar percentages in mind when they use any [verbal probability] term; and the likelihood of misunderstanding is even greater in physician/layman communication.”).

¹⁶⁰ Mazur & Merz, *supra* note 65, at 418 (internal citations omitted); see also Fagerlin, *supra* note 79, at 59–60 (urging medical professionals to “[p]rovide numeric likelihoods of risks and benefits” and calling verbal probability expressions “ineffective”).

¹⁶¹ See, e.g., Sawant & Sanggiry, *supra* note 157, at 1179 (“Standardization of verbal descriptors may help in minimizing the variability in gist interpretations and more accurate perceptions of risk in the future.”).

3.2: Numerical estimates of the word “probable” from medical verbal-probability studies¹⁶²



generally gone unheeded—with one notable exception. In 1998, the European Commission’s Pharmaceutical Committee adopted guidelines governing drug labels and accompanying risk information.¹⁶³ These guidelines included a recommended probability lexicon tying the frequency of side effects to specific verbal probabilities—ranging from “very rare” (a side effect expected in fewer than 1 in 10,000 patients) to “very common” (expected in more than 1 in 10 patients).¹⁶⁴

These terms and their associated probability ranges, however, were not chosen based on empirical evidence,¹⁶⁵ and subsequent research

¹⁶² This chart is reprinted from Hanauer et al., *supra* note 158, at 324.

¹⁶³ See EUROPEAN COMM’N PHARM. COMM., A GUIDELINE ON THE READABILITY OF THE LABEL AND PACKAGE LEAFLET OF MEDICINAL PRODUCTS FOR HUMAN USE (Sept. 29, 1998), <http://www.pharma-eu.com/pdfs/Guideline%20on%20Readability%20EMEA.pdf>; Rebecca K. Webster et al., *How Does the Side-Effect Information in Patient Information Leaflets Influence Peoples’ Side-Effect Expectations? A Cross-Sectional National Survey of 18- to 65-Year-Olds in England*, 20 HEALTH EXPECTATIONS 1411, 1412 (2017).

¹⁶⁴ Berry et al., *supra* note 95, at 2–3.

¹⁶⁵ See *id.* at 2.

suggested that audiences—both lay and professional—understand these terms far differently than the guidelines intended them. Indeed, multiple studies showed that “members of the general public significantly overestimate[d] the likelihood of adverse effects” when presented with the guidelines’ verbal probabilities.¹⁶⁶ For example, in one study, participants estimated that a “common” drug side effect would occur in 45% of patients—far higher than the 1-10% intended by the guidelines.¹⁶⁷ Subsequent versions of the European Commission’s drug labeling guidelines have dropped these prescribed probability phrases.¹⁶⁸

2. National Intelligence

Another field that has thought extensively about its methods of communicating predictions is national intelligence. Estimating likelihood is an essential task in the intelligence field,¹⁶⁹ and these estimates often involve considerable uncertainty.¹⁷⁰ But intelligence estimates “rarely come with explicit probabilities attached.”¹⁷¹ As a result, “[v]ague probability assessments are both common and deliberate in national security decision making.”¹⁷²

Since the mid-twentieth century, the national intelligence community has contemplated using uniform lexicons to convey likelihood estimates—exemplified by Sherman Kent’s 1964 article *Words of Estimative Probability*.¹⁷³ Kent and fellow intelligence official Max Foster (a lawyer by training) proposed a spectrum of seven words and phrases that corresponded to point estimates, surrounded by approximate buffers.¹⁷⁴ ^[3.3]

3.3: Sherman Kent’s proposed probability lexicon

Certain[]	100%
Almost certain	93 +/- ~6
Probable	75 +/- ~12
Chances about even	50 +/- 1
Probably not	30 +/- ~6
Almost certainly not	7 +/- ~5
Impossible[le]	0

¹⁶⁶ *Id.*; see also P. Knapp, *Perceived Risk of Medicine Side Effects in Users of a Patient Information Website: A Study of the Use of Verbal Descriptors, Percentages and Natural Frequencies*, 14 BRIT. J. HEALTH PSYCHOL. 579, 592 (2009).

¹⁶⁷ See Berry, *supra* note 95, at 2.

¹⁶⁸ See EUROPEAN COMM’N, A GUIDELINE ON THE READABILITY OF THE LABEL AND PACKAGE LEAFLET OF MEDICINAL PRODUCTS FOR HUMAN USE (Jan. 1, 2009), https://ec.europa.eu/health/sites/health/files/files/eudralex/vol-2/c/2009_01_12_readability_guideline_final_en.pdf; P. Knapp, *supra* note 166, at 592 (noting that a revised 2006 version of the guidelines “no longer ma[de] reference to the use of verbal descriptors”).

¹⁶⁹ Kent, *supra* note 38, at 50.

¹⁷⁰ Ho et al., *supra* note 37, at 8 (noting a study of intelligence forecasting accuracy, where only 29.5% of the forecasts implied certainty about an event—i.e., a probability of 0 or 1).

¹⁷¹ Schrage, *supra* note 76, at B01.

¹⁷² Friedman, *supra* note 69, at 804.

¹⁷³ See Kent, *supra* note 38; Ho et al., *supra* note 37, at 54.

¹⁷⁴ Kent, *supra* note 38, at 55.

Kent's ideas about quantifying and standardizing probability language met resistance from many colleagues during his time, and he eventually "dropped all thought of getting an agreed air-tight vocabulary of estimative expressions" adopted by the intelligence community.¹⁷⁵ But his ideas about precision and consistency caught on, and the U.S. intelligence community has subsequently made several attempts at creating standardized probability language for use in intelligence estimates. After September 11th, the National Intelligence Council employed five- and seven-grade scales of standardized verbal probability words—using words such as *Remote*, *Very unlikely*, *Unlikely*, *Even chance*, *Probably/Likely*, *Very likely*, and *Almost certainly*—but without tying them to numerical probabilities.¹⁷⁶ Similarly, a 2015 memorandum from the Defense Intelligence Agency laid out a lexicon of qualitative probability phrases—including a wider range of synonyms—to convey uncertainty but expressly rejected the notion of tying those to numerical values.¹⁷⁷ But, that same year, a directive from Director of National Intelligence (DNI) James Clapper embraced seven likelihood ranges with two verbal options and a corresponding numerical value for each range.¹⁷⁸ [3.4]

3.4: Probability lexicon, Director of National Intelligence Intelligence Community Directive No. 203

Almost certain / Nearly certain	90-99%
Very likely / Highly probable	80-95
Likely / Probable	55-80
Roughly even chance / Odds	45-55
Unlikely / Improbable	20-45
Very unlikely / Highly improbable	5-20
Almost no chance / Remote	1-5

The United States isn't the only country that has developed such a scale. The United Kingdom's Defence Intelligence has developed a similar lexicon—although, interestingly, this close U.S. ally's scale uses numerical values that differ *for every single category* from the American scale.¹⁷⁹ [3.5]

¹⁷⁵ *Id.* at 56.

¹⁷⁶ NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: PROSPECTS FOR IRAQ'S STABILITY: A CHALLENGING ROAD AHEAD (Jan. 2007), <https://fas.org/irp/dni/iraq020207.pdf>; Friedman, *supra* note 69, at 805; Ho et al., *supra* note 37, at 59; Friedman & Zeckhauser, *supra* note 36, at 91.

¹⁷⁷ Friedman, *supra* note 69, at 804–05 (noting that the DIA memorandum expressly states that "*DIA does not condone the use of probability percentages in its products to portray likelihood*") (emphasis in original) (quoting Tradecraft Note 01-15: Expressing Analytic Certainty (Jan. 5, 2015)).

¹⁷⁸ INTELLIGENCE COMMUNITY DIRECTIVE NO. 203: ANALYTIC STANDARDS 3 (Jan. 2, 2015), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>.

¹⁷⁹ See Dhimi, *supra* note 94, at 260; Ho et al., *supra* note 37, at 58.

3.5: Probability lexicon, UK Defence Intelligence

Almost certain	90-100%
Very likely	70-85
Likely / Probable	55-70
Realistic possibility	25-50
Unlikely / Improbable	15-20
Highly unlikely / Remote	0-10

While these probability scales may be official policy, “neither lexicon relies on systematic empirical research,”¹⁸⁰ which raises the potential that analysts and decisionmakers won’t actually use and interpret these probability phrases as they were intended. Indeed, subsequent studies have shown “potential inconsistencies” between analysts’ interpretation and the mandated lexicons,¹⁸¹ leading researchers to suggest revisions to the U.S. intelligence lexicon, as summarized in Figure 3.6.^{13.61}

3.6: Prescribed U.S. intelligence lexicon and participants’ interpretations from empirical studies¹⁸²

Term	US Intel Scale	Dhami	Ho et al. (PV Method)	Ho et al (MF Method)
Almost certain	95-99%	90%	80-100	90-100
Nearly certain		–	–	–
Very likely	85-90	70-90	75-80	80-90
Highly probable		80-90	–	–
Likely	55-80	60-80	60-75	50-80
Probable		60-90	–	–
Roughly even chance	45-55	–	45-60	45-60
Roughly even odds		–	–	–
Unlikely	20-45	10-40	25-45	20-40
Improbable		20-40	–	–
Very unlikely	5-20	10-20	15-25	15-25
Highly improbable		–	–	–
Almost no chance	1-5	–	–	–
Remote		10	0-15	0-10

3. Climate Science

Climate scientists—who must communicate to the public the likelihood of various outcomes relating to climate change—have also given serious thought

¹⁸⁰ Ho et al., *supra* note 37, at 59; *see also* Dhami, *supra* note 94, at 259 (noting that “the standardized lexicons advocated by [intelligence organizations] have not been informed by empirical evidence”).

¹⁸¹ *See* Dhami, *supra* note 94, at 266; Ho et al., *supra* note 37, at 60.

¹⁸² *See* Dhami, *supra* note 94, at 265; Ho et al., *supra* note 37, at 61.

to the issue of communicating uncertain predictions.¹⁸³ In preparing its Assessment Reports, the Intergovernmental Panel on Climate Change (IPCC) has convened meetings with its working groups to discuss the issue.¹⁸⁴ The IPCC’s Fourth and Fifth Assessment Reports used verbal probabilities that conveyed the likelihood of the group’s estimates.¹⁸⁵ To clarify the group’s intended meaning, the IPCC adopted standard verbal probabilities that the group defined with specific quantitative ranges. The group’s standardized lexicon used ten likelihood qualifiers:^{186,187}

3.7: IPCC probability lexicon¹⁸⁶

Virtually certain	>99%
Extremely likely	>95
Very likely	>90
Likely	>66
More likely than not	>50
About as likely as not	33 to 66
Unlikely	<33
Very unlikely	<10
Extremely unlikely	<5
Exceptionally unlikely	<1

In addition to the group’s internal discussion of its methods of communicating probability, multiple external studies have examined the way that lay audiences interpret the IPCC’s probability terms; the results have not been encouraging.¹⁸⁷ These studies have generally shown that lay audiences’ interpretations of these phrases can differ considerably from scientists’ intended meanings—even when participants had been previously shown the IPCC’s numerical conversion chart.¹⁸⁸ The effects were especially pronounced for phrases used to convey higher and lower probabilities, such as “very likely” or “very unlikely”; lay readers tended to have a much wider, more moderate interpretation of those terms than the IPCC intended to convey.¹⁸⁹ These studies



¹⁸³ Ho et al., *supra* note 37, at 55.

¹⁸⁴ IPCC GUIDANCE NOTE, *supra* note 80, at Annex A-1.

¹⁸⁵ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 SYNTHESIS REPORT 27, 79, 83 (2008), http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_full_report.pdf; Nick Pidgeon & Baruch Fischhoff, *The Role of Social and Decision Sciences in Communicating Uncertain Climate Risks*, 1 NAT’L CLIMATE CHANGE 35, 37 (2011) (summarizing the Fourth Assessment’s use of probabilistic language).

¹⁸⁶ IPCC GUIDANCE NOTE, *supra* note 80, at 3.

¹⁸⁷ See, e.g., Ho et al., *supra* note 37, at 55; David V. Budescu, *Improving Communication of Uncertainty in the Reports of the Intergovernmental Panel on Climate Change*, 20 PSYCHOL. SCI. 299, 299 (2009).

¹⁸⁸ See Ho et al., *supra* note 37, at 58; Budescu, *supra* note 186, at 299 (summarizing findings by noting that “respondents’ judgments [about likelihoods] deviated significantly from the IPCC guidelines, even when the respondents had access to these guidelines”).

¹⁸⁹ See Ho et al., *supra* note 37, at 64.

have suggested several ways to improve audience comprehension, such as listing both the verbal probability and its numeric equivalents in a given sentence¹⁹⁰ or modifying the scale to better comport with readers' intuitive understanding of the terms.¹⁹¹ [3.8]

3.8: Suggested, evidence-based IPCC lexicon (Ho et al., 2015)¹⁹²

Term	IPCC Scale	Suggested, evidence-based lexicon	
		PV Method	MF Method
Very likely	>90%	80 - 100%	75 - 100%
Likely	>66	50-80	40-75
Unlikely	<33	20-50	15-40
Very unlikely	<10	0-20	0-15

4. Takeaways from non-legal fields

The non-legal examples outlined above offer several potential lessons. They suggest that it is possible to develop and implement standardized probability lexicons, even in fields—like national intelligence—that involve very subjective analysis and that have traditionally resisted quantifying their predictions. But this optimism comes with several caveats.

First, just because it is possible to develop a probability lexicon doesn't mean it will be an easy sell. After all, there was a fifty-year gap between the publication of Sherman Kent's *Words of Estimative Probability* in 1964 and the 2015 National Intelligence directive that adopted a standardized lexicon tied to numerical ranges. And, indeed, even when the Director of National Intelligence promulgated that scale, another American intelligence unit—the Defense Intelligence Agency—reiterated its opposition to numerical probabilities.¹⁹³ Plus, the fact that the American and British probability scales differ significantly suggests that even experts in identical fields can have difficulty reaching consensus on a consistent meaning of qualitative probability phrases.¹⁹⁴

Additionally, there is the possibility that lexicons may be used or interpreted very differently from the way they were intended. Subsequent research from all of these fields has shown that lay audiences—and even

¹⁹⁰ See Budescu, *supra* note 187, at 306 (suggesting that misinterpretation can be reduced by "supplementing verbal terms with numerical boundaries—for example, writing a sentence like "The Greenland ice sheet and other Arctic ice fields likely (66%-85%) contributed no more than 4m of the observed rise in sea level.").

¹⁹¹ See Ho et al., *supra* note 37, at 55.

¹⁹² The numbers in this chart correspond to the two different methods used in the Ho study—the peak value (PV) method and the membership function (MF) method—to measure lay interpretations of probability terms. *Id.* at 57.

¹⁹³ See *supra* note 178 and accompanying text.

¹⁹⁴ See Ho et al., *supra* note 37, at 59 (describing the discrepancy between the U.S. and UK probability scales as "startling" and "puzzling").

the professionals within those fields—may have intuitive understandings of probability expressions that differ widely from the prescribed numerical probabilities. But these same studies also offer a glimmer of hope: they show that probability language can be subjected to serious thought and empirical study—suggesting that a probability lexicon can be refined over time to improve its effectiveness.

Lastly, these fields’ experiences offer some guidance about actually using a probability lexicon: using *both* verbal and the corresponding numerical probabilities in close proximity should maximize its effectiveness and minimize the chance of misinterpretation.¹⁹⁵

C. Toward a general legal writing probability lexicon

We can use the lessons and examples discussed in this section to craft a workable legal writing probability lexicon. So, first, which words to include? Well, to reduce the potential for confusion, we want to avoid using anything that could imply a normative judgment or conflate a likelihood with the desirability of the outcome¹⁹⁶—so phrases like “should” or “good chance” are best left out. And because any attempt to implement a shared probability scale is a major undertaking,¹⁹⁷ to minimize disruption or confusion, the lexicon should incorporate existing guidance from the legal writing community and include terms that are already widely used. Overall, the DNI Directive terminology—based on variations of “likely” and “probable” with additional words like “almost certain” or “almost no chance” at the end-points—seems most consistent with the qualifiers already in common use in legal writing.¹⁹⁸

And what numbers should those words correspond to? In theory, lawyers wishing to use a probability lexicon could assign any values they like; defining the probability expressions for the audience would, itself, reduce ambiguity. But rather than “arbitrarily assigning numerical values to probabilistic expressions, we naturally want to match as closely as possible the general usage of the groups involved.”¹⁹⁹ By looking to previous attempts and studies, we can generate a best estimate of how audiences are likely to interpret probability expressions in legal writing. To

195 See *supra* notes 160 and 190 and accompanying text.

196 See *supra* note 60 and accompanying text.

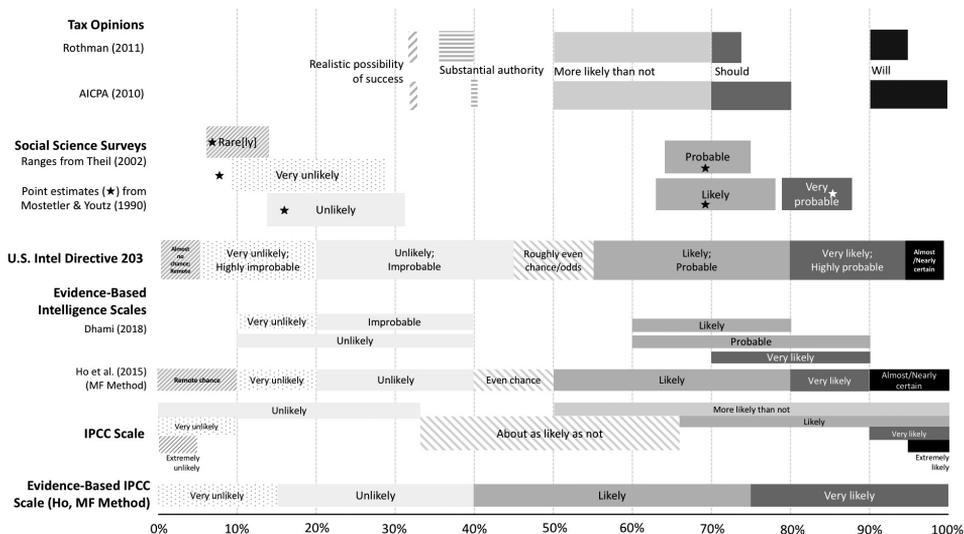
197 Beyth-Marom, *supra* note 48, at 268.

198 Compare *supra* note 21 and figure 1.1 with *supra* figure 3.3. See also Langevoort & Rasmussen, *supra* note 25, at 417 (“In practice, [legal] advice tends to be rendered within the framework of a more restrictive set of conventional locutions: sanction of the proposed course of action, for instance, might be said to be certain to occur; highly likely; likely; uncertain; unlikely; highly unlikely; or certain not to occur.”).

199 Augustine Kong et al., *How Medical Professionals Evaluate Expressions of Probability*, 315 NEW ENG. J. MED. 740, 743 (1986).

start, here are some of the previously discussed examples, laid out in a single chart: [3.9]

3.9: Summary of probability lexicons and numerical ranges



Several patterns emerge from looking at these previous examples laid out side-by-side:

- **How many gradations?** To be useful, the probability scale must have enough discrete levels so that there is a meaningful difference among them, but a scale must not be so fine-grained as to imply scientific precision.²⁰⁰ The experience of tax opinion practice suggests that lawyers and clients can meaningfully distinguish between at least seven levels of certainty—a fact further supported by both the U.S. intelligence (7 gradations) and the IPCC (10 total gradations) probability scales. This is also consistent with empirical research, which has found that “subjects seem able to discriminate 7 levels of subjective confidence.”²⁰¹
- **The ends of the spectrum.** Nearly all of the previous examples support the notion that there are relatively clearly defined ends to the spectrum—corresponding roughly to the 0–10% range or the 90–100% range. On the lower end, these correspond to terms like

²⁰⁰ For example, Sherman Kent originally contemplated a scale comprising eleven probability words with corresponding numerical ranges, but he later decided to reduce the number of levels because “given the inexactness of the intelligence data [we] were working with, the distinctions [we] made between one set of odds and its fellows above and below were unjustifiably sharp.” Kent, *supra* note 38, at 55.

²⁰¹ Beyth-Marom, *supra* note 48, at 267.

“rare,” “remote,” or “almost certainly not,” while on the upper end, these are labeled as “almost certain” or “will.” And while the social science meta-analyses do not include a similar high-end estimate, they show that there is room for another category above “very probable”—which tops out around 87% probability.

- ***More likely than “more likely than not”?*** There appears to be a meaningful difference between “more likely than not” and “likely.” The social science suggests that people view “likely” somewhat higher—somewhere in the 60–75% range. This is also reflected in the IPCC’s scale—where “more likely than not” applies to any percentage about 50%, but “likely” requires at least 66% probability—and in the intelligence scales, where the “likely” category doesn’t begin until 55% probability and extends up to 70% or 80%. This seems consistent with general legal usage, where “more likely than not” implies only a “slight preponderance.”²⁰²
- ***“Likely” and “Probably” are synonyms.*** Both the empirical research and defense intelligence practice suggest that “likely” and “probably” are interpreted similarly and can be used interchangeably,²⁰³ which is promising, as legal writing guides commonly recommend both terms.²⁰⁴ But lawyers should be consistent within a given document by choosing either “likely” root words or “probable” root words and sticking with it.²⁰⁵

Combining previous lexicons and the empirical research discussed in this article, I propose the probability scale (*Figure 3.10*) reflects the best estimate for how audiences will interpret probability expressions in general, predictive legal writing.^[3.10]

A few thoughts about the proposed scale. First, the scale is asymmetrical, but that’s OK. This comes from separating “more likely than not” and “likely,” whereas there’s not a corresponding analog for “less likely than not” that would fall just below the 50% threshold. This asymmetry makes the scale somewhat less aesthetically pleasing, but it comports with previous studies, which have shown that positive and negative probability expressions (e.g., “likely” and “unlikely”) are not always perfect

202 See *supra* note 137 and accompanying text.

203 See, e.g., Ho et al., *supra* note 37, at 60 (reporting results and concluding that “probably” and “likely” “are, for all practical purposes, indistinguishable and thus can be treated as synonyms”); Robert T. Reagan et al., *Quantitative Meanings of Verbal Probability Expressions*, 74 J. APPLIED PSYCHOL. 433, 441 (1989) (concluding that expressions using the stem word “likely” were “synonymous” with expressions using “probable” (e.g., “very unlikely” and “very improbable”)); *supra* figure 2.1.

204 See *supra* note 22 and figure 1.1.

205 Cf. INTELLIGENCE COMMUNITY DIRECTIVE NO. 203, *supra* note 178, at 3 (“strongly encourag[ing] analysts not to mix “likely” and “probably” root words).

3.10: Suggested probability lexicon for general legal writing

Almost certain	90-100%
Very likely / Very probable	75-90
Likely / Probable	60-75
More likely than not	50-60
Unlikely / Improbable	20-50
Very unlikely / Very improbably	10-20
Almost no chance	0-10

complements.²⁰⁶ Also, as a result of this asymmetry and to avoid gaps in the scale, the “unlikely”/“improbable” range comprises a large range—from 20% to 50%. In practice, however, the evidence suggests that audiences will interpret “unlikely” on the lower end of this scale—closer to the 20–30% range.²⁰⁷

Lastly, in terms of actually using this probability lexicon—or any other—the attorney must, of course, inform the audience of the lexicon being used. It may be tempting to simply take a probability scale and bury it in a footnote or an appendix to a memorandum and then use verbal probabilities in the main text. But because verbal probabilities can still be misinterpreted even if audiences have access to the probability lexicon in some format,²⁰⁸ the better practice would be to use *both* the verbal and numerical probabilities in close proximity to minimize the risk of misinterpretation.²⁰⁹ Applying this principle, a lawyer might write something like, “It is likely (a 60–75% probability) that a court would find . . .”

IV. Further opportunities for legal writing practitioners, scholars, and educators

The issue of communicating likelihood estimates to clients presents opportunities to all stakeholders in the legal writing community. For practitioners, the issues raised in this article present an opportunity to reevaluate the ways in which they communicate predictions to clients. For

206 See Kong et al., *supra* note 199, at 741; Reagan et al., *supra* note 203, at 440–41.

207 See *supra* figure 3.7.

208 See *supra* notes 100 and 188 and accompanying text.

209 See Vivianne H. M. Visschers, *Probability Information in Risk Communication: A Review of the Research Literature*, 29 RISK ANALYSIS 267, 270 (2009) (recommending that analysts “[p]resent both numerical and verbal probability information in a risk message”); Budescu, *supra* note 187, at 306 (recommending that verbal probability terms “should be accompanied by a range of probabilities,” noting that “supplementing verbal terms with numerical boundaries improve[s] the quality of communication considerably”); Monahan & Steadman, *supra* note 32, at 935 (noting that when communicating uncertainty “[t]he use of multiple risk formats might aid comprehension,” and suggesting a combination of qualitative risk categories and quantitative frequencies or probabilities).

example, lawyers could consider rethinking their traditional aversion to quantitative probabilities and begin to put their legal predictions into numbers. Or, if they prefer to continue using natural language, lawyers might consider supplementing their language with quantitative ranges—whether or not they adhere to the specific scale suggested in this article.

Issues of communicating predictions also provide opportunities for legal writing scholars. This article has attempted to estimate the most likely meanings of probability expressions as used in general legal analysis. But, ideally, the proposed scale would be just the start of a broader conversation.²¹⁰ Ultimately, for any probability lexicon to truly be effective, it should take into account the actual understandings of the analysts and audiences who will be using them.²¹¹ So, scholars should work to learn how lawyers and clients actually interpret verbal probability phrases in various counseling contexts, since interpretations are likely to change depending on the legal matters involved.²¹² Specifically, researchers should conduct studies—similar to those done in the fields of psychology,²¹³ medicine,²¹⁴ national intelligence,²¹⁵ and climate science²¹⁶—that ask participants to quantify or rank their interpretation of various probability phrases. The legal writing community—with scholars dedicated to empirically studying language use in legal contexts²¹⁷—is well-positioned to take up this task.

Legal writing scholars could also work to further explore the possibility of standardizing a lexicon of probability expressions. For lawyers and clients, bringing uniformity to uncertainty language “could reduce errors in communication of uncertainty and could consequently improve decision outcomes.”²¹⁸ And for the field of legal writing, in particular, the

210 Cf. Mosteller & Youtz, *supra* note 47, at 10 (presenting research on probability expressions that “invites preliminary discussion and criticism that could be the basis for additional work before firming up either form of codification”).

211 Dhami, *supra* note 94, at 267 (noting that “[a]n evidence-based approach to the development of a standardized lexicon” can improve its effectiveness); Ho et al., *supra* note 37, at 55.

212 Cf. O’Brien, *supra* note 51, at 100 (discussing the need to examine how patients’ understanding of probability phrases differs in different clinical contexts).

213 See generally Theil, *supra* note 43, at 178 (summarizing previous research on interpretations of qualitative probability expressions).

214 See, e.g., Mazur & Merz, *supra* note 65; Kong et al., *supra* note 199.

215 See Ho et al., *supra* note 37; Dhami, *supra* note 94.

216 See, e.g., Ho et al., *supra* note 37.

217 See, e.g., Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship between Brief Writing and Summary Judgment Success*, 22 LEGAL WRITING 61 (2018); Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of Negativity Bias*, 14 LEGAL COMM. & RHETORIC: JALWD 1 (2017); Kevin Bennardo, *Testing the Geographical Proximity Hypothesis: An Empirical Study of Citations to Nonbinding Precedents by Indiana Appellate Courts*, 90 NOTRE DAME L. REV. ONLINE 125 (2015); Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—or Is It?*, 45 IDAHO L. REV. 171 (2008).

218 Karelitz & Budescu, *supra* note 37, at 26.

development of a probability lexicon also presents a discipline-building opportunity. In other areas of legal writing practice and pedagogy, scholars have noted the importance of common lexicons, since “without a developed, commonly shared and understood vocabulary, the [legal writing] discipline struggles and communication failure is common.”²¹⁹ The heads of the working groups of the IPCC, for example, convened a two-day meeting in 2010 to discuss how to ensure “[c]onsistent treatment and communication of uncertainty” in the Fifth Assessment.²²⁰ The legal writing community could convene a similar meeting—or, perhaps, a simple workshop session—at a future conference.

Given the importance of prediction as a lawyering task, lessons about communicating predictions could also be a part of the first-year legal writing curriculum. Such a conversation could naturally fit into a broader discussion about client letters or about brief answers or conclusions in memoranda, where probability expressions are likely to appear.²²¹ The conversation could include a range of issues from practical writing guidance to students’ ethical and professional identities as lawyers, including:

- The practical and ethical importance of accurately assessing and communicating uncertainties about potential legal outcomes²²²
- The various sources of uncertainty in predictive legal analysis²²³
- Different ways of communicating predictive analysis—including the advantages and disadvantages of quantitative and qualitative probability expressions²²⁴
- How clients’ needs, expectations, and backgrounds might affect their ability to understand legal advice and how students’ choices in “tone and style” affect how their writing is received by clients²²⁵
- The selection of an appropriate level of certainty as an exercise of professional judgment²²⁶

219 See Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 ME. L. REV. 239, 240 (2004); *id.* at 269 (“For those whose professional life is devoted to teaching communication skills, it is well worth the effort needed to develop and support a shared language.”).

220 IPCC GUIDANCE NOTE, *supra* note 80, at Annex A-1.

221 See Turner, *supra* note 13, at 3.

222 See *supra* notes 1–11 and 64–67 and accompanying text.

223 See *supra* notes 13–19 and accompanying text.

224 See generally *supra* sections 2.1–2.3.

225 Turner, *supra* note 13, at 3.

226 *Id.* at 7 (“Just how definitive a lawyer should be with a brief answer in professional work depends on many factors Making those judgments in the real world will be part of students’ lives as professional attorneys.”).

Because of the demands of the typical first-year curriculum, there likely won't be sufficient time to delve deeply into each of these topics.²²⁷ And we shouldn't "expect students to master the intricacies of brief answer qualifiers and their real-world impacts in a first-year legal research and writing course. Still, asking students to think more deeply about their [predictions] promotes the higher-level thinking we hope students develop."²²⁸ And given the critical role that prediction plays for lawyers, that kind of deliberation is precisely what we should be asking of both current—and future—lawyers.

V. Conclusion

Lawyers must be careful to ensure the language used to communicate legal analysis accurately reflects their best, reasoned judgment. This includes the vital, last link in the chain: the probability expressions that lawyers use when making predictions about legal outcomes. Lawyers need to take this issue seriously, given the high potential for miscommunication. This article has attempted to define common legal verbal probabilities in an effort to reduce ambiguity. But further discussion and research are needed to ensure that we, as lawyers, are using language that best allows our clients to make fully informed decisions about legal matters. Hopefully, this article is merely the first step in encouraging both scholars and practitioners to be more deliberate in considering the issues of communicating uncertainty in legal writing.

²²⁷ Caroline L. Osborne, *The State of Legal Research Education: A Survey of First-Year Legal Research Programs, or "Why Johnny and Jane Cannot Research,"* 108 L. LIB. J. 403, 409 (2016) (noting that basic first-year legal writing courses are "already crowded for time and must teach a multiplicity of basic skills").

²²⁸ Turner, *supra* note 13, at 3.

Analogy Through Vagueness

Mark Cooney*

[E]very term goes cloudy at its edges

—H.G. Wells¹

I. Introduction

A funny thing, this vagueness. To laypersons and lawyers alike, the word *vague* has a negative connotation. Something vague is uncertain, unclear, wishy-washy. Courts declare laws void for vagueness—laws with language too indefinite to give fair notice and, thus, to withstand constitutional scrutiny.² Scholars call the term “pejorative.”³

And yet lawyers need vagueness, and the best lawyers master it. Experts have long recognized the need for flexible language—vague language—in legislation.⁴ And the leading drafting texts acknowledge the

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¹ H. G. WELLS, *The Classificatory Assumption*, in FIRST AND LAST THINGS § 1.5 (Project Gutenberg ed. 2016) (e-book), <http://www.gutenberg.org/files/4225/4225-h/4225-h.htm>; see also ROY SORENSEN, *Vagueness*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3 (Edward N. Zalta ed. 2018) (e-book), <https://plato.stanford.edu/archives/win2016/entries/vagueness/>.

² *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015).

³ See, e.g., SORENSEN, *supra* note 1, § 2; MICHAEL P. LYNCH, TRUTH IN CONTEXT: AN ESSAY ON PLURALISM AND OBJECTIVITY 61 (1998).

⁴ See, e.g., George C. Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885, 890 (1964) (stating that “[t]he importance of the flexibility that vagueness gives to all normative methods of social control can scarcely be overestimated and is recognized by all”); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 856 (2010) (noting that “vague terms may do a better job than precise terms in promoting the goals of contract design”).

⁵ See, e.g., MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS 316 (2013) (noting that “a drafter needs to use vague language” when unable to predict or specify every circumstance that might fit a category).

art of shaping vagueness in legislation, codes, and contracts.⁵ For drafters, vagueness is “both unavoidable and a potential benefit.”⁶ In the “highly stipulative enterprise” of legal rulemaking, the indecision accompanying vague terms is “functional,” a prudent safeguard against premature commitment and a safeguard that allows us to “fill in meanings as we go along in light of new information and interests.”⁷ In other words, vagueness “allows flexibility and spares the drafter from the impossible task of having to identify, and include or exclude, every conceivable particular.”⁸

For instance, imagine—as Professor Tina Stark does in a leading text—an employment contract promising a low-interest loan toward a new executive’s Manhattan “house.”⁹ The term *house* “is problematic,” Stark notes, because it’s “too specific.”¹⁰ Manhattan has far more “cooperatives, condominiums, townhouses, and lofts” than traditional houses.¹¹ For a Manhattan executive’s contract, “a more vague, more inclusive term such as *residence* or *home* is more appropriate.”¹²

The best legal drafters use careful, calculated vagueness to produce forward-thinking language like that found in the Federal Rules of Criminal Procedure.¹³ Rule 41(d)(3), for example, allows a magistrate judge to issue a warrant based on information communicated by telephone “or other reliable electronic means.” Somewhat vague? You bet. And effective. As the technology juggernaut screams forward, having already gone from PC to laptop to iPad to smartphone, and from e-mail to text to Skype to Google Hangouts—and who knows what next?—an appropriately broad, fuzzy category like *other reliable electronic means* is ingenious. It allows the rule to remain viable into the indefinite future, accounting for all sorts of electronic communication devices that we haven’t yet conceived. In short, for lawyers, vagueness is a strategic, creative tool¹⁴—a lens we zoom in or out to capture the right semantic shot.

6 Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 39, 54 (2001–2002).

7 SORENSEN, *supra* note 1, § 8; see also Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 93 (2002) (arguing that “the vagueness in takings doctrine is quite functional and entirely appropriate”).

8 Kimble, *supra* note 6, at 54–55; see also Choi & Triantis, *supra* note 4, at 883 (noting that a vague term can “reduce the risk of errors of over- and under-inclusiveness stemming from precise terms,” serving as a helpful “catch-all for contingencies, particularly unforeseen contingencies, that are not encompassed by the precise terms”).

9 TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 296 (2d ed. 2014).

10 *Id.*

11 *Id.*

12 *Id.* (italics in original).

13 See Kimble, *supra* note 6, at 55 (listing sixteen examples of vague language within the first six rules).

14 See SORENSEN, *supra* note 1, § 8 (noting that vague terms allow judges to exercise discretion through a “creative” gap-filling process).

Careful vagueness won't achieve a utopian bliss free from disputes about intent or meaning. Indeed, Professor Scott Brewer defines *vagueness* as a term that “occasions doubt in a language user about whether a particular object falls within the scope of the term.”¹⁵ Others call it a proposition that is “intrinsically uncertain.”¹⁶ Yet careful, appropriate vagueness can move our texts closer to something resembling linguistic immortality. Just ask the Framers: “unreasonable searches and seizures” . . . “due process of law.”¹⁷

But legislative and contract drafters don't have a monopoly on these language-shaping techniques. While language-shaping may be more visible in the drafting context, litigators and judges shape language in similar ways, at both the micro and macro level. Litigators use vague language to draw analogies—and use precise language to counter that strategy and draw distinctions.¹⁸ After all, a litigator's life is not a steady stream of perfectly on-point cases with ready application. Instead, the litigator often lives on the analytical fringes, trying to argue plausibly that—for a simple example—a pen is like a stapler. And some lawyers might try to buttress that argument by pointing out that both items indisputably fall within the same vague category: office supplies.

My focus here is on this advocacy technique: the lawyer's use of what I call vague analogical categories. And while any number of fine articles flesh out analogical reasoning (and other forms of legal reasoning) with an eye toward exposing fallacies and assessing the validity of resulting conclusions,¹⁹ my interest is solely in the lawyering process—in how advocates shape ideas and language, sometimes in subtle ways, to make analogical *assertions*.²⁰ It's a type of semantic advocacy that some commentators, including Judge Richard Posner, might call mere rhetoric—perhaps even “self-serving” rhetoric—as opposed to policy-based legal

15 Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 937 n.35 (1996); see also Kimble, *supra* note 6, at 54 (noting that we could, for example, “apply the term *good health* to most persons without much disagreement,” but “we would still have the in-between cases, say someone with high (itself vague!) cholesterol”).

16 See, e.g., SORESEN, *supra* note 1, § 1 (quoting CHARLES SANDER PEIRCE, DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 748 (1902)).

17 See Christie, *supra* note 4, at 890.

18 Brewer, *supra* note 15, at 937 n.35 (noting that *precision* is the “logical antonym” of *vagueness*).

19 See, e.g., PAUL BARTHA, *Analogy and Analogical Reasoning*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2013) (e-book), <https://plato.stanford.edu/archives/win2016/entries/reasoning-analogy/>.

20 See Brewer, *supra* note 15, at 963. Readers might also explore the growing body of literature on how stock cognitive structures affect advocacy and statutory interpretation. See, e.g., Michael R. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 LEGAL COMM. & RHETORIC: JALWD 1 *passim* (2011) (exploring, among other things, how ambiguity can arise when a nonprototypical item technically fits within a statutory category yet clashes with that category's standard stock structure—as with an ostrich's falling into the bird category—and also exploring how advocates might evoke more favorable stock structures when their facts technically fall outside a statutory category).

reasoning.²¹ (Judge Posner has remarked that “[a]nalogies are not reasons.”²²) Nevertheless, vagueness, that oft-maligned linguistic bugaboo, is a sharp piece of rhetorical weaponry.

II. Vagueness in Argument

Building on the definitions mentioned above, in referring to *vagueness* I mean a degree of breadth and imprecision high enough to encompass multiple, distinct items and show their commonality, with the ultimate aim of drawing useful legal analogies. As Professor Jeremy Waldron put it, this type of vagueness “attends complex predicates whose meaning is understood in terms of the application of other predicates.”²³ This concept gets clearer with a look at philosopher-logician Ludwig Wittgenstein’s lively explanation, later put to good effect by Professor Waldron:

Consider for example the proceedings that we call “games.” I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don’t say: “There *must* be something common, or they would not be called ‘games’”—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look!—Look, for example, at board-games, with their multifarious relationships. Now pass to card-games; here you may find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all “amusing”? Compare chess with tic-tac-toe. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-around-the-rosy; here is the element of amusement, but how many other characteristic features have disappeared!²⁴

21 Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 762, 764 (2006) (book review) (describing analysis that “never dips below the semantic level,” in contrast to policy-based analysis).

22 *Id.* at 768.

23 Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 517 (1994). Waldron also notes that vagueness can also be found in “classificatory terms” that create a continuum, such as the term *community*, which encompasses locations arranged on a population continuum ranging from *villages* to *towns* to *cities*. *Id.* at 516–17.

24 *Id.* at 517–18 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 66, at 31e–32e (G.E.M. Anscombe trans., 1974)).

Thus, *game* is a vague category into which we might fit any number of activities that are similar—and dissimilar—in some or many ways. An Olympian pole-vaulting 18 feet into the air and over a bar is, as Professor Wittgenstein suggests, arguably doing the same thing as two children playing “Go Fish” at a card table: participating in a *game*. With a vague category such as this, “a competent speaker can faultlessly classify the borderline case as a positive instance while another competent speaker can faultlessly classify the case as a negative instance.”²⁵

Keeping these notions of vagueness in mind, we begin to see how lawyers might try to change perceptions and advance arguments by asking readers or listeners to step back from the differences—from the precise details—and appreciate anew how facially different items are alike. Returning to my fanciful hypothetical, picture yourself staring down a skeptical judge and declaring that “a pen is like a stapler.” When pressed, how might you justify the comparison? After all, a pen is for writing, and staplers don’t write. On the flip side, a stapler fastens together sheets of paper, and pens can’t do that (in any lasting way). By being precise, we see that these are two very different things.

Yet by getting vague and calling them *office supplies*, we make them the same. We’ve broadened our language and softened the conceptual edges just enough to accurately fit into a common category one device used for writing and one device that cannot be used for writing. And this calculated vagueness serves our purpose: it creates an encompassing category that, we hope, connects the two items we’ve placed within it. As philosophy professor Roy Sorensen has noted, “[g]enerality is obviously useful” in projecting the characteristics of one item in a category to other items in that category.²⁶

We might reinforce our vague *office supplies* category by offering up more specific qualities that the contained items share or scenarios in which the items are logically linked. For instance, pens and staplers both help office workers accomplish clerical tasks in the workplace. They’re found together—or near each other—on desks, in supply closets, and on store shelves. Can they really be so different? Materially different?

Scholars often define *analogizing* as “reasoning from the particular to the particular”²⁷ rather than reasoning from the particular to the general. Yet as you saw above, an attorney who reasons from the particular to the

25 SORENSEN, *supra* note 1, § 2 (attributing view to Crispin Wright and Stewart Shapiro).

26 *Id.*

27 RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 90 (3d ed. 1997).

general can suggest a closer similarity—a parallel—between two or more particulars.

Opposing counsel would draw distinctions by doing just the opposite: by narrowing the language and ideas. In other words, she would counter vagueness with precision.²⁸ When we focus on the precise qualities and functions of each item, the items become less sibling and more distant cousin. Returning to our *office supplies* example, an opponent getting precise might point out that a pen is a thin, streamlined, cylindrical vessel that dispenses ink, and a stapler doesn't look or act like that. Staplers fasten sheets of paper together by applying metal fasteners. A pen does not affix metal fasteners and cannot fasten together sheets of paper. More important, a pen is an instrument used to communicate. One cannot write—communicate—with a stapler.

When we delve into this realm of precision and hammer away at a pen's distinguishing characteristics with supporting examples, the stapler is tossed to the wayside as a clumsy (distinguishable) interloper—the distinction emerges, and the vague analogical category is undermined and possibly defeated.

However, creating vague analogical categories still requires focus: the proponent must select a focal attribute that the two items—the source item and the target item—share.²⁹ Since items or ideas often share many attributes, the advocate's focus is crucial. Pens and staplers may both contain metal, but depending on context, this shared attribute may be too far removed from their functions to make for a plausible or meaningful comparison.³⁰ If so, we'd be careful to create a vague category (like *office supplies*) that accentuates the objects' workplace utility rather than their size (things you can hold in your hand) or what they're made of (things with metal). After all, to analogize effectively is to focus on the "relevant similarity."³¹ The controlling law's underlying policies are apt to enter the frame at this point, no matter how facially semantic the argument.³²

As we'll see below, an advocate's careful focus can, oddly enough, be harmonious with a broadening of the lens and a calculated blurriness at the edges.

28 Brewer, *supra* note 15, at 937 n.35 (noting that *precision* is the "logical antonym" of *vagueness*).

29 See generally *id.* at 966–68 (discussing roles of sources and targets and selection of relevant attributes).

30 Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 LEGAL COMM. & RHETORIC: JALWD 149, 165 (2012).

31 Brewer, *supra* note 15, at 950; see also Posner, *supra* note 21, at 772 (noting that cases are analogous when they "share a relevant similarity").

32 See Posner, *supra* note 21, at 772 ("[R]easoning by analogy has no traction unless considerations of policy are brought into play to determine whether a pair of cases shall be deemed analogous . . .").

III. Climbing the Abstraction Ladder

The process described above—that of consciously stepping back from precision to reveal a commonality between items—resembles what Professor S.I. Hayakawa famously called “abstracting.”³³ When we refer to an object, even a *cow*, we are abstracting. The process begins when we perceive an object composed of atoms and attach a label to it. We might begin by using the word *Bessie* to refer to this object. This—the object’s personal name—is the lowest level of verbal abstraction, meaning the most specific way to refer to the object. Note that it still omits some specific information about the object, like the differences between Bessie yesterday and Bessie today.³⁴

If we now declare that “Bessie is a cow,” we are creating a broader classification based on Bessie’s resemblances to other things we call *cow*, and we are “ignoring the differences” between Bessie and those other *cow* objects (like differences in breed, color, spot pattern, size, or temperament).³⁵

By continuing to choose slightly broader and less precise classifications—categories—we are, in essence, ascending the rungs of a ladder that takes us, in incremental steps, from the lowest level of abstraction to the highest. And with each step up, we increase the number of seemingly distinct items that we can present as common, related items. For instance, as we work our way up Hayakawa’s abstraction ladder, we could broaden the object’s classification to *livestock*, which now focuses on the characteristics that Bessie has in common with other animals commonly found on farms, such as chickens, pigs, sheep, and goats.³⁶ With this category, a mammal with no feathers or wings becomes the same as a nonmammalian creature with feathers and wings.

Climbing one more rung up the abstraction ladder, we could classify Bessie as a *farm asset*, grouping her with “all other salable items on the farm,” such as livestock, grain, tractors, and furniture.³⁷ Again, this category focuses on the attributes that Bessie shares with these other items and ignores the many significant differences.³⁸ More abstract still would be to classify Bessie as an *asset*, and, on the next (and perhaps most abstract) rung of the ladder, *wealth*.³⁹

33 S.I. HAYAKAWA & ALAN R. HAYAKAWA, *LANGUAGE IN THOUGHT AND ACTION* 98 (5th ed. 1990).

34 *Id.*

35 *Id.*

36 *Id.* at 97–98.

37 *Id.*

38 *Id.*

39 *Id.*

On the other hand, descending the ladder from *wealth* to *Bessie* involves a “rung-by-rung narrowing: each descending rung becomes more concrete and less abstract; more specific, less vague; more focused, less broad.”⁴⁰

Given how prominently they feature in our ability to classify and reimagine information, scholars have painted abstraction and vagueness in a far more positive shade than that seen by casual skeptics. In a remark that could apply equally to the word *vagueness*, Professor Hayakawa lamented our tendency “to speak with contempt of ‘mere abstractions.’”⁴¹ He reminded us that “[t]he ability to climb to higher and higher levels of

40 JEFF ANDERSON, 10 THINGS EVERY WRITER NEEDS TO KNOW 46 (2011). This statement reflects that a “vague analogical category,” as I’ve put it, may be a confluence of vagueness, abstraction, and generality interacting simultaneously and, the advocate hopes, with a persuasive synergy. Yet experts distinguish between vagueness, abstraction, and generality—and sometimes vary their definitions depending on the field.

As commonly understood, an *abstract* term refers to something that exists in thought but not in a physical or concrete state—something that we can’t touch, like a *mindset* or a *philosophy*. *Abstract*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/abstract> (last visited Mar. 29, 2019) (defining *abstract* as “[e]xisting in thought or as an idea but not having a physical or concrete existence”); *Abstraction*, NEW WORLD ENCYCLOPEDIA, <http://newworldencyclopedia.org/entry/Abstraction> (last visited May 27, 2019) (noting that “[a]bstract things are sometimes defined as those things that do not exist in reality or exist only as sensory experience”). A *vague* term might do that as well, but can also refer to something concrete and physical—like a *car*—while leaving uncertainty at the margins about whether certain items fit within its meaning. See Brewer, *supra* note 15, at 937 n.35. Is a PT Cruiser a *car*? Is a Matchbox toy a *car*? See Kimble, *supra* note 6, at 54.

Yet some experts use the term *abstraction* to encompass both these concepts—along with a third concept: *generality*. See, e.g., *Abstraction*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Abstraction> (referring to *abstraction* as a “process of generalization” and the “reduction of a complex idea to a simpler concept or a general domain”). In their eyes, an abstraction is “an idea created by the mind to refer to all the objects [that], possessing certain characteristics in common, are thought of in the same class”—and that can be “created at various levels of generalization.” JAMES L. CHRISTIAN, PHILOSOPHY: AN INTRODUCTION TO THE ART OF WONDERING 193 n.3 (11th ed. 2012). This definition tracks Hayakawa’s abstraction ladder. In fact, some have described Hayakawa’s abstraction ladder as “sort of a sliding scale of vagueness.” Ken O’Quinn, *Writing with Clarity: Stay Low on the Abstraction Ladder*, WRITING WITH CLARITY (May 3, 2013), <https://www.writingwithclarity.com/writing-with-clarity-stay-low-on-the-abstraction-ladder/>. Others have noted the “vague terms” that appear on the higher rungs. Victoria Hay & Tina Minchella, *Word Choice: The Abstraction Ladder*, WRITING 101 CLUES (Sept. 12, 2009), <https://cceng101.wordpress.com/2009/09/12/word-choice-the-abstraction-ladder/>. Still others have noted that with high-level abstracting, a writer’s or speaker’s meaning “does not lend itself to easy identification because of the vague and indeterminate semantics.” Richard Fiordo, *Midlevel Abstracting: An Underserved Zone of General Semantics*, 70 ETC: A REV. OF GEN. SEMANTICS 82, 86 (Apr. 2013). Thus, while *vagueness* and *abstraction* may not be true synonyms, they are kindred—and are often described as interrelating or acting in concert.

Likewise, *generality* and *vagueness* are not synonymous. Brewer, *supra* note 15, at 937 n.35; see also Marcus G. Singer, *Universality and the Generalization Principle*, in MORALITY AND UNIVERSALITY: ESSAYS ON ETHICAL UNIVERSALIZABILITY 50–51 (Nelson T. Potter & Mark Timmons eds., 1985). Yet the two can coincide. Professor Sorensen has noted that “[v]ague’ has a sense which is synonymous with abnormal generality.” SORENSEN, *supra* note 1, § 2. And as Professor Brewer put it (while addressing the *ejusdem generis* canon), “either generality or vagueness, or both, can generate . . . interpretive questions.” Brewer, *supra* note 15, at 937 n.35 (emphasis added). Other commentators have also acknowledged this potential interrelationship: “The more you rely on general terms, the more your writing is likely to be vague . . .” John Friedlander, *Abstract, Concrete, General, and Specific Terms*, GUIDE TO GRAMMAR AND WRITING, <http://grammar.ccc.commnet.edu/grammar/composition/abstract.htm>.

To complete this conceptual sketch, some might add that a term’s relative generality or specificity depends on which abstraction-ladder rung we’re watching from. As Professor Brewer notes, terms are “neither general nor specific in isolation,” but rather become “one or the other only in relation to another term that can be measured within a common category.” Brewer, *supra* note 15, at 937 n.35. Thus, the word *animal* is general if compared to *cat*, yet *animal* is specific when compared to *living thing*. *Id.* And returning to Hayakawa’s ladder, the term *livestock* is general if compared to *cow*, yet specific when compared to *farm assets*. Again, for this article I embrace the intersection—the potential simultaneity and synergy—of these concepts.

41 HAYAKAWA & HAYAKAWA, *supra* note 33, at 108.

abstraction is a distinctively human trait without which none of our philosophical or scientific insights would be possible.”⁴² Professor Sorensen has similarly observed that vague categories facilitate communication and classification: “[M]any commentators say that vagueness exists because broad categories ease the task of classification. If I can describe your sweater as red, then I do not need to figure out whether it is scarlet. This freedom to use wide intervals obviously helps us to learn, teach, communicate, and remember.”⁴³

Professor Linda Berger’s research on cognitive processes confirms our routine use of novel comparisons or metaphors to produce “analogy-like” comparisons that don’t change what we see but how we see it.⁴⁴ This technique aims to change a reader’s or listener’s perspective.⁴⁵ And it conforms to our mind’s habit of using abstract frameworks to process new information:

We create abstract structures or frameworks for seemingly related items, and by analogy, we try to fit new information into the discrete and recognizable slots we have created. When we are successful, we know how to think and feel about the information without examining it in detail. This lifelong process of “chunking” is an efficient way to acquire, organize, and use information.⁴⁶

And malleable categories, she explains, are critical to human thinking and analogizing:

Again by comparison, we channel the new data and information we perceive into these frameworks. The “triggering of prior mental categories by some kind of input . . . is . . . an act of analogy-making.” This channeling is considered analogical rather than mechanical because there is usually some degree of mismatch or “slippage” between the new instance and the prior category. Sometimes, the channeling works the way we usually think about categorization: we have a prototype in mind, and we fit new items into that slot depending on how similar they are to the prototype.⁴⁷

⁴² *Id.*

⁴³ SORENSEN, *supra* note 1, § 2.

⁴⁴ Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL’Y 147, 149 (2013).

⁴⁵ *Id.* at 152–53.

⁴⁶ *Id.* at 155–56.

⁴⁷ *Id.* at 156–57 (quoting Douglas R. Hofstadter, Epilogue: Analogy as the Core of Cognition, in *THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE* 499, 503 (Dedre Gentner et al. eds., 2001)).

Tapping into this innate ability to channel information, lawyers can emphasize common attributes between a source object and a target object by placing both within an appropriately vague category—a category that’s just far enough up Hayakawa’s ladder to encompass both items. (Your Honor, a cow is materially the same as a pig: both are *livestock*.) The further we go up the ladder, the broader and more potentially vague the category—and the more we potentially strain the comparison, depending on context. (Your Honor, a cow is materially the same as a tractor: both are *farm assets*.) One real case hinged on whether a burrito fell within the “sandwich” category,⁴ prompting colorful commentaries by Justice Antonin Scalia and Judge Posner.⁴ For a burrito to be a sandwich, one scholar noted, “one must define a sandwich more broadly as an item of food with filling (meat, vegetables, etc.), served within or on top of a grain-based product.”⁵

Shrewd advocates climb and descend the ladder, as needed, to shape analogical categories that align their cases with precedent cases—and smooth over nagging distinctions. As Professor Mary Beth Beazley observed, climbing the abstraction ladder can help advocates develop argument themes.⁵ Likewise, advocates who devise abstract fact categories can better recognize how facially dissimilar facts in precedent cases parallel the facts in their own cases.⁵² And while categories can undoubtedly “produce a fallacious sense of certainty for legal conclusions,” they are nevertheless “useful for [their] powerful ability to persuade legal audiences.”⁵³ As Professor Lucy Jewel put it: “Becoming facile with categories pushes the lawyer toward the level of a virtuoso”⁵⁴

III. A Closer Look: Analogies Through Vagueness—and the Precision Counterpunch

A. Natural gas is like a rabbit.

In an essay on analogical reasoning, Judge Posner taps into a legal debate on whether the property-law rule of capture, usually associated

48 White City Shopping Ctr., LP v. PR Rests., No. 2006196313, 2006 WL 3292641 (Mass. Super. Ct. Oct. 31, 2006).

49 See discussion in Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: JALWD 39, 53 (2016) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 55 (2012); Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Sept. 13, 2014), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>).

50 *Id.* at 54.

51 MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 45–46 (4th ed. 2014).

52 *Id.* at 47.

53 Jewel, *supra* note 49, at 77.

54 *Id.* at 72.

with wild game (like Pierson’s famous fox), should control whether a person has acquired rights in oil or gas. In presenting the opposing views on this issue, Judge Posner doesn’t speak explicitly of vague categorization versus precision. Yet a careful reading of his analysis reveals both—and reveals that after using precision to poke holes in the prevailing vague analogical category (with which he finds fault), he creates his own vague analogical category to replace it.

Judge Posner first describes the analogy that has long prevailed in American law: oil and gas fall within the same vague category as wild rabbits. Each is potentially valuable property whose value is unlocked, as a practical matter, only through capture. The category that contains both is, in essence, property that moves freely.⁵⁵ Though one (an animal) moves under its own power and the other (oil or gas) moves from gravitational or external force, they both *move*.⁵⁶ And as courts and commentators have observed, from the outset this similarity practically begged for an analogy between wild game and mobile minerals: “Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner.”⁵⁷ The capture rationale is that whether dealing with natural gas or a rabbit, the putative property owner must somehow curtail that property’s free movement to derive its value and assert rights superior to the rights of other claimants. Thus, natural gas is the same as a rabbit.

As Judge Posner points out (to his mild chagrin), courts have adopted this vague category and have, by virtue of the analogy it supports, long applied the capture rule to settle rights in oil and gas.⁵⁸ In fact, as one court put it: “The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation.”⁵⁹

Not satisfied with this analogy, Judge Posner offers an opposing view that rests not on the vague but on the precise, pushing against the validity of a category encompassing both wild animals and gas. Posner posits that the moving-property analogy—category—rests on the irrelevant similarity of free mobility, or wildness.⁶⁰ After declaring that courts should shine the

55 Posner, *supra* note 21, at 765–66.

56 *Id.* at 766.

57 Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 906 (2005) (quoting *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889)).

58 Posner, *supra* note 21, at 766.

59 *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 13 (Tex. 2008).

60 Posner, *supra* note 21, at 766.

light of sound policy onto any proposed analogy, Judge Posner carves up the vague moving-property category by invoking precision—facts concerning the economic investments, incentives, and rewards associated with gas and oil exploration. Those things, he notes, do not exist for wild game:

By definition these are wild rabbits, not a product of investment, and so you're not deprived of the fruits of an investment when your neighbor shoots a rabbit that, having wandered onto your land, later wanders onto his. In contrast, oil and gas are extracted from the earth by expensive drilling equipment after costly exploratory efforts often involving the digging of many dry holes, the expense of which has to be recouped in the occasional lucky strike.⁶¹

Judge Posner's analytical crescendo reaffirms his belief that policy should dictate whether an analogy is valid: "We need rules that will optimize these investments—a consideration that has no counterpart in the wild-animal case."⁶²

Finally, Judge Posner presents what he sees as the proper analogy, offering his own appropriately vague category: "extractable natural resources."⁶³ This category is just as broad and soft-edged as it needs to be, encompassing, for example, coal, oil, and gas. It reinforces the likeness of these items even though coal, unlike oil or gas, does *not* move freely and cannot escape a pursuer. Once the facts of the case—a dispute over gas rights, for example—are framed within this category, the proponent can assert that the same legal rule should apply to all items within the category. Thus, Judge Posner advocates that because oil, gas, and coal are in the same category of extractable natural resources, the property-law regime that applies to coal rights should apply to disputes over oil or gas.

In short, Judge Posner first defeated his fictional adversary's vague category—the *freely moving property* category—by getting precise. Then, once finished, he offered what he believes to be a sounder, broader policy-based category to replace it: *extractable natural resources*. Classic legal advocacy. And if Judge Posner's dismantling of the *freely moving property* category has persuaded you to look skeptically on vague analogical categories, remember that his is not the prevailing view. In courtrooms across America, natural gas is a rabbit.

61 *Id.*

62 *Id.*

63 *Id.*

B. A Nazi war criminal is like a pirate.

Vague analogical categories have even shaped international legal history. For instance, Israeli courts got vague when confirming Israel's jurisdiction over Nazi war criminal Adolf Eichmann. While some commentators have observed that traditional criminal jurisdiction existed based on Israel's "unique connection to the offense,"⁶⁴ the Israeli courts instead invoked so-called universal jurisdiction. This doctrine empowers a nation to "prosecute offenses to which it has no connection at all."⁶⁵ And while now commonly associated with prosecutions arising from human-rights abuses and war crimes, before World War II the doctrine was associated with piracy on the high seas.⁶ The prevailing historical view was that piracy justified an exception to traditional notions of jurisdiction—an exception that allowed any nation to try (and execute) pirates "regardless of the pirates' nationality or where on the high seas they were apprehended."⁶⁷

In his examination of Eichmann's case, Professor Eugene Kontorovich noted that the Israeli trial court "found support for its jurisdiction in the universal principle," which it "traced back to piracy."⁶⁸ On appeal, the Israeli Supreme Court "placed even greater reliance on the universal principle."⁶⁹ According to Professor Kontorovich, "the Court justified its exercise of universal jurisdiction almost exclusively on the basis of the piracy analogy."⁷⁰ To do so, the Court needed to extract "a general principle . . . from the piracy precedent" that could withstand the inevitable counterargument that "nothing but piracy could be regarded as a universal offense."⁷¹ Thus, the Court "maintained that piracy is merely an example of a broader principle of universal jurisdiction."⁷² This broader principle "extends to heinous acts that 'damage vital international interests . . . [and] violate the universal moral values and humanitarian principles' embraced by all civilized nations."⁷³

64 Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 197 (2004).

65 *Id.* at 183, 190.

66 *Id.* at 184, 190, 194–95; see also *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (noting that historically, the doctrine was tethered to "the special problems and characteristics of piracy").

67 Kontorovich, *supra* note 64, at 188, 190.

68 *Id.* at 196 (citing *Eichmann v. Attorney-General*, 36 I.L.R. 277, 287–92, 298–304 (Isr. 1962)).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 196–97 (quoting *Eichmann*, 36 I.L.R. at 291).

In other words, the Court described a broad, vague category for which universal jurisdiction applies: morally heinous acts against humanity.⁷⁴ Piracy was a “classic” example of conduct falling within this category, but not the only one.⁷⁵ Nazi atrocities likewise fit the category, prompting the Court to apply the same universal-jurisdiction rule used in piracy cases to Eichmann’s war-crimes case.

Since then, more courts have relied on the piracy analogy in exercising jurisdiction over nonpiracy cases—and have supported that analogy with vagueness. The International Criminal Tribunal for the Former Yugoslavia, for example, drew on the piracy analogy “to justify universal jurisdiction over heinous crimes, citing it as an example of jurisdiction over offenses that ‘shock the conscience of mankind.’”⁷⁶ Likewise, in finding that a New York federal court had jurisdiction in a civil suit arising from a politically motivated torture and murder in Paraguay, the Second Circuit said that “for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”⁷⁷

In synthesizing these and other holdings, Professor Kontorovich acknowledged “the centrality of heinousness in analogizing piracy to modern offenses,” but pointed out that “[t]he precise degree of evil necessary to create universal jurisdiction remains unclear.”⁷⁸ The test, he observed, “can only be qualitative and *vague*.”⁷⁹

When the dust settles, we see a line of modern cases in which courts have based universal jurisdiction on a vague category: offenses universally recognized as being extraordinarily heinous (or some variant).⁸⁰ We see the courts fitting piracy into that category and then fitting alongside piracy various war crimes or other human-rights abuses. And thus the universal-jurisdiction rule historically relegated to piracy now applies to war crimes and politically motivated torture. In other words, we see vagueness supporting the piracy analogy.⁸¹ Under international law, a war criminal is like a pirate.

74 *Id.*

75 *Id.* at 197.

76 *Id.* at 199 (quoting *Prosecutor v. Tadic*, No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (The Hague Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>).

77 *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

78 Kontorovich, *supra* note 64, at 206.

79 *Id.* (emphasis added).

80 *Id.* at 185.

81 *Id.* at 184–85.

Like any other analogy supported by vagueness, the piracy analogy is potentially vulnerable to a precision counterpunch. In fact, Professor Kontorovich himself questions the piracy analogy's validity and criticizes courts, lawyers, and scholars for failing to meaningfully question its underpinnings.⁸² After all, precision reveals that to most minds, piracy is "nothing more than robbery at sea"—a mere "subspecies of robbery."⁸³ And while robbery victims surely view robbery as a heinous act, courts do not treat robbery on par with genocide; and robbery would strike most minds as a lesser evil than murder or rape.⁸⁴

Professor Kontorovich ultimately concludes that the vague *heinousness* category underlying modern universal jurisdiction rests on loose historical readings and faulty assumptions.⁸⁵ In his opinion, the "fallacy of the piracy analogy" unravels court decisions that have used it to justify the modern brand of universal jurisdiction.⁸⁶ Still, underlying Professor Kontorovich's criticism is a truth that he readily acknowledges: modern courts and advocates perpetuate this vague *heinousness* rationale—a vague category encompassing especially heinous offenses—to prop up the piracy analogy and, in turn, justify universal jurisdiction over heinous *nonpiracy* crimes.⁸⁷

C. A hairbrush is like a toothbrush.

Turning to the comparatively mundane, patent disputes, with their frequent wrangling over the presence of "analogous art" in a field, can also pit vagueness against precision. For instance, in a case involving a hairbrush invention, the Federal Circuit considered whether a patent had been properly denied because the applicant's invention (boasting a unique hairbrush shape) was analogous to a preexisting *toothbrush* invention and thus "obvious" to reasonable minds in the field.⁸⁸ The rub was articulating exactly what the relevant field *was*.

In affirming denial of the patent, the majority adopted the patent board's broad, vague category: "the 'field of hand-held brushes having a handle segment and a bristle substrate segment.'"⁸⁹ (Might this category include a brush used to clean pipes? To dust snow off a car windshield? To

⁸² *Id.* at 223, 230.

⁸³ *Id.* at 191, 223.

⁸⁴ *Id.* at 223.

⁸⁵ *Id.* at 223, 233.

⁸⁶ *Id.* at 237.

⁸⁷ Kontorovich, *supra* note 64, at 205–07, 236–37.

⁸⁸ *In re Bigio*, 381 F.3d 1320 (Fed. Cir. 2004).

⁸⁹ *Id.* at 1325 (quoting *In re Bigio*, No. 2002–0967 (B.P.A.I. Jan. 24, 2003)).

clean toilets?) And having reaffirmed this category, the majority agreed that a brush for hair is the same as a brush for teeth, making preexisting toothbrush innovations obvious to inventors working with hairbrushes.⁹⁰

But the dissenting judge bristled at this broad category, countering with precision: “A brush for hair has no more relation to a brush for teeth than does hair resemble teeth. . . . [T]eeth are not bodily hair.”⁹¹ Her argument on why a hairbrush is not the same as a toothbrush bears a striking resemblance to our mock argument on why a stapler is not the same as a pen:

The mode and mechanics of brushing teeth cannot reasonably be viewed as analogous to the mode and mechanics of brushing hair. To state the obvious: teeth require a brush that penetrates around the edges of relatively large and hard substrates, a brush that administers a soapy abrasive, a brush that works in the up-and-down and circular motion needed to scrub teeth; a brush for hair must serve entirely different shapes and textures and purposes.⁹²

Points well made. And yet for the majority, the broader, vaguer category held more sway than this precise view.

IV. Practical Application

And so we see that analogy through calculated vagueness—with a broad, soft-edged category driving the analogy—can serve the thoughtful advocate (or judge). Thus, “lawyers should master the skill of category manipulation and shaping.”⁹³ This ability to “choose language that will affect the shape of legal categories” allows advocates to, among other things, “influence the way that rules interact with the facts on the ground.”⁹⁴

With this in mind, let’s consider some hypothetical cases to see how lawyers can devise and apply vague analogical categories to their advantage, especially in written advocacy.

As mentioned, advocates can use vagueness at both the micro and macro level. For a glimpse at the macro level, picture a lawyer defending a blogger in a defamation case. The blogger has publicly maligned a

90 *Id.* at 1326.

91 *Id.* at 1327 (Newman, J., dissenting).

92 *Id.*

93 Jewel, *supra* note 49, at 73.

94 *Id.*

politician for opposing police-budget increases—branding the politician “pro-crime” and “pro-terrorist.” The blogger’s lawyer plans to argue that even if those statements were literally false, they were merely hyperbole used to express the blogger’s subjective political opinion. Thus, they cannot, in a legal sense, satisfy the falsity element. For support, the lawyer will rely on a case that used this reasoning to absolve a custody-seeking father who, in a fit of obvious exaggeration, publicly claimed that his child’s mother “never spends any time” with the child. In analogizing this precedent to his blogger–client’s case, the lawyer might assert, vaguely, that both cases arose from “obviously exaggerated language questioning a person’s fitness for a position of responsibility.”

At the same time, advocates use vagueness at the micro level—sometimes more than once in the same sentence—to wash away small factual differences that might stick out if expressed with precision. Consider an advocate arguing that an injured boat passenger was heavily to blame for accepting a ride from a drunk boater. The advocate might use vague language to smooth over the fact that the leading cases involved *car* passengers. Throughout her brief, the advocate might stress that courts have affirmed findings of fault against passengers who accepted rides in “vehicles” driven by known drunks. Or the advocate might use the ultimate form of vagueness by omitting any vehicle reference at all: passengers are at fault when they “accept rides from drunk drivers.” Either way, a boat is now the same as a car because they both fit within a broad, vague *vehicle* category—or within the even vaguer implicit category of any nameless thing that a drunk person might drive.

Likewise, an advocate whose client suffered a broken clavicle might wish to rely on precedent holding that a broken elbow meets a statutory serious-impairment threshold. If so, the advocate might introduce that broken-elbow case (think topic sentence) as a case finding that a *broken bone* satisfies the threshold. Thus, the reader’s first impression is that the injury in that broken-elbow case must be like the immediate plaintiff’s broken clavicle. The advocate would, of course, follow with precise details about the broken-elbow case, hoping that the topic sentence’s broad *broken bone* category has firmly planted the parallel between a broken elbow and a broken clavicle, and, by doing so, smoothed over the difference.

The typical court brief presents any number of opportunities for planting and supporting analogies through vague categorization. A brief supporting or opposing a motion for summary judgment, for example, might benefit from vague categories in:

- *point headings:*

2. The Act applies to office supplies.

- *thesis paragraphs:*

YZ incorrectly asserts that the statute did not govern this transaction. Binding precedent confirms that the statute applies to transactions involving office supplies. The stapler here is an office supply common to every workplace and, like pens and other office supplies, is used to fulfill everyday clerical functions. Thus, the statute controls, and the Court should deny XYZ's motion.

- *rule exposition/synthesis:*

The statute's definition encompasses office supplies, such as pens. *Jones v. . . .*

- *topic sentences:*

The court of appeals has applied this rule to office supplies. For instance, in *Jones v. . . . a pen . . .*

- *case synthesis:*

Read together, *Jones* and *Smith* confirm that the statute applies to office supplies. . . .

- *application of law to facts:*

Like the pen in *Jones*, the stapler here is an office supply that serves a common clerical function, and the policies underlying the *Jones* rule apply with equal force. . . .

Let's work through some more realistic examples.

A. Example 1—An assisted suicide is like a heat-of-the-moment shooting.

Factual/procedural context: As an act of mercy, and at the patient's urging, a hospital orderly suffocates a terminally ill patient while she sleeps. The two had carefully planned the killing. The patient's estate later sues the hospital on a *respondeat superior* theory, trying to hold the hospital vicariously liable for the orderly's workplace act. You represent the hospital.

Leading case: In your research, you find a case holding that the owner of an apartment complex was not vicariously liable for its manager's shooting of a tenant during a heated argument. The court reasoned that

this intentional, criminal act was outside the scope of the manager’s employment. The crime was wholly unauthorized and unexpected, and did not further the apartment complex’s business interests.

Notable differences: How might you heighten the analogy between your carefully planned mercy killing and the leading case’s heat-of-the-moment shooting? Besides the commission of a fatal crime, there’s not much in common:

Your case	→	Leading precedent
vulnerable patient		confrontational tenant
hospital orderly		apartment manager
hospital		apartment complex
suffocation as an act of mercy, at terminally ill patient’s request		shooting during a a heated argument

Shaping the analogy: The advocate would point out that the differences are superficial given the underlying policies and legal rules at play. Yet a careful attorney would still look for language-shaping opportunities to emphasize the factual parallels and neutralize the many differences. A number of vague analogical categories could, in opportune places, help smooth over the distinctions—and a few are self-evident.

For instance, a hospital orderly is the same as an apartment manager when we broaden our language to the vague *employee*. The same is true for the *victims*, despite the notable differences between a terminally ill patient begging for a merciful end and a tenant whose unruly behavior stirs an ugly confrontation. *Employer* is the natural category for the hospital and the apartment complex.⁹⁵

A bit less obvious is how to describe the employees’ acts. Recall that you’re representing the hospital here, and the more egregious the act—the more obvious its departure from a legitimate work activity—the better your client’s odds of avoiding vicarious liability. Both acts were *intentional killings*. Both were *crimes*. Both were *unauthorized acts*, though committed in the workplace. After sorting through the possible word choices, you might settle on a phrase like *criminal workplace killing*, which is sufficiently broad and vague to encompass both acts. Some lawyers

95 For a case acknowledging the potential vagueness of terms like *employee* and *employer*, see *Ferreira v. Network Express, Inc.*, No. 6:05-cv-893-Orl-22DAB, 2007 WL 8097539, at *3–4, *4 n.3 (M.D. Fla. Mar. 9, 2007) (noting that because the Fair Labor Standards Act’s definitions of *employee* and *employer* are “vague” or “not helpful,” courts are left to “define” the contours of the employer-employee relationship,” a process that involves a multifactor economic-reality test).

might choose *an unforeseeable homicide*, and the like. There's certainly room for debate on the best words, tone, and shape. (And while these categories may not seem vague at first, some scenarios could well test their margins, especially in the vicarious-liability context. Consider, for example, whether a fatal car accident or industrial accident caused by a reckless or drunk employee might fall within *criminal workplace killing*.⁹⁶)

Now armed with vague categories (italicized in the example below), we could construct a topic sentence designed to help our reader transition into our discussion of the leading (apartment-shooting) case, while also planting the seed of analogy to our hospital mercy killing:

It is settled that a Michigan *employer* is not vicariously liable for an *employee's criminal workplace killing*. For instance, in *Bryant v. Brannen . . .*, an apartment manager got into a heated argument with a tenant who had been disturbing neighbors with loud music. During the argument, the manager pulled out a gun and . . .

Again, the topic sentence's vague categories show the reader that it's all the same, even though it's different.

Policy support: After shaping and presenting a vague analogical category, an advocate may want to tie it back to the policy underlying the controlling legal rule. A pure exercise in semantics may not conquer skeptical minds. So for our fictional hospital case, the advocate might remind the court that the proposed *criminal workplace killing* category embodies the policy underlying the rule: it is unfair to hold an employer vicariously liable—legally responsible without fault—for a criminal act that is wholly unauthorized and unexpected, and that does not further the employer's interests. A criminal act reflects not the employee's service to or for the employer but, instead, the employee's personal animus.

A caveat: My approval of strategic vagueness is not meant to endorse a generally vague or abstract writing style. On the contrary, the best legal writers adopt the concrete style that Judge Gerald Lebovits describes so effectively in his writings. "The more concrete the writing, the better," he urges, having read thousands of court briefs in his years on the bench.⁹⁷ So an advocate's use of vague categories for analogical assertions is, again, *strategic*. We pick our spots. Thus, while our hypothetical topic sentence above uses vagueness, note that the case analysis that follows it is, and

⁹⁶ See, e.g., *Weinstein v. Siemens*, 673 F. Supp. 2d 533, 534, 542–43 (E.D. Mich. 2009) (denying employer's motion for summary judgment on respondeat superior claim arising from drunk employee's fatal car accident; employee had pleaded no contest to second-degree murder and received a lengthy prison sentence).

⁹⁷ Gerald Lebovits, *Free at Last from Obscurity: Achieving Clarity*, 16 SCRIBES J. LEGAL WRITING 127, 130 (2014–2015).

should be, concrete and precise. The very purpose of the strategically vague topic sentence is to ensure that readers immediately appreciate the analogy and thus aren't put off when they learn, in the coming moments, that the cases aren't truly identical.

Shaping and reshaping: Recall also that the analogy-shaping process can be a matter of degrees. Thinking back to Hayakawa's abstraction ladder, we climb to the lowest rung (i.e., use the lowest degree of abstraction possible) necessary to support our proposed analogy. So in the example above, imagine that the leading precedent arose not from an apartment shooting but instead from a hospital orderly's sexual assault of a patient who'd been restrained during a manic episode. Suddenly, our advocate wouldn't need to rely on the highly vague *victim*, which was necessary to encompass a hospital patient and an apartment tenant. Instead, the advocate would choose a less vague term: *vulnerable patient*. This lower rung on the ladder is still vague enough to encompass both victims, yet it's precise enough to emphasize helpful similarities: both victims were hospital patients, and both were susceptible to wrongdoing. Likewise, the vague *employer* would become the more precise *hospital*, further emphasizing the cases' similarities.

Now suppose that your research had yielded even better results: the leading case instead arose from a registered nurse's intentional overdosing of a terminally ill patient. Suddenly, the vague *vulnerable patient* would become less vague still: *terminally ill patient*. And the precise *mercy killing* would replace our vague references to the employees' criminal acts.

In short, when the facts in supporting precedent match the facts in our own case, precision wins the day. We descend Hayakawa's ladder to the lowest rung possible—or hop off altogether—to emphasize the likenesses. We use vagueness, and higher degrees of vagueness, when our facts are a mismatch.

B. Example 2—A pothole is like an icy staircase.

Factual/procedural context: A slip-and-fall victim has sued your client, a local college, for failing to remove a patch of ice from an exterior staircase. You intend to argue that the college owed no duty to warn of the danger because it was open and obvious—meaning a danger that (the cases tell you) an average person would have readily appreciated.

Leading case: Your research reveals no open-and-obvious-danger cases involving ice. The only modern case you've located applied the rule to a summertime pothole in a supermarket parking lot.

Shaping the analogy: You might analogize the pothole case to your ice-patch case by creating vague categories to describe where the falls took

place and what caused them. A college's exterior staircase isn't the same as a flat supermarket parking lot. And yet both are *pedestrian walking surfaces*. Likewise, a patch of ice isn't a pothole. One is frozen water atop pavement, while the other is an irregular hole in pavement. Yet both are *common, visible hazards* found on *pedestrian walking surfaces*.

Armed with these vague categories, you might plant the analogy to your case in a point heading:

1. The open-and-obvious rule applies to common, visible hazards on pedestrian walking surfaces.

The same vague categories (italicized below) might appear in a thesis paragraph:

XYZ College is entitled to summary judgment because it owed Smith no duty. Our supreme court has held that *common, visible hazards* on *pedestrian walking surfaces* pose open and obvious dangers, for which there is no duty to warn. Here, Smith admits that he saw ice on XYZ's staircase before climbing the steps—and that any person in his position would have seen the ice and appreciated the risk of slipping. Therefore, the risk was obvious, and XYZ had no duty to warn Smith of it.

The same vagueness might show up in the argument section's application of law to facts:

Like the pothole in *Jackson*, the icy patch that Smith confronted was the type of *common, visible hazard* that pedestrians encounter and avoid every day. . . .

Policy support: The advocate might support this vague category—*common, visible hazard on a pedestrian walking surface*—by arguing that it reflects the open-and-obvious doctrine's recognition that invitees are expected to remain reasonably vigilant. Our tort jurisprudence has not absolutely negated personal responsibility or embraced absolute liability (in this context). Thus, the law does not require a warning about (or, in some jurisdictions, protection from) what is known or what is so apparent on a casual inspection that it should be known—like a *common, visible hazard on a pedestrian walking surface*.

Now that we've eased into this technique a bit, let's tackle a more challenging set of facts.

C. Example 3—An aquifer is like drained farmland.

Factual/procedural context: You’re a Department of Justice attorney prosecuting an oil company whose well leaked oil into the ground. The oil seeped into groundwater that collected in an aquifer. From there, oil-tainted groundwater flowed through a spring and into a navigable river. Federal jurisdiction under the Clean Water Act depends on whether the oil company discharged oil into a *navigable* water.⁹⁸ But it’s impossible to navigate groundwater or an aquifer or a spring, isn’t it? And that’s where the oil company leaked—“discharged,” to use the statutory term⁹⁹—its oil.

Leading case: A published case in your federal circuit is helpful because it applied the Act even without a direct discharge into a navigable water. The court held that a farmer fell under federal jurisdiction—and violated the Act—by “sidecasting.” With this sidecasting process, the farmer created additional farmable land by digging ditches that drained polluted wetlands into a small, nonnavigable creek. After pollutants reached the creek, they flowed downstream and eventually into a navigable river.

Notable differences: How could you use this farmland-sidecasting precedent for support in your groundwater case? The differences are daunting:

Your case	→	Leading precedent
<p><i>Initial water body receiving pollutant:</i> Aquifer (i.e. areas of underground rock or sediment containing enough ground water to sustain a well or spring).</p>		<p>Wetlands (i.e. areas where water covers the soil or is at/near the soil’s surface all parts of the year).</p>
<p><i>Nature of polluter’s conduct:</i> Allowing defective oil rig to leak oil into the ground.</p>		<p>Dredging, draining wetlands and refilling wetlands with dredged soil.</p>
<p><i>Mode of pollutant’s movement to navigable river:</i> Oil seeped into groundwater and aquifer, was carried through natural spring into river.</p>		<p>Farmer dredged, drained wetlands so that pollutants flowed into small creek that carried pollutants to river.</p>

Again, at first glance an oil leak into the ground doesn’t look like polluted water flowing through a dredged wetland into a small creek. Those farm wetlands also don’t look anything like an aquifer (i.e., underground rocks and sediment holding groundwater). And a creek flowing through farmland and into a river looks little like an aquifer spilling

⁹⁸ 33 U.S.C. § 1362(7), (12) (Westlaw through Pub. L. No. 116-5); *see also* Rapanos v. United States, 547 U.S. 715 *passim* (2006).

⁹⁹ 33 U.S.C. §§ 1311(a), 1362(12) (Westlaw through Pub. L. No. 116-5).

groundwater out through a spring. Yet, by using an analogy, they're the same.

Shaping the analogy: The cases are the same because both polluters engaged in a *surface activity* that caused a pollutant to enter *hydrologically connected nonnavigable water*—water, in other words, that eventually flowed into a navigable waterway over which the federal government has Clean Water Act jurisdiction.

These vague categories—*surface activity* and *hydrologically connected nonnavigable water*—might show up in your appellate brief's issue statement. Let's try Bryan Garner's deep-issue style, which imitates a deductive syllogism but turns the conclusion into the core legal question:

The Clean Water Act governs *surface activities* that cause pollutants to reach navigable waters through *hydrologically connected nonnavigable waters*. Big Mitten Oil Company's well spilled oil into groundwater that flowed through a natural spring into the navigable Black River, polluting the river. Does the Act govern this spill?

Once again, we see how an advocate can use vagueness to shape language multiple times in a single sentence to build a sense of similarity between their case and controlling precedent.

Policy support: Later in the brief, this advocate might buttress the *hydrologically connected nonnavigable waters* argument by reminding the court that Congress's stated purpose in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁰⁰ When pollutants despoil what is undisputedly one of the nation's waters (i.e., a navigable water), it would thwart the Act's purpose to reject federal jurisdiction merely because the pollutant began its journey in a nonnavigable water.

In each of these examples, the hypothetical advocate faced the type of factual distinction that routinely tests lawyers. The advocate's case involved a patch of ice, but the leading case involved a pothole; the advocate had a pollutant-moving aquifer, but the leading case a dredged wetland; and so on. In each instance, vagueness offered a subtle yet potentially potent strategy for making seemingly disparate items seem kindred. The vague category—shaped just broadly and imprecisely enough to capture the items being analogized—signaled a commonality that had perhaps been latent and supported a comparison that, the advocate hoped, felt natural and logical.

100 33 U.S.C. § 1251(a) (Westlaw through Pub. L. No. 116-5).

V. Conclusion

Scholars often tie analogy to precision, speaking of particulars and “minuteness.”¹⁰¹ But advocates can also analogize through breadth and imprecision. Stepping back from the minutiae and taking a vague macro look at a case can yield potentially persuasive comparisons to precedent cases. And on a micro scale, lawyers can suggest and reinforce analogies by planting vague categories that logically encompass otherwise distinct facts. Lawyers can use these categories to make connections and smooth over superficial or troubling factual differences, sometimes multiple times in the same sentence. Yes, lawyers aspiring to virtuosity should embrace strategic, appropriate vagueness (and recognize an opponent’s use of it), despite the word *vague*’s dubious reputation.

¹⁰¹ ALDISERT, *supra* note 27, at 95.

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Why Congress Drafts Gibberish

Richard K. Neumann Jr.*

We are so used to Congressional gibberish that we take it for granted. We sigh, roll our eyes, and ask, “Will Congress’s drafters ever learn?”

If we mean the drafters Congress has on staff, maybe that’s an unfair question. Every writing teacher knows that it’s impossible to separate developing the wording from developing the ideas. Congress is one drafter. Many people are involved—Senators, Representatives, employees in their offices, committee staff, and the Senate and House Offices of Legislative Counsel. But Congress is one author writing in one voice.

This article examines some typical congressional gibberish and hypothesizes some of its causes. Part I explains how the Supreme Court was flummoxed by a statute so complicated that neither the justices nor the lawyers arguing the case could really understand it. Part II examines a statute so mysteriously drafted that no one really knows what a President could legally do in replacing an Attorney General and Deputy Attorney General who stood in the way when the President wanted to get rid of a special counsel.

Part III shows how Congress hasn’t learned how to draft a coherent criminal statute. Part IV examines the federal obstruction of justice statutes, which are so incoherent that reading them is like wading through glue.¹ They appear here in Appendix A. I have redrafted those statutes, cutting their size in half. The redraft is in the article’s Appendix B. The Appendix’s footnotes explain how gibberish became clarity.

Part V hypothesizes some of the causes of Congressional gibberish. The main hypothesis is that legislating is made up of two functions—

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¹ Alfred Lord Tennyson used those words in describing Ben Jonson’s poetry. *FIGHTING WORDS: WRITERS LAMBAST OTHER WRITERS—FROM ARISTOTLE TO ANNE RICE 5* (James Charlton ed., 1994).

designing law and enacting it. Designing law is analogous to architecture or engineering. It's choosing an intellectual structure, with optimal wording, so that a statute will get the right results. Enacting is adopting the design so that it will be enforced. Legislators are good at the enacting part but have few, if any, law-design skills. Judging by their output, almost no one in Congress has the most important law-design skill—simplicity. If there's a way to make something unnecessarily complicated, an American legislature will find it. That's our one true legislative skill.

I. The Gibberish Case

The case was *Cyan, Inc. v. Beaver County Employees Retirement Fund*.² The statute was the Securities Litigation Uniform Standards Act of 1998,³ which amended the Securities Act of 1933.

The word *gibberish* doesn't appear in the Court's opinion. Judges are too polite to put that in writing. But the word dominated oral argument:⁴

Justice Alito Mr. Katyal, . . . [what are we] supposed to do when Congress writes gibberish. And that's what we have here. You said it's obtuse. That's flattering. And we have very smart lawyers here who have come up with creative interpretations, but this is gibberish. It's—it is just gibberish. It says . . . that the state courts have jurisdiction over federal claims, except as provided in Section 77p, which says nothing whatsoever about jurisdiction . . . for federal claims.

Mr. Katyal⁵ So—

Justice Alito So what are—what are we supposed to do with this?

Mr. Katyal Justice Alito, I—I think I'd say three things about that. First, as I—as I was saying to Justice Ginsburg, I don't think the statute's by any stretch a model of clarity, but I don't go so far as to say it is gibberish. . . .

Mr. Katyal
[later] Congress had other ways of writing the statute that are clear, that could have been clearer, but this Court confronts this—and this returns to Justice Alito's question—all the time, in big cases like *Burwell*, in

² 138 S. Ct. 1061 (2018).

³ 3 U.S.C. § 77a et seq.

⁴ Oral Argument, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018) (No. 15-1439), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1439_k5fl.pdf [hereinafter *Cyan Transcript*].

⁵ Neal K. Katyal for *Cyan, Inc.*, *Cyan Transcript*, *supra* note 4, at 1.

small cases like *Perry versus Merit Systems Protection Board* last term, you're dealing with the statute that, maybe if you look at it one way it's gibberish, maybe some of you could have written it better, but it still has to be given some meaning.

Justice Gorsuch Mr. Goldstein, speaking of gibberish—
[later]

Mr. Goldstein⁶ Yes?

Justice Gorsuch —aren't we stuck with gibberish your way too? I mean, it seems like it's gibberish all the way down here because—because under your version, as I understand it, . . . that first “except” clause, is superfluous. It doesn't—doesn't do anything. And also we render “involving a covered security,” that language, potentially superfluous in (c).

Mr. Goldstein Okay. So—

Justice Gorsuch So help me out with that.

Mr. Goldstein I — I —

Justice Gorsuch And—and I know—I know we generally—you know, we—nobody likes gibberish, but it is our job to try and give effect whenever possible to Congress's language. It's not for us to assume that Congress's language means nothing—⁷

Justice Alito didn't say “*If* Congress writes gibberish.” He said, “*When* Congress writes gibberish.” He was referring to § 77v(a)'s cross-reference to § 77p. Among other things, § 77v(a) gives state courts jurisdiction over certain federal claims “except as provided in section 77p.” Section 77p contains two judicial duties; seven declarations of jurisdiction and lack of jurisdiction, many of them phrased as prohibitions even though they aren't; and five definitions, one of which contains a total of 41 concepts—ideas that must be understood individually to understand the definition as a whole.

A concept in this sense is a discrete idea being used as raw material by a drafter. A three-element test has a minimum of three concepts, at least one per element. If any of the elements is complicated, it will use more

⁶ Thomas C. Goldstein for the Beaver County Employees Retirement Fund. *Id.*

⁷ *Id.* at 11–12, 16, 47.

than one concept, and the test's total concept usage will rise. Every concept imposes costs. Complying with a ten-issue test can be harder and more complicated than complying with a three-issue test. The same is true of enforcement. Complicated tests confuse everyone and lead to complicated litigation.

Imagine that you're a lawyer or a judge who must make a practical decision that will be governed by this statute. In one section, Congress told you to go to another section, but the thing Congress told you to find isn't where Congress told you to find it—even though Congress drafted both sections. Congress sent you and others on a fool's errand, imposing costs on everyone affected. Lawyers didn't know where to sue; judges didn't know what to do with the lawsuits; and eventually the Supreme Court had to pretend to find meaning where there was none. Those were real costs, passed on to ordinary people: individuals who were retired or were saving for retirement, shareholders, and taxpayers whose taxes paid for wasted court time.

Some of this can be blamed on Congress's drafters—the congressional staff whose job it is to find the best wording for what legislators want to enact. Both of the sections involved here contain a lot of wording that staff drafters shouldn't have used. And maybe those drafters should have spotted the fool's-errand cross-reference and pointed it out to the legislators who might have fixed it. But content is the legislators' turf, which they guard fiercely. When legislators insist on mind-numbing complexity throughout a statute—of which a 41-concept definition is but one example—perhaps we can empathize with drafters who were overwhelmed and missed the faulty cross-reference. Gibberish isn't only in the wording. It's primarily in the thinking.

II. The Vacancies Reform Act: The Statute That Tied Up Everyone Twice

This story's human drama is so well known that we can omit the details here. The essence is that in February of Year 1 of his presidency, a President grew unhappy with an investigation going on in his Justice Department. In March, the Attorney General recused himself from supervision over that investigation⁸ and delegated that responsibility to the

⁸ The reason offered at the time was a conflict of interest because of the Attorney General's connection to political organizations being investigated. Another reason didn't become public until two years later. The Attorney General himself became one of the subjects of the investigation, regarding possible perjury and making false statements to Congress, although ultimately he was not indicted. SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, Vol. 1, at 197–98 (2019), <https://www.justice.gov/storage/report.pdf> [hereinafter MUELLER REPORT].

Deputy Attorney General, who appointed a special counsel to take over the investigation. This so deeply offended the President that for twenty months—from March of Year 1 to November of Year 2—he subjected his Attorney General to merciless humiliations, continually in public and occasionally in private, in an apparent effort to provoke the Attorney General into resigning so the President could appoint a new Attorney General who would terminate the investigation.

During those twenty months, the President didn't fire his Attorney General, and the Attorney General didn't resign⁹—behavior on both sides that seemed inexplicable to everyone except the few people who realized that, in a key place in the Vacancies Reform Act, the word *dismiss* doesn't appear.

In November of Year 2, the Attorney General finally did resign, and the President named as Acting Attorney General a breathtakingly unqualified person who had said many times previously in print and on television that the special counsel's investigation should be shut down.

That person was claimed by the administration to be Acting Attorney General for three months before a new Attorney General was confirmed by the Senate in February of Year 3. During those three months, there was serious doubt about whether anybody was Acting Attorney General.

Throughout the whole story—from March of Year 1 to February of Year 3—people kept looking at the Vacancies Reform Act for answers and not finding them. On two issues crucial to the country and at the statute's core—its meaning was genuinely disputable. Any statute with that level of opaqueness is a legislative failure. In a national crisis, the statute is a spectacular failure.

Presidentially-appointed offices become vacant all the time. Officials die, retire, or quit to take more lucrative jobs. It can take months for a successor to be nominated and then confirmed by the Senate. In the meantime, who does the departed official's job? Somebody must be able to make decisions of the type the departed official had been making.

This is a relatively simple cluster of problems, at least compared to others that legislatures must solve. Here's how to do it: First, create one simple formula that identifies the person who will automatically take over the vacant position on an acting basis the moment it becomes vacant. Make that formula so elegantly simple that it will work in every executive branch department with every position normally filled by a Senate-

⁹ Actually, in one chaotic incident, the Attorney General did offer a resignation letter in May of Year 1, but the President was persuaded not to accept it, a decision he quickly regretted. By coincidence, the FBI had just delivered an evidence-preservation notice to the White House Counsel. White House staff returned the letter to the Attorney General. MUELLER REPORT, *supra* note 8, Vol. 2, at 79–80.

approved Presidential appointee. Please don't say that the executive branch is too big and complicated for one formula to work. That's an excuse, not an explanation. Great law is made by finding the simple solution. Mediocre law-making fails to do it. And horrible law results from not even trying.

Second, create one simple backup formula that a President can use to substitute someone else—just one formula, not three or four. If you pile on alternate formulas to give a President flexibility, your statute will become inefficiently complex. If you come up with a well-thought-out formula, alternate ones shouldn't be needed. After all, these are *temporary* appointments to fill positions that are *temporarily* vacant.

Finally, provide for the miscellaneous details. Set deadlines, for example.

Congress instead enacted a statute filled with mind-numbing complexity. It includes tests with elements that seem to have mysterious purposes; lists of exceptions combined with exceptions to exceptions; lists of different categories of deadlines; complicated ways of extending deadlines; limits that apply in different ways to extending different deadlines; and cross-references to statutes that the Act doesn't identify and that might or might not apply, depending on the extent to which they "expressly" authorize or designate something. There's no effective way to understand all this. The best you could do would be to put huge pieces of paper on a wall and draw flow-chart diagrams. You might need an entire wall and still not understand what you're reading. While drawing those diagrams, you'll feel like sending texts to Congress saying "Simplify! Simplify! Simplify!" Complexity raises the odds that both drafters and readers will make mistakes. Bad actors will capitalize on accidental loopholes, as they do in the tax code and virtually all other overly complicated statutes. And good actors won't be able to figure out how to obey the law.

A. The Word That Isn't There—"Dismiss"

Suppose you were the President. And suppose that a special counsel was annoying you to the point that you want him gotten rid of. You might not have the power to fire the special counsel. But the Attorney General and, in this case, the Deputy Attorney General have that power. They aren't doing it, and you have the constitutional power to fire them.

The problem is replacing them with someone who will fire the special counsel. You know that you have the power to nominate successors to be approved by the Senate.¹⁰ But you want someone to take office imme-

10 U.S. CONST., art II, § 2, clause 2.

diately and fire the special counsel within the hour, without waiting for Senate approval. You also know that you can make recess appointments while the Senate isn't in session.¹¹ But the Senate seems to go out of its way to stay in session all the time. It doesn't matter whether you're a good President or a bad one or whether your motivations are good ones or bad ones. This is about bad law.

Other than recess appointments, your power to make temporary appointments is in the Vacancies Reform Act, in title 5 of the U.S. Code. The most interesting words for you are in bold italics below:

§ 3345. Acting officer

- (a) If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, ***dies, resigns, or is otherwise unable to perform the functions and duties of the office*** —
- (1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . . ;
 - (2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity . . . ; or
 - (3) notwithstanding paragraph (1), ***the President*** (and only the President) ***may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity***, subject to the time limitations of section 3346, ***if*** —
 - (A) during the ***365-day period preceding*** the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee ***served in a position in such agency for not less than 90 days***; and
 - (B) the ***rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15*** of the General Schedule.

¹¹ "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST., art II, § 2, clause 3.

Subsections (a)(2) and (a)(3) would seem wonderful to you if you want to name an Acting Attorney General who will fire a special counsel within the hour. Under (a)(2), you would be able to move into the Attorney General's office anybody who has already been confirmed by the Senate for some other job. There are hundreds of such people.

But (a)(3) is even better. You would be able to do the same with any of the thousands of Justice Department lawyers who have GS-15 rank and have been in the Justice Department for at least 90 days. The statute seems crystal clear.

No, it isn't.

Three types of events trigger your power to name an acting officer: death, resignation, or inability to perform the functions and duties of the office. Dismissal by the President *isn't* among them. The original wording, from the 1868 Vacancies Act, was "in case of the death, resignation, absence, or sickness."¹² Through various codifications and amendments, the nouns became verbs: "dies, resigns, or is sick or absent." But in substance the list didn't change for 130 years, until the Vacancies Reform Act in 1998, when the list became what it is today: "dies, resigns, or is otherwise unable to perform the functions and duties of the office."

Resignation is by a large margin the most frequent method through which vacancies are created. Far less common are death, disability without resignation, and dismissal without resignation.¹³ All except dismissal are in the statute. Dismissal without resignation isn't, and the only relevant Congressional committee report is silent about why.¹⁴ When a President dismisses someone who doesn't resign, how is the office to be filled temporarily until a new office holder can be nominated and confirmed?

The "dies, resigns, or is otherwise unable to perform the functions and duties of the office" formulation occurs more than once in the Vacancies Reform Act. Wherever the list appears, the gap recurs, and the consequences of its absence recur. Notice the bold italicized words here:

§ 3348. Vacant office

....

- (b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, *and* 3347, if an officer of an Executive agency . . . whose appointment to

¹² Act of July 23, 1868, ch. 227, 15 Stat. 168–69.

¹³ The genteel way of firing an incumbent officer, saving face for both sides, is for someone from the White House to tell the officer something like "The President wants your resignation," after which the officer writes a cordial letter resigning and expressing gratitude for the opportunity to serve, etc. That letter would satisfy § 3345(a). But if an Attorney General refuses to write such a letter when fired, the President can't make a § 3345(a)(2) or (3) appointment.

¹⁴ Report of the Senate Committee on Governmental Affairs to Accompany S. 2176, S. REP. No. 105-250 (1998).

office is required to be made by the President, by and with the advice and consent of the Senate, *dies, resigns, or is otherwise unable to perform the functions and duties of the office* —

(1) *the office shall remain vacant*

. . . .

(d)(1) *An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b) [of this section], in the performance of any function or duty of a vacant office . . . shall have no force or effect.*

Under Justice Department regulations, only an Attorney General can fire a Special Counsel.¹⁵ If someone is claimed to be an Acting Attorney General in circumstances that don’t satisfy the Vacancies Reform Act, any attempt by that person to fire a Special Counsel will have “no force and effect” under 5 U.S.C. § 3348(d)(1).

The Supreme Court—in *NLRB v. SW General, Inc.*,¹⁶ the main case interpreting the Act—held that nullifying an officer’s actions under 3348(d)(1) is the Act’s remedy for violations. In a seven-to-two decision and in an opinion by Chief Justice Roberts, the Court nullified an action by an acting NLRB general counsel on exactly that reasoning.

Sometimes the most important words are the ones that *weren’t* drafted. Was this a careless oversight? Or did Congress do it on purpose, perhaps with great foresight, to prevent a President from abusing power by firing a cabinet officer and then bypassing the Senate by making a GS-15 civil service employee an acting cabinet officer for 210 days, which is the time allowed for a temporary appointment under the statute.¹⁷

If Congress left out dismissal on purpose, why didn’t Congress tell us that? It would be so easy to do (*see Chart 1*).

Chart 1

<i>What the statute says</i>	“an officer . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office”
<i>What it could have said</i>	“an officer is unable to perform the functions and duties of the office, or the office becomes vacant for a reason other than dismissal by the President without the officeholder’s resignation”

.
¹⁵ “The Special Counsel may be . . . removed from office only by the personal action of the Attorney General [and only] for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause . . .” 28 C.F.R. § 600.7(d)(2019).

¹⁶ 137 S. Ct. 929 (2017).

¹⁷ 5 U.S.C. § 3346(a).

Aside from a single comment in floor debate by Senator Fred Thompson, the principal sponsor of the bill that became the Vacancies Reform Act, no explanation appears in the legislative history. Here's the comment:

[T]he *Doolin* court stated that the current [statute] does not apply when the officer is fired, and for similar reasons, it might not apply when the officer is in jail if he does not resign. To make the law cover all situations when the officer cannot perform his duties, the "unable to perform the functions and duties of the office" language was selected.¹⁸

Thompson's theory seems to have been that an officer who has been fired is "unable to perform the functions and duties of the office." Courts have at least four reasons to ignore this (listed in the footnote).¹⁹ Regarding another comment about the Act made in the same speech by the same senator, the Supreme Court held that "floor statements by individual legislators rank among the least illuminating forms of legislative history."²⁰

If the President had fired his Attorney General and then named a temporary replacement under the Act, litigation would have followed immediately. Privately the judges involved would have been grumbling about Congress leaving it to courts to clean up Congress's mess. And publicly those judges would have written opinions parsing Congress's mysteries with reasoning like this (which, fortunately for the judges here, they didn't have to write):

Congress repeated the list several times in the statute and each time omitted firing, and Congress knows how to spell "dismissed by the President" when it wants to write those words.

Courts determine legislative intent using this type of reasoning. It's a game courts are forced to play. Often, as here, there is no legislative intent. Nobody knows why firing isn't on the list. Congress didn't really know why it did what it did.

18 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson). The reference is to *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998).

19 First, the committee report says nothing on this subject. Second, there's no evidence that other co-sponsors agreed with Thompson's comment. Third, the House of Representatives couldn't consider his comment because the House had already passed the bill. Fourth, Thompson misquoted the *Doolin* court, which said nothing about officers being fired. And even if the court had said anything, it would have been dicta because nobody in *Doolin* had been fired.

20 NLRB v. SW Gen. Inc., 137 S. Ct. 929, 943 (2017).

B. Changing “Application” to “Exclusivity” and Getting the Opposite of What the Drafter Wanted

Finally, after 20 months of verbal abuse by the President, the Attorney General in our story did resign in November of Year 2. The President then used § 3345(a)(3) to appoint, as Acting Attorney General, the breathtakingly unqualified person mentioned earlier.

The Vacancies Reform Act isn’t the only way that presidentially-appointed offices are filled temporarily. The Act includes this (bold italics added):

§ 3347. Exclusivity

- (a) Sections 3345 and 3346 *are the exclusive means for temporarily authorizing* an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate, *unless* —
 - (1) *a statutory provision expressly . . .*
- (B) *designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity . . .*

For Attorneys General, such a statutory provision exists. Under 28 U.S.C. § 508(a), if the Attorney General is fired, the Deputy Attorney General would become the Acting Attorney General. Note the bold italics:

§ 508. Vacancies

- (a) In case of *a vacancy* in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office

Chart 2 shows the difference between the two statutes’ lists of vacancy predicates (*see Chart 2*).

Chart 2

Statute	Vacancy Predicate	Consequence if the predicate is satisfied
5 U.S.C. § 3345(a)	“dies, resigns, or is otherwise unable to perform the functions and duties of the office” (<i>Firing the incumbent isn’t in this list.</i>)	The President can exercise the powers in (a)(2) or (a)(3)
28 U.S.C. § 508(a)	“a vacancy in the office of Attorney General, or . . . his absence or disability” (<i>Because this statute doesn’t list causes for vacancies, a vacancy created by the President in firing the incumbent would satisfy this vacancy predicate.</i>)	The Deputy Attorney General becomes Acting Attorney General

But the Deputy Attorney General was exactly the person the President *didn't* want. It was the Deputy Attorney General who had appointed the special counsel who so outraged the President. What if a President were to fire *both* the Attorney General *and* the Deputy Attorney General? That would be governed by § 508(b):

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

Thus, under 28 U.S.C. § 508(a), the powers of the Attorney General can be exercised by the Deputy Attorney General or Associate Attorney General or, if those offices are both vacant, by someone in a line of succession created under § 508(b) by the Attorney General before he was fired, or, if *all* those people have been fired, by someone named in an Executive Order.²¹

Because the Attorney General finally resigned in November of Year 2, the Vacancies Reform Act was finally activated—maybe. What about § 508(a)? The two statutes lead to different results. Which one controls?

For three months, until an Attorney General was finally confirmed, motions were filed in various courts, including the Supreme Court, asking for orders declaring that the person whom the President claimed to be the Acting Attorney General was not actually the Acting Attorney General. If that turned out to be true, under § 3348(d), every document he signed would be void. Judges procrastinated ruling on these motions, apparently hoping for a quick appointment of a real Attorney General. If the purported Acting Attorney General had purported to fire the special counsel,²² there would have been turmoil, and nobody would really know who in the Justice Department had authority.

How did Congress create this mess? The only way to answer that question is to tell the Vacancies Reform Act's story.

During the Clinton administration, vacancies in positions requiring Senate confirmation were increasingly being filled on a theoretically

21 On March 31, 2017, the President issued Executive Order 13,787 adding three U.S. Attorneys at the end of the line of succession "to act as Attorney General" if all the officers named in 28 U.S.C. § 508, plus all those designated by the Attorney General exercising § 508's authority, are unable to act—for example in a disaster affecting Washington. This is unremarkable. The two preceding Presidents had issued similar executive orders (numbered 13,481, 13,557, and 13,762).

22 The reason he didn't might be the same reason the President's aides refused to carry out his orders to fire the Attorney General and the special counsel. The aides could have been indicted for obstruction of justice. See MUELLER REPORT, *supra* note 8, Vol. II, at 77–120.

temporary basis by people who hadn't been confirmed by the Senate for anything, much less the jobs they were temporarily filling. This happened partly because of Clinton's presidential style and partly because the Republican majority in the Senate was increasingly less willing to observe the tradition of deferring to a President's desires in executive branch appointments. In 1997, about one in five positions requiring Senate confirmation were being occupied on a temporary basis by people who had not been Senate-confirmed,²³ and many of them were working in violation of the Vacancies Act then in effect.²⁴ The Justice Department was the object of much of the Senate's blame, both because of the number of DOJ positions being filled temporarily and because for a decade or more DOJ had considered itself exempt from the Vacancies Act and had encouraged other departments to take the same position.²⁵ For Senate Republicans, the breaking point came in December 1997 when Bill Lann Lee was appointed Acting Assistant Attorney General for Civil Rights despite the fact that the Senate Judiciary Committee had refused to approve his nomination for the job on a permanent basis. Lee was thoroughly qualified, but he was anathema to the Senate Republican majority.

In June 1998, Senator Thompson,²⁶ of Tennessee, introduced S. 2176, the bill that would become the Vacancies Reform Act.²⁷ His principal co-sponsor was Senator Robert Byrd of West Virginia, who had been majority leader when Democrats controlled the Senate. The bill was referred to the Committee on Governmental Affairs, which Thompson chaired. In July, the Committee reported out the bill with minor changes.²⁸

Both versions of the bill—the one Thompson introduced in June and the one the Committee reported out in July—included this sentence, as § 3345(c):

²³ Although the Trump administration's statistics fluctuate, they often exceed the Clinton percentages. Senate Republicans, however, do not complain.

²⁴ Morton Rosenberg, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, 4 (Congressional Research Service 1998). In March 1998, Rosenberg had testified before the Senate Governmental Affairs Committee in favor of the bill that would become the Vacancies Reform Act. In January 2019, he filed an amicus brief in the Supreme Court arguing, in *Michaels v. Whitaker* that Matthew Whitaker's appointment as Acting Attorney General violated the law because the operative statute was 28 U.S.C. § 508 and not the Vacancies Reform Act. The Supreme Court never ruled on the issue.

²⁵ S. REP. NO. 105-250, at 3 (1998).

²⁶ Before election to the Senate, Thompson had been counsel to the Republicans on the Senate Watergate Committee. During the televised Watergate hearings, he was frequently seen by millions of viewers interrogating witnesses. Later he became an actor in movies such as *Die Hard 2* and *The Hunt for Red October*, and he became a regular on the television drama *Law & Order*.

²⁷ 144 CONG. REC. S6413–16 (daily ed. June 16, 1998).

²⁸ S. REP. NO. 105-250, at 9–11.

With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.

The Committee report explained (*italics added*) —

With respect to a vacancy in the office of Attorney General, 28 U.S.C. § 508 will remain applicable. *That section ensures that Senate-confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General.*²⁹

Remember: Thompson, Byrd, and a number of other senators were incensed that people who hadn't been confirmed by the Senate were in charge of major units in the Justice Department, holding, on an endlessly temporary basis, positions that were supposed to require Senate confirmation.

In the Committee's bill, § 3347 was titled "Application" and in part provided that —

- (a) Sections 3345 and 3346 *are applicable to* any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate, *unless* —
 - (1) . . .
 - (2) *a statutory provision in effect on the date of enactment of [this Act] expressly* —
 - (A) . . .
 - (B) *designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.*³⁰

In two separate ways, the Committee's bill would have unambiguously forbidden the purported Acting Attorney General appointment in November of Year 2.

One way would have been through the bill's § 3345(c) and its cross-reference to 28 U.S.C. § 508 as the method of designating an Acting Attorney General. Under § 508, the Deputy Attorney General, a position requiring Senate confirmation, automatically becomes the Acting Attorney General.

The other way would have been through the bill's § 3347(a)(2)(B) and its general cross-reference to all statutes like 28 U.S.C. § 508. The Vacancies Reform Act would apply unless some other statute designates

²⁹ *Id.* at 26 (*emphasis added*).

³⁰ *Id.* at 26 (*emphasis added*).

an officer or employee to fill a vacancy temporarily. That's what 28 U.S.C. § 508 and other statutes do.

On September 25, the Committee's bill came up for debate, and several senators, including Thompson, submitted amendments.³¹ One of Thompson's amendments would delete § 3347(a)'s "are applicable to" and substitute "are the exclusive means for temporarily authorizing an acting official to perform the functions and duties." Clearing away all but the basics, this is the wording Thompson's amendment would produce:

Sections 3345 and 3346 are *the exclusive means* for temporarily authorizing an acting official . . . *unless* . . . a statutory provision in effect on the date of enactment of [this Act] expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.

Thompson wanted his bill to control as much temporary office-filling as possible to prevent presidential manipulation. *Exclusive* sounds so much more powerful than *applicable*. But substituting *exclusive* for *applicable* actually had the opposite effect.

The bill was—and the Vacancies Reform Act is—so convoluted that there's plenty of room *inside* it for presidential manipulation. But position-specific statutes like 28 U.S.C. § 508 are much simpler; they mostly operate automatically; and there's far less room for manipulation because they typically put people who are already Senate-confirmed for their current jobs into acting positions to fill a vacancy temporarily. The *applicable . . . unless* wording would have caused the maximum number of vacancies to be filled that way.

But the *exclusive . . . unless* wording would—and later did—create ambiguity. If two statutes cover the same vacancy when the Act isn't exclusive, which statute outranks the other one? Thompson's amendment would make the Attorney General's position subject to *both* the Act *and* 28 U.S.C. § 508 without any indication of which statute would outrank the other. The Congressional Record doesn't show a vote on Thompson's amendment, but he later put it in the bill when it was enacted via a House appropriations bill. The ambiguity might have been cleared up by the explicit sentence in the bill's § 3345(c): "With respect to the office of the Attorney General of the United States, the provisions of section 508 of

31 144 CONG. REC. S10,996–97 (daily ed. Sept. 25, 1998).

32 144 *Id.* at S11,021–38. The debate is charming. There's a relaxed civility among the senators. They graciously yield to each other as friendly colleagues with no apparent party tensions, although there was a party division on the bill. Senator Byrd, who affected classical oratory, tells, in his unique style, a long story about seven youths who fled persecution in ancient Greece and ended up sleeping in a cave for 187 years, believing they had been asleep for only one night, the story leading to Byrd's moral that the Senate has been sleeping on its rights versus the Executive branch.

title 28 shall be applicable.” But that sentence later disappeared from the version of the bill that became law.

On September 28, after some floor discussion,³² the bill was headed toward a filibuster, and a cloture motion failed to muster the three-fifths majority needed to cut off debate. Clinton had threatened to veto it anyway. The bill appeared comatose, if not dead.

Then Thompson, perhaps with Byrd, made an end-run around both the Senate and Clinton.³³ Thompson went to the House and got his bill folded into a 920-page House omnibus appropriations bill³⁴ that was so vast that the Senate couldn’t pick it apart and Clinton couldn’t veto it without shuttering federal agencies awaiting their operating funds. Other people had done the same thing with their pet bills. The Vacancies Reform Act is on pages 612–17 of the House bill, just ahead of the American Fisheries Act, which regulates commercial fishing vessels in ways so convoluted as to be incomprehensible.

In the House’s mega-appropriations bill, the § 508 sentence—“With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable”—had disappeared. There seems to be no record of how or why it disappeared. If it had stayed in the bill, Matthew Whitaker would never have been Acting Attorney General.

The House passed the appropriations bill on October 20. The next day, the Senate passed it, and Clinton signed it.³⁵

That is how Congress made a mess of the Vacancies Reform Act. It wasn’t just sloppy work. It was unprofessional. When judges make law, they are expected to act like professionals. No such expectation is applied to Congress. We will explore that in this article’s part V.

III. Congress Still Hasn’t Mastered the Basics of How to Create a Crime

Chart 3 presents five commonly used methods³⁶ of creating a crime and its punishment (*see Chart 3*).

³³ There appears to have been some negotiation between the bill’s sponsors and the Clinton administration.

³⁴ H.R. 4328, which became the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277 (1998).

³⁵ October 21 was also the day on which the House Judiciary Committee decided to begin impeachment proceedings against Clinton.

³⁶ Every method except C uses declarations. A declaration creates a status or legal situation by declaring it to be true, often with a form of the verb *to be*.

Chart 3

Method A (a declaration)	"Whoever [does X] shall be [fined, imprisoned, etc.] or "A person who [does X] shall be fined, imprisoned, etc.]."
Method B (a declaration)	"It is unlawful to [do X]." [A nearby sentence or section will set out the punishment.]
Method C (a duty)	VARIATION 1: "A person shall not [do X]." [A nearby sentence or section will set out for the punishment for doing X and thus violating this negative duty.] VARIATION 2: "A person shall [do X]." [A nearby sentence or section will set out the punishment for doing X and thus violating this affirmative duty.]
Method D (a declaration)	"A person who [does X] is guilty of [crime Y]. [Crime X] is a [Class B felony or Class A misdemeanor]." [A group of sections elsewhere in the criminal code will set out the punishments for each Class.]
Method E (a declaration)	"A person is guilty of [crime Y] if the person does [crime X]. [Crime Y] is a [Class B felony or Class A misdemeanor]." [A group of sections elsewhere in the criminal code will set out the punishments for each Class.]

Methods D and E are infinitely better than the others. They give each crime a name as part of a system of classifying crimes with uniform punishments, which most states have done. Method E is better than D because it gets the reader to the verb quickly, and an English-language sentence makes sense only after the reader has found the verb.

Congress uses Method A—by far the worst method—to create most of the crimes in title 18, the federal criminal code. Here is an example. (*Find the verb.*)

§ 1503. Influencing or injuring officer or juror generally.

- (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence,

obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

Where is the empathy in this sentence? Good writing is built on empathy—an ability to see words as a reader will and to write and rewrite until the words satisfy the reader’s needs and cause the reader to feel gratitude at having been helped. Congress has no empathy for its readers, a situation that should shock us for two reasons. First, a legislature’s readers are the millions of people who must comply with what the legislature writes. Lack of empathy for their needs is self-defeating because it sabotages the legislature’s own goals. Second, most law can be expressed in words that educated lay readers can understand (which Appendix B illustrates). Legislatures are a unique category of authors who are elected by their own readers. A legislature that writes in a way that shows not just lack of empathy but also contempt for reader needs undermines democracy.

For some crimes, Congress breaks out of its addiction to Method A. For some title 18 crimes, it uses Method B. An example is the RICO statute (Racketeer Influenced and Corrupt Organizations), also in title 18:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity³⁷ . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

Sometimes Congress can be ambidextrous, using two methods in the same section. Tucked away in an obscure corner of the Tax Code³⁸ is a statute in which Congress uses Method B to create a crime in subsection (a) and Method C to create a different crime in subsection (b).

§ 7217. Prohibition on executive branch influence over taxpayer audits and other investigations

(a) **Prohibition.** — It shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an

³⁷ Section 1961(B) defines “racketeering activity” to include, among others, obstruction of justice; obstruction of criminal investigations; tampering with or retaliating against a witness, victim, or informant; mail fraud; wire fraud; and money laundering. Under § 1963, every asset a defendant has acquired through RICO violations can be forfeited to the government.

³⁸ Title 26 of the U.S. Code.

audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer.

- (b) **Reporting requirement.** — Any officer or employee of the Internal Revenue Service receiving any request prohibited by subsection (a) shall report the receipt of such request to the Treasury Inspector General for Tax Administration.
- (c) **Exceptions.** . . .
- (d) **Penalty.** — Any person who willfully violates subsection (a) or fails to report under subsection (b) shall be punished upon conviction by a fine in any amount not exceeding \$5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.
- (e) **Applicable person.** — For purposes of this section, the term “applicable person” means —
 - (1) the President,³⁹ the Vice President, any employee of the executive office of the President, and any employee of the executive office of the Vice President; and
 - (2) any individual (other than the Attorney General of the United States) serving in a position specified in section 5312 of title 5, United States Code.

Congress is making two kinds of mistakes. One is using three different methods of creating crimes. The other is using the worst possible method for the overwhelming majority of the crimes it creates. Most states use one—and *only* one—of the five methods. And most states use Method D or Method E, the most effective two of the five.

But Congress has also done something well here. Section 7217 is a lean, simple statute with a clarity and economy unlike any of the other Congressional enactments discussed in this article. It might be drafted in an odd way, but it’s the opposite of gibberish.

IV. Obstruction of Justice

A. The Big Picture

Here’s a list, from title 18 of the U.S. Code, of the federal cover-up crimes—the ones for which people are indicted and convicted during national political scandals. They are all reproduced in Appendix A.

- § 4. Misprision of felony
- § 1001. Statements or entries generally

³⁹ In the controversy over whether a President can be prosecuted for exercising what the Constitution calls “The executive Power [that is] vested in a President” (Article II, § 1), it seems unnoticed that Congress has created a crime specifically for Presidents.

- § 1503. Influencing or injuring officer or juror generally
- § 1504. Influencing juror by writing
- § 1510. Obstruction of criminal investigations
- § 1512. Tampering with a witness, victim, or an informant
- § 1513. Retaliating against a witness, victim, or an informant
- § 1515. Definitions for certain provisions; general provision
- § 1521. Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title
- § 1622. Subornation of perjury

When significant numbers of people are being indicted for various types of obstruction of justice, you might want a detailed scorecard that would help you follow the action through pre-trial motions, trials, and appeals. Appendix A should provide that scorecard. These crimes shouldn't be hard to understand. They cover simple things like falsifying evidence and threatening witnesses. Try to read Appendix A. Will it help you follow obstruction of justice scandals and explain them to your family and friends?

These sections contain so many crimes with overlapping elements that the total effect is incoherence. Reading them is like trying to find your way through a labyrinth. Over decades Congress has enacted new sections or amended existing ones with no attempt to coordinate them and limit the number of concepts involved. It has just thrown concepts onto a page. That's not writing—it's typing.⁴⁰

I redrafted all the Appendix A obstruction of justice statutes, and the redraft is in Appendix B. It's not the best conceivable drafting. It's just what a good drafter would be able to do if the drafter were permitted to rewrite all the relevant sections from scratch, which our legislatures usually don't permit their staff drafters to do. Not allowing drafters to do that might be one of the reasons why our statutes become more complex as they are continually amended.

In the Appendix B redraft, simplifying not only created clarity but also cut the number of words in half:

Appendix A (*current law*) — 2,193 words

Appendix B (*the redraft*) — 1,107 words

Some of the shrinkage is because Appendix B's wording is more concise. But most of the shrinkage is because Appendix B has *fewer concepts*.

⁴⁰ Truman Capote's description of Jack Kerouac's work. FIGHTING WORDS, *supra* note 1, at 129.

For example, Congress frequently criminalizes both an act and an attempt to commit the act. An attempt is an inchoate crime. It equals trying plus failing to succeed. Criminal law treats completing a crime and attempting it as mutually exclusive. Succeeding and failing don't overlap. If you want to penalize both success and failure, the usual drafting method is to create two crimes, perhaps punishing a failed attempt less than a successful one. But with obstruction of justice crimes—reprinted here in Appendix A—Congress unaccountably combines the two, using the formula “do X or attempt to do X.” This is inefficient, and Congress knows better because with one obstruction of justice crime Congress has used a brilliant solution.

For nearly two centuries—since 1831—18 U.S.C. § 1503 has contained an ingenious method of creating one crime in place of two, which Congress seems not to have realized even though it created the method. Instead of using the word *attempt*, § 1503 uses the word *endeavor*. The complete crime definition is quoted earlier in this article.⁴¹ Here's the key wording, which courts call the omnibus clause:

corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice

For at least the last century, courts have seized on this use of *endeavor* to hold that in § 1503 success is irrelevant and that a defendant is just as guilty for trying as for succeeding. The courts reason that because Congress didn't say *attempt*, it meant something other than the inchoate crime of attempt. This is from a 1921 Supreme Court case:

The word of the section is “endeavor,” and by using it the section got rid of the technicalities which might be urged as besetting the word “attempt,” and it describes any *effort* or essay to do or accomplish the evil purpose that the section was enacted to prevent. . . . The section . . . is not directed at success in corrupting a juror, but at the “endeavor” to do so.⁴²

Attempt has an exact meaning in criminal law. *Endeavor* has none of *attempt's* baggage, and the courts had to invent a meaning for it. Essentially the courts are reading the statute like this:

corruptly . . . ~~influences, obstructs, or impedes, or~~ endeavors to influence, obstruct, or impede, the due administration of justice

⁴¹ See *supra* text accompanying notes 36 and 37.

⁴² United States v. Russell, 255 U.S. 138, 143 (1921) (emphasis added). “This is not to say that the defendant's actions need be successful; an ‘endeavor’ suffices.” United States v. Aguilar, 515 U.S. 593, 599 (1995). “The ‘endeavor’ element of the offense describes any attempt or *effort* to obstruct justice.” United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (emphasis added).

Because Congress used *endeavor* rather than *attempt*, courts are able to ignore the words crossed out above. Trying makes you guilty, and § 1503 doesn't care whether you succeed or fail.

Congress probably did this by accident. Nobody today knows why a drafter in 1831 wrote *endeavor* rather than *attempt*. The statute obviously mentions succeeding ("influences, obstructs, or impedes") separately from trying ("endeavors to influence, obstruct, or impede").

Maybe the drafter thought *endeavor* and *attempt* meant the same thing. Maybe to many people in 1831, they actually did mean the same thing, and *endeavor* seemed the more genteel way of saying it. Or maybe it was style. The drafter might just have liked *endeavor* more than *attempt* and didn't wonder about the similarities or differences in meaning. Or maybe the drafter actually meant that trying completes the crime and success or the lack of it is irrelevant. That actually seems like the least likely explanation. Why would the drafter have mentioned success ("influences, obstructs, or impedes") if the drafter meant it to be irrelevant?

It doesn't really matter why the drafter wrote *endeavor*. Whether by accident or by design, the drafter—and therefore Congress—invented a two-fer, a way of getting one concept to do the work of two. Actually *endeavor* is a three-fer. Using *endeavor* reduces three concepts to one. *Endeavor* includes both trying and succeeding, making it unnecessary to criminalize both the act and the attempt. And *endeavor* also includes the concept of *knowingly*. If you make an effort (*endeavor*) to do something, inherent in making the effort is knowing that you are making it: you are trying to accomplish a specific goal.

Where Congress has criminalized equally both an act and the attempt in the same section—invariably in the same sentence—the Appendix B redraft uses *endeavor* instead, eliminating also any *knowingly* requirements. This is how drafters simplify—by using the smallest number of concepts that will get the job done. Bloated drafting isn't caused only by too many words. It's also caused by too many concepts. Here Congress was using three concepts to do the work of one.

Section 1503 was the original obstruction of justice statute. All the others came afterward. In every later statute, Congress ignored the efficiency of its own accidental invention.

When it enacted the later sections, why didn't Congress do what the Appendix B redraft does with its own brilliant but accidental invention of *endeavor*? Surely Congress reads the case law—the way Broadway stage actors read critics' reviews—and should have been pleasantly surprised at how well its accidental invention has worked out when courts interpret § 1503. Maybe Congress doesn't read case law. Or maybe Congress reads

it, but simplicity isn't something Congress would value or even notice when courts recognize it.

Other aspects of the redraft—and there are many—are explained in Appendix B's footnotes, which develop this article's analysis.

B. The Dispute between Mueller and Barr about the Word Otherwise

In June 2018, while still a private citizen, William Barr wrote a 19-page unsolicited memo⁴³ complaining that Robert Mueller's investigation was, among other things, based on a wrong-headed interpretation of the word *otherwise* as Congress used it in 18 U.S.C. § 1512(c)(2). This has come to be known as the “audition memo” because it was unsolicited and Barr handled it in a way that suggested that he himself wanted to be appointed Attorney General.

A long passage in the Mueller Report, apparently written after Barr eventually became Attorney General (and Mueller's supervisor), is devoted to refuting Barr's interpretation of *otherwise*.⁴⁴ The two documents read like dueling appellate briefs on the issue. Analyzing the true meaning of *otherwise* would require a separate law review article in itself. Here it's enough to point out that Congress made two mistakes and the mistakes embroiled everyone in uncertainty about which crime a President might have committed.

Section 1503, the original obstruction of justice statute, applies only to obstruction connected to a judicial proceeding. In 2002, as a result of the Enron-Arthur Anderson scandal, Congress passed the Sarbanes-Oxley Act, adding 18 U.S.C. § 1512(c) to cover obstruction not connected to a judicial proceeding.⁴⁵ This was Congress's first mistake. The simple solution would have been to amend § 1503, changing or adding only a phrase or two. But as usual, Congress chose the complicated solution, which created unnecessary issues about the relation between and relative scope of the two sections. Prosecutors and courts now must make unnecessary decisions about which statute has been violated and whether there's a gray zone between them where bad behavior falls between cracks and actually hasn't been criminalized.

43 Memorandum from Bill Barr to Deputy Attorney General Rod Rosenstein (June 8, 2018), <https://documentcloud.org/documents/5638848-June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.html>.

44 MUELLER REPORT, *supra* note 8, Vol. 2, at 160–68.

45 Julie R. O'Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006). Title 18 is “a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.” *Id.* at 643.

Congress's second mistake was to use the word *otherwise* in § 1512(c)(2), following a list of specific acts in (c)(1). This is such a common mistake that a substantial amount of case law has been created—unnecessarily—to decide what *otherwise* means when used to introduce an omnibus general item at the end of a list of specific items. The case law is described in great detail in Barr's audition memo and in the Mueller Report's rebuttal.

These two mistakes aren't just legislative sloppiness. Given the stakes involved, they are displays of legislative incompetence. We expect this kind of thing from our legislatures, and lawyers and courts are used to cleaning up legislative messes. But it is incompetence, and in some other countries it occurs much less frequently.⁴⁶

V. Why Congress Drafts This Way

Simplicity is the ultimate sophistication.

— headline on the brochure introducing the Apple II computer (1978)⁴⁷

Complexity leads to more complexity.

— Richard A. Givens⁴⁸

Keep it simple, stupid.

— the KISS principle in engineering, created by Kelly Johnson,⁴⁹ from the common experience that malfunctions occur more often in complex systems than in simple ones performing similar tasks.

Clutter and confusion are failures of design

—Edward Tufte⁵⁰

Simplicity is the shortest path to a solution. . . . [A] lot of simplicity comes from knowing what matters and what doesn't matter.

— Ward Cunningham⁵¹

⁴⁶ For examples, see Reed Dickerson, *Legislative Drafting: American and British Practices Compared*, 44 A.B.A.J. 865 (1958) and Richard K. Neumann Jr., *Legislation's Culture*, 119 W. VA. L. REV. 397 (2016) (France and Sweden). The poet Paul Valéry said that the French Civil Code is "the greatest book of French literature," and the novelist Stendhal read it daily as an example of precision and clarity that he had set as a benchmark for himself while writing *The Charterhouse of Parma*. Neumann, 119 W. VA. L. REV. at 403, 408 (with small caps for W. Va. L. Rev.) at 403, 408. The British Parliament's drafting manual sets out an exemplary method of statute creation. OFFICE OF THE PARLIAMENTARY COUNSEL, DRAFTING GUIDANCE (2017).

⁴⁷ Curated by the Computer History Museum, <http://www.computerhistory.org/collections/catalog/102637933>.

⁴⁸ Richard A. Givens, *Legal Simplification*, 68 N.Y. ST. B.J. 26, 26 (Oct. 1996).

⁴⁹ BEN R. RICH, *Clarence Leonard (Kelly) Johnson, 1910–1990, A Biographical Memoir* (National Academy of Sciences).

⁵⁰ EDWARD TUFTE, ENVISIONING INFORMATION 51 (1990).

⁵¹ Bill Venners, *The Simplest Thing That Could Possibly Work: A Conversation with Ward Cunningham*, Part V (concerning software programming) at <https://www.artima.com/intv/simplest2.html>.

Our life is frittered away by detail. . . . Simplify, simplify.

— Henry David Thoreau⁵²

Abair ach beagan is abair gu math e.

(Say but little and say it well.)

— Gaelic proverb, posted on a wall in the Scottish Parliament's drafters' office.⁵³

Drafting is designing. A contract or statute is intellectual machinery—a machine made up of ideas geared together. It should produce the results we want whenever we use it. It shouldn't waste fuel (require unnecessary effort to understand, comply with, or enforce). It should be reliable. It should *work right*.

Simple solutions, if well chosen, work better than complex ones. To achieve simplicity, a drafter figures out the few things that really matter, uses them, and throws away the rest as clutter. A confused drafter uses every relevant concept because that drafter can't tell the difference between what really matters and clutter. What separates those two drafters is that one knows how to *design* and the other doesn't.

Simplicity isn't simplistic. It's sophisticated. Simplicity is a professional skill, and in legislation, it's a hard one to master.

Legislating is made up of two functions— designing law and enacting it. A lot of legislative incoherence is caused by mistakenly conflating the two functions.

Designing law is diagnosing the problems a statute would address; building a set of legal rules that would best do that; finding the best words to express those rules; and producing, in writing, a product suitable for enactment. These require a set of professional skills, most especially mastery in the wise use of rules with the foresight to predict what will work and what won't. (This is one of the reasons why teaching drafting involves teaching high-level problem-solving skills.)

Enacting law is deciding whether the designers' product should become law. Enacting provides legitimacy. Those who enact are elected by the public and are responsible to the public. If they make bad enactment decisions, the public can replace them. Professional expertise isn't particularly relevant to good enacting and might even be a hindrance to political credibility. Deciding whether to enact is intuitive work—intuition about what's right and wrong and about what the public will accept as fair and reasonable. The finest intuition is priceless, and your favorite legislators probably have it.

⁵² HENRY DAVID THOREAU, *WALDEN*, Ch. 2 (1854).

⁵³ Andy Beattie, *Why Drafting Matters*, in PARLIAMENTARY COUNSEL OFFICE, *DRAFTING MATTERS!* (2d ed.), <https://www.gov.scot/publications/drafting-matters>.

Fred Thompson and Robert Byrd were masters at enacting law. They knew the Senate and all its rules backwards and forwards. They had enormous credibility with their constituencies. And, in a narrow sense, they had reasonable judgment about choosing policy goals. But, if the Vacancies Reform Act is typical of their work, they were amateurish rather than professional law designers.

In our legislatures, those who enact also do most of the designing. But winning an election isn't evidence that a legislator has professional law-designing skills or even realizes that they exist as a skill set. An election isn't a professional licensing exam. It establishes legitimacy.

Chaos. When Victoria Nourse and Jane Schacter interviewed Congressional drafters, they heard comments like these,

Staffers repeatedly told us that there was often insufficient time to achieve textual clarity: "Time pressure . . . is the key here. . . . This pressure leads to errors, inertia, [and] not understanding completely the potential . . . pitfalls" of a law. When bills are drafted on the floor or in conference, time pressures can be intense; a staffer may have only "thirty minutes to get something done" on a "high profile issue." Another reported that she might get the actual text only twenty minutes before the vote: "This happened with the juvenile-crime bill, when the stuff on gun shows came out of the woodwork, and there was no time to even check what the current law is. So sometimes you can't be more clear because you don't know what you're addressing."⁵⁴

This isn't a professional process designed to produce professional-quality work. It's an amateurish process and produces gibberish.

VI. Conclusion

These problems—a chaotic process and law being designed amateurishly—typically don't occur in some parliamentary systems, where law is designed professionally in the executive branch, or by separate commissions, and presented to the legislature for enactment.⁵⁵ Parliaments aren't, however, being used as rubber stamps. A parliament chooses from its own members the cabinet that controls the executive branch.

⁵⁴ Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 595 (2002). For somewhat different views, see Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COL. L. REV. 807 (2014) and Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79 (2015).

⁵⁵ For an example (Sweden), see Neumann, *supra* note 46, at 418–21.

Maybe we should treat legislative drafters with a bit more respect. In most U.S. legislatures, the drafters on staff aren't the core problem. Legislative drafters have a lot of experience in *part* of designing law (finding the words), but they are typically excluded from the rest. Writing and thinking, however, are one process. And a legislature's drafters are its institutional memory. Some are senior in years of service to most of their legislators. An experienced drafter has seen decades of bad law being made and might have learned law-design lessons that legislators don't have much opportunity to learn.⁵⁶ An hypothesis that probably won't be tested is that we would get better legislation if legislators were to reduce, by at least some amount, their involvement in law design and if some staff drafters were to have a more active role in it.

VII. Appendix A

Federal Cover-Up Crimes (from Title 18, U.S. Code)

This Appendix contains cover-up crimes involving courts and criminal investigations, including lying to the FBI. Omitted, especially from § 1001, are offenses like lying to Congress and administrative agencies.

This Appendix includes only the crimes' formulations—the elements of crimes and defenses. Omitted are provisions on penalties, jurisdiction, and venue.

Congress drafted nearly all these sections using the formula "Whoever [does X, Y, and Z] shall be imprisoned [number of years] or fined [details] or both." The same sentence that sets out the elements of the crime also includes the penalties. That's terrible drafting because it leads to huge sentences, as the one in 18 U.S.C. § 1503. To cut out the distracting penalty clutter in this Appendix, I omitted the penalty parts of the sentences and replaced them with "shall be [penalty]." That might seem awkward wording, but it's a concise way to indicate a deletion needed here because Congress uses the least effective method of creating crimes. See text after note 30.

§ 4. Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon

⁵⁶ To get a sense of how legislative drafters go about their work, you can find links to about 30 state legislatures' drafting manuals on the National Conference of State Legislatures' website: <http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx>. The Texas manual is particularly good.

See also LAWRENCE E. FILSON & SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* (2d ed. 2008); Tamara Herrera, *Getting the Arizona Courts and the Arizona Legislature on the Same (Drafting) Page*, 47 ARIZ. ST. L.J. 367 (2015); Amy Langenfeld, *Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom*, 22 PERSPS. 141 (2014).

as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [*penalty*].

§ 1001. Statements or entries generally⁵⁷

- (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive . . . or judicial branch of the Government of the United States, knowingly and willfully —
- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 - (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
- shall be [*penalty*].
- (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
- (c) . . .⁵⁸

§ 1503. Influencing or injuring officer or juror generally⁵⁹

- (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs,

⁵⁷ This is the section that Michael Flynn and George Papadopoulos pled guilty to violating. MUELLER REPORT, *supra* note 8, Vol. 1, at 192–95.

⁵⁸ Subsection 1001(c) applies to Congress. It is the subsection to which Michael Cohen pled guilty, together with violations of § 1001(a)(2). *Id.* at 195–96. The Mueller team considered but eventually decided not to charge Jeff Sessions with violating § 1001(c). *Id.* at 197–98.

⁵⁹ This is the original obstruction of justice statute, dating from 1831. See *supra* text accompanying notes 36–37 and notes 40–43. It is also one of the sections that the Mueller team apparently believed Donald Trump violated. See MUELLER REPORT, *supra* note 8, Vol. 2, at 7–14.

or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be *[penalty]*.

§ 1504. Influencing juror by writing

Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be *[penalty]*.

Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury.

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be *[penalty]*.

(b) . . .⁶⁰

(c) As used in this section, the term “criminal investigator” means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

(d) . . .⁶¹

(e) . . .⁶²

§ 1512. Tampering with a witness, victim, or an informant⁶³

- (a)
 - (1) Whoever kills or attempts to kill another person, with intent to —
 - (A) prevent the attendance or testimony of any person in an official proceeding;
 - (B) prevent the production of a record, document, or other object, in an official proceeding; or

.....

60 Subsection 1510(b) penalizes a financial institution officer for alerting a customer that the customer’s records have been subpoenaed. Because the crime is so narrow and specialized, I omitted it.

61 Subsection 1510(d) covers insurance company officers and employers in the same way that subsection (b) covers bank officers. For the same reason, I omitted it.

62 Subsection 1510(e) concerns the Fair Credit Reporting Act, the Right to Financial Privacy Act, and related statutes. Again, I omitted it because it’s so narrow and specialized.

63 The Mueller team apparently believed Donald Trump violated § 1512(b) and (c)(2). See MUELLER REPORT, *supra* note 8, Vol. 2, at 7–14. The dispute between Mueller and Barr centered around Congress’s sloppy use of the word *otherwise* in subsection (c)(2). Compare MUELLER REPORT, *supra* note 8, Vol. 2, at 159–67 with the Barr audition memo, *supra* note 43.

- (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be [*penalty*].

- (2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to —
 - (A) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (B) cause or induce any person to —
 - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
 - (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
 - (iv) be absent from an official proceeding to which that person has been summoned by legal process; or
 - (C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
- shall be punished as provided in paragraph (3).

...

- (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —
 - (1) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (2) cause or induce any person to —
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

- (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

shall be [*penalty*].

(c) Whoever corruptly —

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be [*penalty*].

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from —

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be [*penalty*].

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section —

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

- (g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance —
- (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
 - (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

...

§ 1513. Retaliating against a witness, victim, or an informant

- (a)
- (1) Whoever kills or attempts to kill another person with intent to retaliate against any person for —
 - (A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
 - (B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,
 shall be *[penalty]*.

...

- (b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for —
- (1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
 - (2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;
- or attempts to do so, shall be *[penalty]*.

...

§ 1515. Definitions for certain provisions; general provision

- (a) As used in sections 1512 and 1513 of this title and in this section —
- (1) the term “official proceeding” means —
 - (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
 - (B) a proceeding before the Congress;
 - (C) a proceeding before a Federal Government agency which is authorized by law; or
 - (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;
 - (2) the term “physical force” means physical action against another, and includes confinement;
 - (3) the term “misleading conduct” means —
 - (A) knowingly making a false statement;
 - (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
 - (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
 - (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
 - (E) knowingly using a trick, scheme, or device with intent to mislead;
 - (4) the term “law enforcement officer” means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant —
 - (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

- (B) serving as a probation or pretrial services officer under this title;
- (5) the term “bodily injury” means —
 - (A) a cut, abrasion, bruise, burn, or disfigurement;
 - (B) physical pain;
 - (C) illness;
 - (D) impairment of the function of a bodily member, organ, or mental faculty; or
 - (E) any other injury to the body, no matter how temporary; and
- (6) the term “corruptly persuades” does not include conduct which would be misleading conduct but for a lack of a state of mind.
- (b) As used in section 1505,⁶⁴ the term “corruptly” means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.
- (c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

§ 1521. Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title

Whoever files, attempts to file, or conspires to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in section 1114,⁶⁵ on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation, shall be *[penalty]*.

§ 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be *[penalty]*.

.....

⁶⁴ 18 U.S.C. § 1505, titled “Obstruction of proceedings before departments, agencies, and committees.”

⁶⁵ 18 U.S.C. § 1114: “any officer or employee of the United States . . . while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance.”

VIII. Appendix B

Redrafted Federal Cover-Up Crimes

This Appendix is a redraft of the crimes in Appendix A. See Part 4 as well as the footnotes in Appendix A. To avoid confusion with current law—the numbered sections reproduced in Appendix A—sections in this redraft are lettered (§ A, etc.). If this redraft were ever enacted—which is extremely unlikely—the letters would naturally become numbers. Congress uses the least effective method of creating crimes. This redraft uses a method states often adopt when modernizing their criminal codes.⁶⁶

§ A. Definitions⁶⁷

In sections B through E —

- (1) “**Corruptly**” means with an improper purpose.⁶⁸
- (2) “**Court**” means a federal court.
- (3) “**Endeavor**” means an effort or to make an effort.⁶⁹
- (4) “**Informant**” means a person who provides information to a law enforcement or judicial officer. A victim or witness might also be an informant.
- (5) “**Injure**” includes causing pain.⁷⁰
- (6) “**Judicial officer**” means a judge, magistrate, or prosecutor⁷¹ with legal authority in a federal court.

⁶⁶ See *supra* text after note 36.

⁶⁷ Congress provided few definitions for terms used in the statutes reproduced in Appendix A. One way to reduce the number of concepts—simplify—is to create a consistent vocabulary through definitions. Because Congress failed to do it here, the courts have had to do it, with much effort that wouldn’t have been needed if Congress had done a complete job of legislating. In creating some of these definitions, I used concepts from the case law.

⁶⁸ In 1831, Congress used the word *corruptly* in what is now 18 U.S.C. § 1503, the basic obstruction of justice statute. But Congress didn’t define it then or over the next 165 years as it added the other sections in Appendix A. During those 165 years, the courts developed four different definitions, one of which was so unacceptable that in 1996 Congress finally chose sides and added, in § 1515(b), a definition of *corruptly*. For the history and the cases, see Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1284–89 (2018).

But the § 1515(b) definition applies only to § 1505, which penalizes obstructing justice before administrative agencies and Congress—not courts (which is why § 1505 isn’t in Appendix A). The definition is, however, consistent with most of the case law interpreting the sections in Appendix A.

Congress’s § 1515(b) definition is unnecessarily complicated: “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”

Corrupt is a state of mind, and the only state of mind words in Congress’s § 1515(b) definition are “with an improper purpose.” Everything else Congress lists is action—things a person *does* while in that state of mind. All the acts are already in the statute as *actus reus*. Cutting out the redundant bloat leaves the phrase “improper purpose,” which also permeates the case law. To simplify, remove ideas that don’t matter.

⁶⁹ For an explanation of this definition, see *supra* text accompanying note 43.

⁷⁰ A redraft of § 1515(a)(5), cutting out all the unnecessary concepts. The only reason to define this term is to include the idea of pain, which might occur without what people normally think of as an injury—broken bones, bleeding, etc.

⁷¹ Prosecutors have been held to be covered even though they aren’t mentioned in § 1503’s bizarre and internally inconsistent lists of judicial officers. See *United States v. Jones*, 663 F.2d 567 (5th Cir. 1981).

- (7) “**Judicial proceeding**” means a proceeding in a federal court, including a grand jury investigation.
- (8) “**Juror**” means a petit juror, grand juror, or person who has been summoned⁷² to serve as a petit or grand juror.
- (9) “**Law enforcement officer**” means a federal officer or employee, or a person authorized to act for the federal Government, who —
 - (A) is authorized under law to participate in the prevention, investigation, or prosecution of a federal offense; or
 - (B) serves as a probation or pretrial services officer under this title.
- (10) “**Proceeding**” means a judicial proceeding, or an investigation by a law enforcement officer.

§ B. Obstructing justice; corruptly influencing or impeding a judicial officer or juror⁷³

- (a) **Obstructing justice.** A person is guilty of obstructing justice if that person
 - (1) corruptly
 - (2) endeavors to influence or impede
 - (3) the administration of justice
 - (4) in a proceeding.
- (b) **Corruptly influencing or impeding a judicial officer or juror.** A person is guilty of corruptly influencing or impeding a judicial officer or juror if that person
 - (1) corruptly
 - (2) endeavors to influence or impede
 - (3) a judicial officer or juror
 - (4) in the discharge of a duty.

§ C. Concealing a felony; concealing a material fact; making a false statement.⁷⁴

- (a) **Concealing a felony.** A person is guilty of concealing a felony if —
 - (1) a felony under this Code has been committed, and
 - (2) the person endeavors to conceal the felony.

⁷² Even though the statutes don't say so, the case law holds that people who have been summoned to serve as jurors are to be treated, for obstruction of justice purposes, as jurors. *See United States v. Jackson*, 607 F.2d 1219 (8th Cir. 1979). That makes sense. A person who wants to obstruct justice could try to do so before someone is sworn in as a juror. That hadn't occurred to Congress. But it has occurred to the type of people Congress wanted to deter.

⁷³ A redraft of part of § 1503, cutting out many unnecessary concepts and eliminating the need for § 1504. Subsection (a) here is a redraft of the omnibus clause as courts have interpreted it. *See supra* text before and after note 42.

⁷⁴ A redraft of § 4 and part of § 1001, combining the two and simplifying them. Sections C and D eliminate the need for § 1510(a).

- (b) **Concealing a material fact.** A person is guilty of concealing a material fact if that person
 - (1) conceals or encourages another person to conceal
 - (2) a material fact
 - (3) from
 - (A) a federal law enforcement agency or
 - (B) a court unless the fact is concealed by a party or a party’s counsel.
- (c) **Making a false statement.** A person is guilty of making a false statement if that person
 - (1) makes a false statement,
 - (2) knowing of its falsity,
 - (3) to
 - (A) a federal law enforcement agency or
 - (B) a court unless the statement is made by a party or a party’s counsel.

§ D. Suborning perjury; tampering with a witness, informant, or evidence.⁷⁵

- (a) **Suborning perjury.** A person is guilty of suborning perjury if —
 - (1) that person
 - (A) persuades a witness to testify falsely
 - (B) knowing that the testimony will be false; and
 - (2) the witness
 - (A) afterward testifies falsely
 - (B) knowing that the testimony is false.
- (b) **Witness tampering.** A person is guilty of witness tampering if that person —
 - (1) corruptly
 - (2) endeavors to persuade, intimidate, or mislead another person
 - (3) intending to
 - (A) influence that other person’s testimony or
 - (B) hinder that other person from
 - (i) appearing,
 - (ii) testifying or speaking fully and truthfully, or
 - (iii) producing an object⁷⁶
 - (4) during a proceeding.

⁷⁵ Subsection (a) is a redraft of § 1622. Subsection (d) includes a redraft of part of § 1001(a). The rest of this section is a redraft of § 1512, cutting out many unnecessary concepts.

⁷⁶ “Object” might seem like awkward writing, but Congress wisely used that word in the Appendix A statutes. Congress used one concept—an “object,” meaning a tangible thing—in place of a cluster of concepts and issues such as whether something is a document or not, whether it’s admissible as evidence, and whether the person who commits this crime believes it’s admissible.

- (c) **Informant tampering.** A person is guilty of informant tampering if that person —
- (1) endeavors to persuade, intimidate, or mislead another person
 - (2) to hinder that other person from communicating to —
 - (A) a judicial officer or
 - (B) law enforcement officer
 - (3) concerning the possible
 - (A) commission of a federal offense or
 - (B) violation of conditions of
 - (i) probation,
 - (ii) supervised release,
 - (iii) parole, or
 - (iv) release pending a judicial proceeding.
- (d) **Evidence tampering.** A person is guilty of evidence tampering if that person does any of the following:
- (1) knowingly participates in creating a false document connected to a proceeding;
 - (2) knowingly participates in submitting a false document to a law enforcement officer or a court;
 - (3) (A) endeavors to alter, destroy, or conceal an object
(B) intending to impair its integrity or availability in a proceeding; or
 - (4) (A) endeavors to persuade, intimidate, or mislead another person
(B) to cause that other person to withhold, alter, or destroy an object
(C) to impair the object's integrity or availability in a proceeding.
- (e) **Facts not relevant to a prosecution under this section.** It is irrelevant whether —
- (1) a proceeding was pending or about to be instituted at the time of the offense;
 - (2) the object was admissible in evidence; or
 - (3) the defendant knew or should have known that —
 - (A) a proceeding was a federal proceeding;
 - (B) a judicial officer was a federal judicial officer; or
 - (C) a law enforcement officer was a federal law enforcement officer.

§ E. Retaliation against a judicial officer, juror, witness, party, or informant.⁷⁷

- (a) **Retaliating against a judicial officer.** A person is guilty of retaliating against a judicial officer if that person —
 - (1) endeavors or threatens to —
 - (A) injure or kill a judicial official;
 - (B) damage a judicial officer’s property; or
 - (C) file a false document as a publicly available record concerning the judicial officer’s ownership of property;⁷⁸
 - (2) to retaliate for the judicial officer’s performance of an official duty.
- (b) **Retaliating against a juror.** A person is guilty of retaliating against a juror if that person —
 - (1) endeavors or threatens to —
 - (A) injure or kill a juror;
 - (B) damage a juror’s property; or
 - (C) file a false document as a publicly available record concerning the juror’s ownership of property;⁷⁹
 - (2) to retaliate for
 - (A) a verdict or indictment assented to by the juror or
 - (B) the juror’s service as a juror.
- (c) **Retaliating against a witness or party.** A person is guilty of retaliation against a witness or party if that person —
 - (1) endeavors or threatens to —
 - (A) injure or kill another person;
 - (B) damage another person’s property; or
 - (C) file a false document as a publicly available record concerning the other person’s ownership of property;
 - (2) to retaliate for that other person’s doing any of the following during a proceeding:
 - (A) attending or participating as a witness or party,
 - (B) testifying,
 - (C) providing information, or
 - (D) producing an object.

77 Subsections (a) and (b) are a redraft of part of § 1503. Subsections (c) and (d) are a redraft of § 1513. In redrafting, many unnecessary concepts disappeared. But it isn’t possible to combine all the § E subsections into one test that would cover everybody. Although paragraph (1) is parallel in all the subsections, no paragraph (2) is the same as any other paragraph (2).

78 Adding the 16 words in (C) replaces all of § 1521, which Congress enacted because of some incidents in which people harassed judges with false filings. But Congress didn’t need to enact § 1521. All it needed to do was add these words to § 1503.

79 When Congress enacted § 1521, it responded to incidents involving judges. It didn’t occur to Congress to protect jurors, parties, witnesses, and informants. This redraft covers them.

- (d) **Retaliating against an informant.** A person is guilty of retaliation against an informant if that person —
- (1) endeavors or threatens to —
 - (A) injure or kill another person;
 - (B) damage another person's tangible property; or
 - (C) file a false document as a publicly available record concerning the informant's ownership of property;
 - (2) to retaliate for that other person's providing to a law enforcement officer or judicial officer information relating to the possible
 - (A) commission of a federal offense or
 - (B) violation of conditions of
 - (i) probation,
 - (ii) supervised release,
 - (iii) parole, or
 - (iv) release pending a judicial proceeding.

Negative Narrative

Reconsidering Client Portrayals

Helena Whalen-Bridge*

I. Introduction

The defendant in a murder case is a selfish, immature lout who cheated on his wife, the victim. Should the lawyer attempt to minimize the bad qualities of the client, unearth good qualities to balance out the bad, or something else? Lawyers are regularly advised to present positive portrayals of clients, on the theory that this will encourage decisionmakers to respond favorably to their client and allow the client to prevail. Much of the relevant literature, including trial manuals from a variety of common-law jurisdictions, legal writing materials, and the literature of applied legal storytelling, recommends a narrative with a primarily positive story about the client, or assumes it.¹ The difficulty is that although this orientation may work for many cases, it ignores instances in which a negative client portrayal is the most persuasive approach. Legal practice includes cases demonstrating the use of negative client portrayals in a way distinctly at odds with the majority of texts on trial advocacy, a point explored using two cases studies on the negative continuum from common-law jurisdictions in North America and Asia. In addition to unnecessarily limiting narrative options, the general preference for positive client portrayals may encourage unwarranted and potentially unethical departures from the evidence.

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¹ For a full review of the literature recommending primarily positive stories, see *infra* section II.

In this article I make two arguments. First, in the right case, a persuasive narrative incorporating a negative client portrayal should be actively considered as a valuable option. Rather than a choice made reluctantly when the evidence does not support a primarily positive client portrayal, it is a persuasive strategy in its own right. Legal cases “are, of course, stories,”² and I focus on negative client portrayal as it occurs in persuasive legal narrative, understood as a persuasive version of the facts that incorporates narrative techniques and structures. To address persuasive narratives with a primarily negative client portrayal, I focus on narratives used by lawyers to present a fuller construction of the facts, as opposed to using strategies used to avoid facts—for example, challenging the adequacy of the other side’s evidence³ or substituting a legal position or a legal value for a factual position.⁴

Second, I argue that narratives with negative client portrayals should be included in advocacy literature and better theorized in relevant literature such as applied legal storytelling. Negative client narrative is not an example of high-minded advocacy standards that cannot be met in practice, but rather a case of the advocacy literature not getting the persuasive dynamic quite right to begin with. The fact that advocacy literature does not address negative client portrayals suggests that its uniform goal of positive client portrayal should be reconsidered. I argue here that the ultimate goal of client portrayals—previously described by different authors as favor, likeability, empathy, or sympathy—should be reframed as points on a continuum, with varying degrees of positive and negative qualities. Such a continuum should be adopted because this kind of mechanism is more likely to produce an effective case theory well grounded in the evidence and ethical practice.

II. The Preference for Narratives with Positive Client Portrayals

A. Advocacy-Advice Literature

The literature of advocacy includes a variety of materials: trial and advocacy manuals; biographies of successful lawyers with anecdotes and

2 Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning From Social Science*, 7 OHIO ST. J. CRIM. L. 7, 14 (2009).

3 See W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM, 94–95, 98–107 (1981); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS, 141–75 (3d ed. 2007). In Bennet & Feldman’s terminology, the article focuses on redefinition and reconstruction narrative strategies, as opposed to challenge strategies. In Krieger and Neumann’s terminology, it focuses on the story model, as opposed to the legal elements or chronology models.

4 Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L. J. 459, 473 (2001).

personal and professional history; legal writing materials meant to introduce and develop law students' abilities in advocacy; and, more recently, applied legal storytelling, or the study of persuasive storytelling. Although their subject matter varies, when these collections consider how to present the client, as a whole they assume or expressly advise that to prevail a lawyer should paint a positive picture of the client, one in which the client's good points are brought out and highlighted.

The genre of trial and advocacy manuals has been around for some time; a 2016 study of the "early modern era" begins with the 1500s.⁵ The genre expanded considerably starting in the 1970s, particularly in the U.S.⁶ These texts have a specific audience of "aspiring and practicing lawyers interested in learning how to be effective trial advocates."⁷ They emphasize "winning, strategy, tactics, techniques, persuasion, and effectiveness," and advocates "are told how to achieve success, excellence, impact, and power and how to gain an edge."⁸ Advocacy manuals represent the "conventional wisdom or perhaps the state of the art on effective advocacy,"⁹ but they do not necessarily embody a reflective practice.¹⁰

A review of recent advocacy-advice literature in common-law jurisdictions suggests that client portrayals tend to be situated in discussions of the trial theme, or the case theory—the condensed, conjoined statement of a case's law and fact that organizes trial evidence and seeks to guide the decisionmaker to a favorable judgment.¹¹ The trial theme affects the entire trial, including the opening and closing arguments made by lawyers. An "opening statement should lead the fact finder to a conclusion that a party is entitled to win. The plaintiff will naturally take the 'offensive' and explain the story in a positive way."¹² A Canadian text advises lawyers to present "your case in its most favourable light."¹³ There is a perceived need to humanize the client, particularly in criminal defense, whereby the lawyer "must attempt to place [the] client in a sympathetic light."¹⁴ The criminal defendant needs to be seen as a human being, so that it is harder

5 See PHILIP GAINES, FROM TRUTH TO TECHNIQUE AT TRIAL: A DISCURSIVE HISTORY OF ADVOCACY ADVICE TEXTS 12, ch. 12 (2016).

6 *Id.* at 3.

7 *Id.*

8 *Id.* at 4.

9 *Id.* at 5.

10 *Id.* at 5, 10.

11 MAUET'S FUNDAMENTALS OF TRIAL TECHNIQUES 8–9, 60–61, 250 (Thomas Eichelbaum ed. 1989).

12 ROGER HAYDOCK & JOHN SONSTENG, OPENING AND CLOSING: HOW TO PRESENT A CASE ¶ 2.42 (1994).

13 JOHN A. OLAH, THE ART AND SCIENCE OF ADVOCACY 17-7 (1990).

14 *Id.* at 17-27.

to convict.¹⁵ In civil cases, it is critical particularly with jurors that they “empathize with the plaintiff.”¹⁶ On occasion, a claimant is confronted with a “likeable defendant,” prompting advice that the claimant needs to overcome that likeability and show that the defendant nevertheless did not meet the required standard of behavior.¹⁷

The advice to present a positive portrait of the client does not mean that negative facts should be ignored. One textbook on courtroom psychology notes that acknowledging and refuting opposing argument and facts damaging to the client’s case strengthens lawyer credibility and gives counterarguments to receptive decisionmakers.¹⁸ This advice is common,¹⁹ and the issue has been subjected to empirical research that corroborates the wisdom of addressing negative information in most situations.²⁰ However, the assumption in trial manuals is that the client portrayal will be primarily positive, and that negative information will be defused by and integrated into that positive narrative. The trial theme should be consistent with all the facts the decisionmaker will believe at the end of the case, including those that seem adverse to the client’s position,²¹ and the theme must make all the evidence work for the client “*as if it were a positive part of your proof.*”²² This key point is sometimes made even more assertively:

Be candid with the jury. Beat your opponent to the punch. Anticipate his attacks on your case and be prepared to respond to them. Give the jury your best explanations. Tell them why your opponent must fail. If you defuse your opponent’s arguments, you will deny him the effect of surprise and draw the sting from this argument. *But do not let your adversary deflect you from your closing; your summary should not be an apology.*²³

A second category of advocacy materials are texts used in legal writing and advocacy courses for law students and pre-professionals. A narrative incorporating a positive client portrayal is suggested here as well.

¹⁵ PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 250 (1979).

¹⁶ OLAH, *supra* note 13, at 17-28.

¹⁷ *Id.*

¹⁸ RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY § 2.05, 30 (2003).

¹⁹ See Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy* 60 RUTGERS L. REV. 381 (2008); GEOFFREY D.E. ADAIR, ON TRIAL: ADVOCACY SKILLS: LAW AND PRACTICE 373 (1992). For a discussion on incorporating the opposing party’s good points, see Ronen Perry & Dana Weimann-Saks, *Stealing Sunshine*, 74 L. & CONTEMP. PROBS. 33, 33–38, 45–46 (2011).

²⁰ See Stanchi, *supra* note 19, at 381–92, 409–34.

²¹ RALPH ADAM FINE, THE HOW-TO-WIN TRIAL MANUAL 16 (3d ed. 2005).

²² *Id.* at 17 (emphasis in original).

²³ OLAH, *supra* note 13, at 17-24 (emphasis added) (citation omitted).

The trial theme should enable students to “highlight favourable facts and minimize the impact of unfavourable ones.”²⁴ Lawyers’ use of story structures to present facts to judges and juries is well-documented,²⁵ so students should strive to “create an appealing story” that emphasizes positive facts about their clients and de-emphasizes negative facts.²⁶

Like trial manuals, legal writing texts advise students to acknowledge negative facts. While addressing coverage in the context of trial story integrity, one text states that students

cannot craft a very persuasive story by ignoring negative facts. In fact, audiences appreciate a storyteller who acknowledges the dark side of his characters and deals honestly with them. The trick is to be able to develop a compelling tale that *in some way* recognizes the existences of these facts.²⁷

A common strategy is to sandwich bad facts between good facts,²⁸ and “[m]ost legal writing texts, at a minimum, encourage students to present the facts from their clients’ point of view; to emphasize positive facts”²⁹

Legal writing texts assume that the client portrayal in persuasive legal narratives will be primarily positive. The highlighting of positive facts about the client together with the accommodation of negative facts is suggested from the very early stages of litigation, such as the client interview. In Steven Lubet’s semi-fictional “Biff” story,³⁰ the client seeks a lawyer’s advice on whether he can sue for assault, the reasonable fear of being hurt, based on an incident that occurred at an airport. While in the airport terminal waiting for a flight, the client sees an empty seat and sits down. The seat next to him has folded up newspapers upon it, and the seat next to that has someone sitting in it, referred to as “Biff.” When the client sits down, Biff says, “Someone was sitting there.” The client is confused, looks around, and turns to Biff to clarify. Biff then says, “I’m telling you that my father is sitting there.” As the client starts to pack up his things, Biff says, “And he’s coming back,” raising his voice. The client protests,

24 CATHY GLASER ET AL., *THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 355 (2002); see also *id.* at 358, 363, 364, 367.

25 See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 519–40 (1991), and more recently, PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* 1–2 (2014).

26 ROBIN SLOCUM, *LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT* 462 (2d ed. 2006). See generally *id.*, ch. 28.

27 KRIEGER & NEUMANN, *supra* note 3, at 195–96 (emphasis added).

28 See HUGH SELBY, *ADVOCACY: PREPARATION AND PERFORMANCE* 6 (2009).

29 Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 *LEGAL WRITING* 163, 166 (2010).

30 STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON’T, CAN’T, AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH* 11–26 (2001).

saying, “Hold on a minute, mister.” Biff says, “Don’t piss me off” in an angry tone and with a clenched fist, leaving the client in no doubt that Biff would use physical force if the client did not move off quickly enough. The lawyer, talking with the client to analyze the legal possibilities, asks the client why Biff would have reacted so forcefully. Having met the client, the lawyer considers the role that the client’s manner may have played in making Biff angry, although expressed in an unacceptable and illegal way; the client is somewhat superior, and the language he reported using (“mister”) would be derogatory in that context. This client portrayal is primarily positive, but it acknowledges negative information to provide a more realistic explanation of what occurred in a way that makes the client’s reasonable fear of attack credible.

The persuasive use of storytelling by lawyers has been extensively analyzed in the subfield of applied legal storytelling,³¹ and this scholarship also implicitly assumes or explicitly advises a positive client presentation. An early example of the preference for persuasive legal narratives with positive client portrayals is Brian J. Foley and Ruth Anne Robbins’s “Fiction 101: A Primer For Lawyers On How To Use Fiction Writing Techniques To Write Persuasive Facts Sections.”³² This groundbreaking article introduced lawyers to storytelling principles for use in persuasive argument, covering topics such as character, conflict, resolution, organization, and point of view.³³ In reviewing these techniques, the authors identified the need to make the client likeable,³⁴ noting that though lawyers routinely dig up dirt on the opposition, “they should be mindful of planting flowers about their own clients.”³⁵ Although other forms of fiction, such as satire, do not use this formula, “the lawyer telling a story should aim for judges and juries to like the client.”³⁶ The authors also provide an appendix entitled “Developing Your Client’s Character,” a list of questions prompting the user to determine “[w]hat makes your client likeable?”³⁷ They suggest that if “the lawyer has done a good job in making the client ‘likeable’ and in defining the conflict, the judge may even nod as

31 See Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling*, 14 LEGAL WRITING 1 (2008); Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81 (2012); J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

32 Foley & Robbins, *supra* note 4.

33 *Id.* at 467–80.

34 *Id.* at 468, 473–75, 477.

35 *Id.* at 469.

36 *Id.* at 468.

37 *Id.* at 481, app. A (*Developing Your Client’s Character* (including the question “What makes your client likeable?”)); *see also id.* at 483, app. C (*Developing Your Corporate Client’s Character* (same)).

she reads the proposed resolution, *wanting* to deliver it, because it is fair, because it ‘fits.’”³⁸

A subsequent article by Robbins rightfully prompts lawyers to consider the client as a kind of hero with archetypal status in a recognizable story structure, one who is heroic in the face of life’s struggles but who is also a flawed individual.³⁹ Heroes “start out as somehow flawed at a fundamental level that affects their daily life and/or prevents them from living up to their potential.”⁴⁰ Portraying the client as a hero therefore “gives the client permission to be imperfect in order to have the audience identify with them and with their need to embark on or continue on their transformative journeys.”⁴¹ Because it incorporates flaws, the hero paradigm is an ingenious suggestion in the trial context. Disputes do not normally reach the trial stage if one side is a clear winner, and parties in most cases need to accommodate flaws or other kinds of bad facts. However, the hero paradigm, like other literature that admonishes lawyers to consider whether bad facts are actually bad,⁴² assumes an essentially positive client portrayal. What if the evidence and law are such that a positive portrayal is just not possible? Even if there is a choice, are there cases in which a positive client portrayal is not the most persuasive approach?

Portions of applied-legal-storytelling literature do consider how to present problematic clients who cannot be made likeable, although this discussion is limited. Two potentially problematic clients are the criminal defendant and the corporation.⁴³ The criminal defendant is unsavory, and it is unlikely that the judge can be made to like such clients.⁴⁴ There are two sample strategies available. The first, making the client a proxy for an ideal such as constitutional protection,⁴⁵ eschews persuasive factual narrative and substitutes a legal argument. This strategy can be considered a narrative in which the lawyer argues that the story is about the law, not the client, but it purposively avoids negative facts and asserts a positive portrayal of the case.⁴⁶ The second strategy, a theme of man against self,

38 *Id.* at 477 (emphasis in original).

39 Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE L. REV. 767, 776 (2006).

40 *Id.*

41 *Id.*

42 See Cathren Koehlert-Page, *Breaking Bad Facts: How Intriguing Contradictions in Fiction Can Teach Lawyers to Re-Envision Harmful Evidence*, 13 LEGAL COMM. & RHETORIC: JALWD 1 (2016); 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, 216–28 (2012).

43 See Foley & Robbins, *supra* note 4, at 473–75.

44 *Id.* at 473.

45 *Id.*

46 See RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING* 131 (2d ed. 2019).

e.g., a client who struggles with a nemesis such as drugs,⁴⁷ is essentially a hero narrative. The hero *mythos* allows the client to be imperfect, because it is the imperfections which the hero must overcome.⁴⁸ This second strategy for criminal defendants uses a narrative with a primarily positive client portrayal. If this narrative is in fact supported by the evidence and relevant law, then it could be successful. Overall, the strategies suggested for criminal defendants are potentially helpful in some cases, but there are cases in which they would not apply.

The second potentially problematic client is the corporate client.⁴⁹ Although corporations may not be likeable at first blush and do not inspire empathy, they can be portrayed positively, e.g., by identifying the corporation's goals and socially beneficial functions.⁵⁰ The lawyer can also represent the corporation through people, corporate managers who are likeable.⁵¹ These clients are in fact not special at all, and the same guidelines apply,⁵² i.e., the guideline to present a narrative incorporating a primarily positive client portrayal.

The degree to which negative client portrayals are absent from active consideration in advocacy literature is perhaps illustrated by Kenneth Chestek's article investigating the negativity bias, "the brain's natural inclination to attend to and process negative stimuli."⁵³ Chestek noted that in citations to literature that "could go on indefinitely,"⁵⁴ judges frequently admonish counsel not to go negative, but if negative information stimuli is much stronger than positive stimuli, "wouldn't advocates be better served by choosing negative themes and attacking the other side?"⁵⁵ Chestek's empirical research on how judges evaluated the use of negative and positive themes in arguments about facts and law led to two main conclusions. First, a negative theme appeared to focus judicial attention on the facts, while a positive theme tended to focus judicial attention on the law.⁵⁶ Second, a negative theme deployed against the opposing party could help a weaker party attack a stronger party, but the use of a negative theme

47 See Foley & Robbins, *supra* note 4, at 474.

48 Robbins, *supra* note 39, at 776.

49 Foley & Robbins, *supra* note 4, at 475–76; see also Ruth Anne Robbins, *Finding Perspective in the Institution*, 28 SECOND DRAFT 20, 20–23 (2015).

50 Foley & Robbins, *supra* note 4, at 474.

51 *Id.* at 474–75.

52 *Id.* at 473.

53 Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effect of Negativity Bias*, 14 LEGAL COMM. & RHETORIC: JALWD 1, 2 (2017).

54 *Id.* at 5 n.20.

55 *Id.* at 5–6.

56 *Id.* at 2–3.

by a stronger party might prompt the judge to protect the weaker party.⁵⁷ For purposes of this article, what is notable is the assumption that negative themes would be used against the opposing side, not on behalf of the client. In an earlier article, Chestek asked whether advocates should “choose a negative theme, attacking their opponents, rather than a positive theme showing the court why their client is deserving of relief.”⁵⁸ A positive client portrayal is so prevalent that it is hard to imagine a theme that puts the client in a negative light.⁵⁹

Why does this literature uniformly prefer a persuasive narrative with a positive client portrayal, to the virtual exclusion of negative portrayals? There are likely a number of explanations. A systemic explanation would highlight the adversarial dynamic in common-law systems,⁶⁰ and a positive client portrayal makes intuitive sense in this context. The client’s lawyer, as the client’s agent, highlights the positive aspects of the client’s case and the bad aspects of the opponent’s case; it is the job of opposing counsel to point out the negative aspects of the client’s case, not the client’s lawyer.

Another reason for the strong preference for narratives with positive client portrayals lies in what is assumed to be persuasive. The persuasive focus is normally on the decisionmaker, and although the literature does not speak in one voice, it reflects two strategies to reach the decisionmaker. First, some literature states that the decisionmaker should know⁶¹ or understand the client. These goals focus on information about the client and emphasize the role of the decisionmaker’s cognitive processes. Second, some literature suggests that the goal is to create empathy⁶² or sympathy⁶³ for the client.⁶⁴ A subset of this category comprises texts that urge the lawyer to point out similarities between the client and the decisionmaker so the decisionmaker identifies with the client.⁶⁵ These goals focus on the emotional aspect of decisionmaking. “Fiction 101” can be understood as encompassing both sets of goals, in

⁵⁷ *Id.* at 3.

⁵⁸ Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 617 (2015).

⁵⁹ Chestek, *supra* note 53, at 6 (noting that there are many different ways of using negative argument and that it was not possible to test them all).

⁶⁰ For a brief comparison of the impact of adversarial and inquisitorial procedure on construction of legal narrative in the context of wrongful convictions, see Ralph Grunewald, *The Narrative of Innocence, or, Lost Stories*, 25 LAW & LITERATURE 366 (2013).

⁶¹ See Foley & Robbins, *supra* note 4, at 470.

⁶² *Id.* at 474.

⁶³ See MEYER, *supra* note 25, at 2; GLASER ET AL., *supra* note 24, at 356; Foley & Robbins, *supra* note 4, at 475, 476 n.53.

⁶⁴ Empathy is shared feeling and perspective; sympathy is emotion felt for another that relates to the other but does not match the other’s feelings. Suzanne Keen, *Narrative Empathy*, LIVING HANDBOOK OF NARRATOLOGY (rev. Sept. 14, 2013), <https://www.lhn.uni-hamburg.de/node/42.html>.

⁶⁵ See Robbins, *supra* note 39, at 776.

view of the statement that “[i]n general, the reader must like the character and agree with, or at least understand, the character’s goal.”⁶⁶ The interplay of cognition and emotion in decisionmaking is resisted in some quarters of the legal world, but the role of emotions in decisions of all kinds,⁶⁷ including legal proceedings and judgments,⁶⁸ is too well established to ignore, and it assists in understanding the preference for positive client portrayals, as well as why narratives with negative client portrayals are persuasive in some cases.

B. Narrative Client Portrayals and Emotion

Stories explore the emotional states their characters experience,⁶⁹ and they elicit emotional responses in audiences.⁷⁰ Literature makes special claims upon us “precisely because it nourishes the kinds of human understanding not achievable through reason alone but involving intuition and feeling as well.”⁷¹ Emotion also appears to be implicated in the experience of hearing and understanding any narrative, quite apart from the emotions that a particular story might invoke. A full understanding of narrative would include “the temporal dynamics that shape narratives in our reading of them, the play of desire in time that makes us turn pages and strive toward narrative ends.”⁷²

Law may in the large part be reasoned judgment, but “it also engages forces beyond reason, like most other things in life.”⁷³ Using Aeschylus’ trilogy of plays *Oresteia* to chart the emergence of law in western civilization, Paul Gewirtz observed that though law was made possible by a shift from personal violence and revenge to decisions influenced by reason, the foundation of the legal order is partially fear of punishment, with law “an instrument of violence[—]not its replacement.”⁷⁴ Emotions are therefore an inherent, and important, part of the law. And although emotions can admittedly “distort,” they can also “open, clarify, and enrich understanding.”⁷⁵

66 Foley & Robbins, *supra* note 4, at 468.

67 ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

68 See, e.g., Terry A. Maroney, *Emotion in the Behavior and Decision Making of Jurors and Judges*, EMOTION RESEARCHER (2016); Leif Dahlberg, *Emotional Tropes in the Courtroom: On Representation of Affect and Emotion in Legal Court Proceedings*, 3 LAW & HUMAN. 175 (2009).

69 Martha Nussbaum, *Narrative Emotions: Beckett’s Genealogy of Love*, 98 ETHICS 225 (1988).

70 Jeffrey Pence, *Narrative Emotion: Feeling, Form and Function*, 34 J. NARRATIVE THEORY 273–76 (2004).

71 Paul Gewirtz, *Aeschylus’ Law*, 101 HARV. L. REV. 1043, 1050 (1988).

72 PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* xiii (1984).

73 Gewirtz, *supra* note 71, at 1049.

74 *Id.* at 1048.

75 *Id.* at 1050.

In legal argument, the role of emotion is reflected in such august traditions as Aristotle's persuasive schema of logos, pathos, and ethos,⁷⁶ or logic, emotion, and the credibility of the speaker. Emotion has obvious relevance to legal stories, in particular the persuasive legal narrative used by lawyers to portray the facts and the client. Here, persuasive legal narrative develops party likeability to motivate the decisionmaker to rule in the party's favor, because "[t]he more the reader understands and likes a character, the more the reader will root for him."⁷⁷

Making a connection between positive client information and positive emotion has support in scholarship on law and emotion. Emotions signal changes in the environment and help individuals choose among competing goals and values, and the empathy and sympathy identified in the advocacy literature has been connected to case outcomes.⁷⁸ Research on narrative empathy, defined as "the sharing of feeling and perspective-taking induced by reading . . . hearing, viewing or imagining narratives of another's situation and condition,"⁷⁹ suggests that positive emotions in the decisionmaker should help motivate the decisionmaker to find for the client. One set of experiments showed scenarios to different groups of judges, who then made a ruling for either a sympathetic party or a nonsympathetic party.⁸⁰ Results indicated that judges made more favorable rulings for the more sympathetic party.⁸¹ The "likeability" of the party was technically irrelevant to the legal ruling, but it influenced judicial decisions.⁸² Overall, this research indicates that narratives with positive client portrayals fare better than negative client portrayals, but the research did not include scenarios of negative client portrayals coherently integrated into a strong case theory. Conclusions from this research are also limited because the process of evaluating and deciding real cases is more complex in real life.⁸³

⁷⁶ See ARISTOTLE, RHETORIC 6–7 (W. Rhys Roberts, trans., Dover Thrift ed. 2004). See also the discussion of these ideas in MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 77–79, 81–99 (2002); Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 980–81 (2006).

⁷⁷ See Foley & Robbins, *supra* note 4, at 468.

⁷⁸ Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997). See also Peter Brooks's queries about sympathy in Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1, 1, 5 (2002).

⁷⁹ Keen, *supra* note 64.

⁸⁰ For example, in an immigration case raising issues regarding the pasting of a false U.S. entry visa into a passport, judges ruled on proceedings involving either a father trying to "earn more money so that he could pay for a liver transplant needed to save the life of his critically ill nine-year-old daughter," or someone "hired to sneak into the United States illegally to track down someone who had stolen drug proceeds from the cartel." Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

⁸¹ *Id.* at 878.

⁸² *Id.* at 879–80.

⁸³ Terry A. Maroney, *Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's "Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?"*, 93 TEX. L. REV. 317, 318, 325–30 (2015).

Other scholarship, particularly research reviews of emotions and attributions of legal responsibility conducted in 2006⁸⁴ and 2016,⁸⁵ suggests that both positive and negative emotion, as well as moods—understood as more diffuse and longer lasting than emotions and not tied to discrete triggers⁸⁶—have different kinds of impacts on decisionmaking. Especially relevant to cases with negative client facts is the observation that emotions affect decisionmaker receptivity to persuasive messages in different ways.⁸⁷ Many studies have shown that people in moderately positive moods tend to think more creatively and are better at drawing associations and inductive reasoning than people in neutral moods, while people in negative moods tend to be better at analytical and deductive reasoning.⁸⁸ Happy moods also tend to increase reliance on heuristics, while negative moods tend to produce more deliberate, bottom-up information processing.⁸⁹ This finding supports the intuition in advocacy literature that a positive client portrayal, which brings about a more positive mood in a decisionmaker, creates receptivity to narrative structures. However, the finding that negative emotions tend to produce more analytical reasoning also supports the use of a narrative that uses a negative client portrayal. Advocacy literature has suggested that a decisionmaker who does not like the client will reject the client's case, but research suggests that a narrative with a negative client portrayal may prompt the decisionmaker to think more carefully about the evidence, which may increase the likelihood of a finding for the negative client.

Considering the particular emotions evoked in the decisionmaker in more detail may also help generate an understanding of what the goal of persuasive legal narrative should be. For example, an evidentiary record that supports a positive client portrayal could seek to evoke emotions of satisfaction, relief, or even happiness. A mixed evidentiary record may produce a client portrayal that evokes emotions of pity or regret. A negative client portrayal may evoke emotions including disgust or revulsion. Depending on the case, it is also likely that the facts will evoke more than one related emotion, or perhaps a mixture of different kinds of emotions. Lawyers cannot assume that particular target emotions will invariably be called up, and they should appreciate the protean nature of

84 Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143 (2016).

85 Neal Feigenson, *Jurors' Emotions and Judgments of Legal Responsibility and Blame: What Does the Experimental Research Tell Us?*, 8 EMOTION REV. 26 (2016).

86 Terry A. Maroney, *supra* note 83, at 326 n.44.

87 Feigenson & Park, *supra* note 84, at 147.

88 *Id.*

89 *Id.*

emotions,⁹⁰ but acknowledging the role of the different emotions elicited by persuasive legal narratives, positive and negative, better supports an expanded repertoire of possibilities.

C. Discouraging Unethical Narrative

Advocacy literature assumes or advises lawyers to employ a persuasive narrative with a primarily positive client portrayal, but there are good reasons to question this overall approach, including the need to discourage unethical narrative. The ethics of legal narrative is a complex subject⁹¹ that this article cannot tackle in detail, but some limited points can be made. The power of narrative to persuade, when combined with the partiality endemic to the common-law adversarial system, raises issues of ethics. Lawyers are prohibited from lying to the court or allowing the client to commit perjury,⁹² but aside from these extremes, there is little in the way of ethical guidelines for persuasive legal narrative.⁹³ In this context, encouraging a positive client portrayal in a case with insufficient supporting evidence can invite unethical practices. Lawyers attempting to make unlikeable clients likeable have two main options: (1) ignore awful facts, or (2) shade or manipulate facts to produce a story beyond what can reasonably be asserted. Advocacy-advice texts regularly discourage the first option. Not acknowledging “bad facts” by leaving facts out of the client narrative may allow a more pleasing story and more likeable client to emerge, but the resulting narrative does not do justice to the facts. This strategy is also likely to fail when the fact finder is made aware of bad facts, which the party has not acknowledged or explained. Ignoring bad facts is also questionable in view of a lawyer’s responsibility to bring all material facts to the fact finder’s attention and not actively misrepresent matters to the court.⁹⁴ The second option, which misrepresents details in a deceptive manner, is likely to be unethical.⁹⁵ In some cases, trying to achieve a positive client portrayal will cause lawyers to stray further from the

⁹⁰ See BARBARA H. ROSENWEIN, *EMOTIONAL COMMUNITIES IN THE EARLY MIDDLE AGES 17–19* (2007).

⁹¹ Helena Whalen-Bridge, *Persuasive Legal Narrative: Articulating Ethical Standards*, *J. LEGAL ETHICS* 1 (2019); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 *J. ALWD* 63 (2010); Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 *J. ALWD* 229 (2010); Kaiser, *supra* note 29; Johansen, *supra* note 76; Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEGAL ETHICS* 1 (2000).

⁹² See MODEL R. PROF’L CONDUCT 3.3 (AM. BAR ASS’N 2018) (Candor Toward the Tribunal), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/comment_on_rule_3_3.html.

⁹³ For a comparative overview of professional rules regarding factual presentations and narrative license in commonwealth jurisdictions, see Whalen-Bridge, *supra* note 91, at 235–37.

⁹⁴ See MODEL R. PROF’L CONDUCT 3.3 cmt., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/comment_on_rule_3_3.html.

⁹⁵ See Helena Whalen-Bridge, *Persuasive Legal Narrative: Articulating Ethical Standards*, *supra* note 91.

evidence than they should or need to go. Articulating the goal of persuasive legal narrative in a way that allows for negative client portrayals would better support ethical presentations of fact.

III. What Do Lawyers Do? Two Narrative Case Studies using Negative Client Portrayals

The literature of advocacy, legal writing, and applied legal storytelling uniformly recommend persuasive narratives with a primarily positive client portrayal. What do lawyers do in practice? Sometimes lawyers use narrative to tell a story critical of their own client. Examining cases that do so is especially important in narrative research because of the nature of narrative, which does not exist outside of its particulars.⁹⁶ Summarizing a story, for example, will not have the impact or significance that characterizes narrative, so testing a theory about narrative requires wrestling with its detail.

This article is a preliminary study which offers two examples of persuasive narratives with negative client portrayals in criminal cases. The article does not seek to establish the narrative practices of all lawyers as an empirical matter, but to consider some examples of negative client portrayals in order to extrapolate to larger problems.⁹⁷ These examples, from a jury trial and a judge trial, arise in two different common-law jurisdictions—the U.S. and Singapore. The cases are intentionally drawn from different countries to illustrate the use of narratives with negative client portrayals in different common-law systems, under different laws, for different kinds of decisionmakers. Although Singapore’s colonial history with England has produced practices more in line with English than American models, these jurisdictions are less different than alike—in language, in adversarial orientation, and in fundamental concepts such as burden of proof. In the U.S. case, a lying husband who cheated on his wife was accused of murdering her and her unborn child. In the Singapore case, a defendant posted material regarding assassination on the internet to get attention and was charged with intent to incite violence.

A. U.S. Case Study: North Carolina v. Jason Lynn Young

In 2006 the defendant’s wife, Michelle, was found dead in the couple’s bedroom with their unharmed daughter. The victim was five months

96 See MOSHE SIMON-SHOSHAN, *STORIES OF THE LAW: NARRATIVE DISCOURSE AND THE CONSTRUCTION OF AUTHORITY IN THE MISHNAH* 16 (2012) (“*Stories, Narratives, and Narrativity*”).

97 See BROOKS, *supra* note 72, at xv (using a similar technique).

pregnant and had been beaten to death.⁹⁸ The prosecution argued that the defendant, Young, was stuck in a marriage that he couldn't afford to extract himself from, and that he had had multiple relationships with other women during the marriage. The prosecution alleged that Young had secretly returned from a business trip to Virginia to kill his wife, disabled a surveillance camera to sneak out of his hotel room, and disposed of his clothes after the murder, which were never found. The defense attacked the case as circumstantial and argued that key pieces of evidence were missing, such as the defendant's fingerprints in the blood at the scene.

Young was tried for first-degree murder.⁹⁹ The case involved two trials and three appeals. The first jury deadlocked eight to four for acquittal, and a mistrial was declared.¹⁰⁰ At Young's second trial, the jury found him guilty of first-degree murder, and he was sentenced to life imprisonment without parole. On appeal, Young's conviction was overturned, primarily on the basis that the trial judge should not have admitted evidence of two civil proceedings—a wrongful-death lawsuit against the defendant, and a child-custody complaint filed by the deceased wife's parents.¹⁰¹ The court vacated the conviction and ordered a new trial, in what would have been the third jury trial in the case.¹⁰²

The matter was then appealed to the North Carolina Supreme Court. That court held that Young had not been prejudiced by the introduction of the contested evidence; it reversed the appellate court's vacation of the conviction and remanded the case to the appellate court for consideration of Young's other challenges to the conviction.¹⁰³ On remand, the Court of Appeals rejected Young's remaining objections to the second trial, affirmed his conviction, and confirmed the sentence of life imprisonment without parole.¹⁰⁴

In addition to the case's procedural complexity, the case presented evidentiary challenges for both parties. The prosecution introduced evidence of motive and opportunity but lacked direct evidence against

⁹⁸ *North Carolina Supreme Court Weighs Third Trial for Jason Young*, ABC11 EYEWITNESS NEWS (May 19, 2015), <http://abc11.com/news/nc-supreme-court-weighs-third-trial-for-jason-young/730262/>.

⁹⁹ *State v. Young*, 756 S.E.2d 768 (N.C. Ct. App. 2014), *rev'd*, 775 S.E.2d 291 (N.C. 2015).

¹⁰⁰ *Id.*

¹⁰¹ The child-custody complaint alleged that the defendant had killed the daughter's mother, that the mother had been pregnant with the defendant's child at the time, and that the daughter was in the house at the time of the murder. The suit requested a psychological evaluation of the defendant as well as discovery and depositions. The defendant ultimately agreed to transfer primary physical custody of the daughter to the grandmother under a consent order stating that no discovery or depositions would be taken. *See id.*

¹⁰² *Id.*

¹⁰³ *State v. Young*, 775 S.E.2d 291 (N.C. 2015).

¹⁰⁴ *State v. Young*, 821 S.E. 2d 313 (N.C. Ct. App. 2018).

Young. The prosecution focused on Young's increasing hostility toward his wife and his motivation to get out of the marriage, as well as on strong circumstantial evidence: a camera pointing toward an emergency exit in Young's hotel had been unplugged and later pointed toward the ceiling, and the door to the hotel emergency exit had been propped open with a rock.

The defense had its own challenges. It focused on the prosecution's burden of proof and argued that the evidence was insufficient, but it had to accommodate an admittedly obnoxious defendant. Young had cheated on his wife, the two argued often and publicly, and the communication between them had broken down to such an extent that they could communicate effectively only over e-mail. The advice to find likeable aspects of the defendant's character, and use positive emotions to persuade the jury, would not have worked in this case, and that is not what the defense did. The defense strategy was two-fold: argue the law by focusing on procedural shortcomings in police investigation, and use a narrative with a negative client portrayal to argue that Young's crass, unthinking character was inconsistent with the extensive planning required by the prosecution's case theory.

The defense narrative at trial reflected a negative client portrayal in considerable detail. At the first trial, Young took the witness stand, not required in a U.S. criminal case and a riskier if calculated trial strategy.¹⁰⁵ Young admitted that he was a less-than-perfect husband, but he also said he was working on his marriage and hadn't killed his wife.¹⁰⁶ He did acknowledge that he had used physical force on his former fiancée, Genevieve Cargol; Cargol testified to an incident when Young, drunk, got angry with her and pried an engagement ring off her finger. "What I did was wrong," admitted Young. "I did pin her down and I took the ring . . . I was very intoxicated but I don't feel that's an excuse for what I did."¹⁰⁷ At the second trial, Young did not testify,¹⁰⁸ but a recording of his testimony at the first trial was replayed for the jury.¹⁰⁹

¹⁰⁵ Regarding the *Young* trial, see Kelly Gardner, *Jason Young's Testimony Presented As Evidence in Trial*, WRAL.COM (Feb. 21, 2012), <http://www.wral.com/specialreports/michelleyoung/story/10761325/>.

¹⁰⁶ *North Carolina Supreme Court Weighs Third Trial for Jason Young*, *supra* note 98; Louise Boyle, *Salesman Sentenced to Life Without Parole at Retrial after Beating Pregnant Wife to Death in Front of Daughter*, DAILY MAIL ONLINE 2 (Mar. 6, 2012), <http://www.dailymail.co.uk/news/article-2110752/Jason-Young-Man-guilty-retrial-beating-pregnant-wife-death-pretending-away-business-trip.html#ixzz3fe4ixXff>.

¹⁰⁷ *Dateline Extra*, MSNBC (Mar. 16, 2019), https://archive.org/details/MSNBCW_20190317_050000_Dateline_Extra.

¹⁰⁸ Anne Blythe, *N.C. Appeals Court Throws out Jason Young Murder Conviction, Orders New Trial*, CHARLOTTE OBSERVER (Apr. 1, 2014), <http://www.charlotteobserver.com/news/local/crime/article9108731.html#storylink=cpy>.

¹⁰⁹ Gardner, *supra* note 105.

The negative client portrayal is also reflected in the defense's opening and closing arguments. In opening argument, one of the defense attorneys conceded that the Youngs were having problems in their marriage, but argued that these problems did not make Jason Young a killer. Counsel said, "I am not here to tell you that he was a good husband. He was far from it. He's acted like an obnoxious, juvenile jerk. But what you've got to remember ladies and gentlemen, is that we don't convict people of murder, just because they act like jerks."¹¹⁰ The negative defense strategy emerges even more strongly in the closing argument.¹¹¹ Defense counsel first noted at least ten points of confused, partial, or missing evidence that constituted a basis for acquittal.¹¹² The defense also argued for a different version of the facts, asserting that Young had been on a business trip while the murders occurred. In this narrative, the defense conceded Young's bad character and used it in two ways. First, counsel argued about the relevance of this evidence. Noting that this point had already been raised in the opening argument, defense counsel stated, "He's been a jerk. He's a philanderer. He's a womanizer. He says grossly inappropriate things and does grossly inappropriate things, but that doesn't make him a murderer."¹¹³ Video images of the closing argument underscore this list of Young's bad traits, reflected in the attorney's counting off Young's negative character traits on his fingers as he mentions them.

The second use of negativity arises in the defense narrative of how the murder occurred. The defense attorney stated that Young's sending his wife an anniversary card while he was actively sleeping with another woman was "just wrong . . . it's just awful, it's awful."¹¹⁴ The incident was potentially harmful to Young because it implied a certain comfort with deception, but defense counsel used it in Young's favor, arguing that Young did not think far enough ahead to consider that the mail stamp on the envelope would reflect a different place from where he told his wife he would be. Young's bad character and behavior therefore demonstrated that he was not calculating enough to have killed his wife in the way alleged by the prosecution, at least without leaving some evidence of himself behind.¹¹⁵ Counsel in this case was able to integrate Young's bad character,

110 Boyle, *supra* note 106.

111 Opening and closing arguments were recorded and made available, along with most trial proceedings in the case, by a local television station, WRAL, and are available at https://www.wral.com/specialreports/michelleyoung/asset_gallery/10684977/.

112 Michelle Young: Defense's closing arguments (pt. 1), 02:25–02:40, <http://www.wral.com/specialreports/michelleyoung/video/10800240/#/vid10800240>.

113 *Id.* at 54:54–55:13.

114 *Id.* at 55:37–55:44, and in general 55:22–55:44.

115 *Id.* at 55:37–58:04.

which produced selfish, short-sighted behavior, to directly contest an element of the crime, his ability to carry out the offense.

This case illustrates that persuasive legal narratives can incorporate negative client portrayals. Is it possible to evaluate how successful that approach was? Figuring out the answer to this question in the *Young* case is not straightforward. First, and most importantly, a loss at trial or on appeal does not mean that a persuasive legal narrative was weak, or that it was not the best narrative that could have been devised; assessments of narrative quality should be based primarily on narrative criteria as opposed to the ultimate win or loss.¹¹⁶ Second, because the *Young* case was a jury trial and jurors do not provide the reasons for their verdicts, the degree to which the defense's negative client portrayal succeeded with them cannot be accurately assessed. The first and second juries were also made up of different persons, further complicating comparisons. Nonetheless, although the second jury convicted the defendant and the first jury could not reach a unanimous decision, eight of the twelve jurors in the first trial voted for acquittal, which means that a majority of those jurors were not persuaded there was sufficient evidence of guilt. It seems reasonable to attribute some role in the first jury verdict to the defense, although how much of that success was due to a narrative incorporating a negative client portrayal is not possible to say.

B. Singapore Case Study: Public Prosecutor v. Yue Mun Yew Gary

The second example arises from Singapore, a common-law jurisdiction in Asia. *Public Prosecutor v. Yue Mun Yew Gary*¹¹⁷ was a criminal case tried in the first instance in the Singapore District Court. Yue posted material on the internet, and he was charged with inciting violence on two occasions in violation of Singapore Penal Code section 267C.¹¹⁸

For the first charge, Yue had posted a link to a doctored video of the Anwar al-Sadat assassination with the comment, "We should re-enact a

116 For a review of criteria indicating the quality of persuasive narrative in the legal context, see J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53 (2008).

117 *Public Prosecutor v. Yue Mun Yew Gary* [2012] SGDC 115 (district court opinion).

118 At the time of the offense, the Singapore High Court observed that Singapore Penal Code (Cap 224, 1985 Rev Ed) section 267C provided:

Making, printing, etc., document containing incitement to violence, etc.

267C. Whoever —

(a) makes, prints, possesses, posts, distributes or has under his control any document; or

(b) makes or communicates any electronic record,

containing any incitement to violence or counselling disobedience to the law or to any lawful order of a public servant or likely to lead to any breach of the peace shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.

Public Prosecutor v. Yue Mun Yew Gary [2012] SGHC 188, [2012] 1 SLR 39, ¶ 1.

live version of this on our own grand-stand during our national's parade!"¹¹⁹ The post was made on Singapore's National Day 2010, a day widely associated with an official event and parade celebrating Singapore's independence. For the second charge, Yue had uploaded a doctored version of a well-known picture of Nguyễn Ngọc Loan, a South Vietnamese National Police Chief, executing a handcuffed prisoner, Nguyễn Văn Lém, a suspected Việt Cộng member, during the Tet Offensive in Vietnam in 1968. Yue had changed the photo to make it appear that Nguyễn Ngọc Loan was executing a former Singapore Deputy Prime Minister and Minister of Home Affairs, Mr. Wong Kan Seng.¹²⁰

At trial, the defense argued that section 267C of the Penal Code was "not a strict liability offence, and the ingredients of the offence have not been made out."¹²¹ In order to prove lack of intent, defense counsel elicited testimony from Yue that he was aware of the unhappiness in Singapore over matters such as development projects involving casinos and pro-foreigner policies.¹²² Yue testified that he was frustrated and wanted to be expressive, and that he was not thinking any violent thoughts at all.¹²³ Regarding the posting of the doctored picture of a Singapore official, he testified that he was amused by another satirical picture that he had seen and he wanted to do something similar.¹²⁴

The defense also submitted a psychiatric report, which noted in part that Yue

1) . . . has an introverted, poorly socialised personality with a previous psychiatric treatment as a child; it is therefore not surprising that he finds the internet a fertile ground for his imaginative play and creative re-enactments of his "angst" against his perceived ills in society; such internet forays like the netizens forum afforded him great relief and provided an outlet for the discharge of his "angst" and "tensions." If his postings attract many "hits" and "likes," it will enhance his self-esteem and social standing among netizens, something he will not be able to achieve in real life.

2) He has stopped posting on Temasek Review since September 2010 and has deactivated his personal Facebook on 14 July 2011. He is very remorseful over his actions and has promised never to repeat such "foolish acts" again. His main regrets are to have caused such prolonged mental distress to his "frail" father and to lose a "sole-breadwinner job."

119 *Yue*, [2012] SGDC 115, ¶ 3.

120 *Id.*

121 *Id.* ¶ 7.

122 *Id.* ¶ 10.

123 *Id.*

124 *Id.* ¶ 11.

3) Gary has a psychological problem which needs psychotherapy instead of incarceration; I am confident that with therapy, he is very unlikely to repeat such an offence in future.¹²⁵

In arguing for a conviction, the prosecutor asserted that section 267C of the Penal Code created a strict-liability offense and that the accused's intentions when he made the two postings were therefore irrelevant to the two charges.¹²⁶

The trial court found that although the postings expressed incitements to violence, Yue had not intended to actually incite violence.¹²⁷ Regarding Yue's intention, the court was persuaded that posting the video was motivated instead by Yue's personality—he was “socially immature and awkward, prone to attention-seeking through the social media.”¹²⁸ Regarding the doctored photo, the court found that Yue's intention was to be humorous rather than incite violence, although what was essentially a political cartoon was “done in very bad taste.”¹²⁹ Ultimately, however, the trial court agreed with the prosecution regarding the mens rea requirements of the statute and determined that section 267C of the Penal Code had created a strict-liability offense. Yue's intention, whatever it had been, was therefore irrelevant to both charges and he was convicted.¹³⁰

The defense counsel's argument as reflected in the trial-court opinion indicates that the defense portrayed Yue negatively, with unlikeable qualities. If Yue did not intend to incite violence, his counsel needed to demonstrate what intention he did have, and the two related themes arising from the testimony were that Yue posted the material because he was attention-seeking and immature. The immaturity theme focused on Yue's flawed character in a way directly related to proof of intention, in that his immaturity prompted the attention-seeking behavior that led him to post the objectionable material. This theme was also supported by the Defense Submissions to the trial court, which emphasized Yue's testimony that the postings were done in a moment of “folly.”¹³¹ Newspaper reports of the trial provide further evidence that the defense strategy was distinctly negative. At the mitigation stage of the trial, defense counsel noted that Yue was paying a “huge price for his stupidity.”¹³² The strategy focuses attention not on Yue's positive aspects, but on weaknesses that could generate decisionmaker emotions of irritation and pity.

125 *Id.* ¶ 47.

126 *Id.* ¶ 13.

127 *Id.* ¶¶ 41–42, 44.

128 *Id.* ¶ 50.

129 *Id.* ¶ 54.

130 *Id.* ¶ 21.

131 Defense Submissions, *Yue*, ¶¶ 40, 43 (on file with author).

132 Elena Chong, *Man Fined for Online Postings in Landmark Case*, STRAITS TIMES (Mar. 13, 2012).

It could be argued that defense counsel in fact used a primarily positive portrayal, of the defendant as a hero, with immaturity and the need for approval as the flaws he struggles with. However, the record and counsel argument do not portray a struggle, and a positive hero characterization does not do justice to the way in which the defense prioritized negative aspects of Yue's character. The defense could have constructed a more positive portrayal, by highlighting the remorse that Yue felt and subordinating his stupidity and folly, but the defense did not go in that direction.

The trial-court opinion suggests that the narrative focus on Yue's negative character was a successful strategy in terms of factual findings. The trial court found that Yue did not have the intent to incite violence, but rather the intent to gain attention, and to that extent the inclusion of a negative narrative of the client's character should be considered successful. The trial court ultimately convicted the defendant because, it held, the offense was one of strict liability, so the prosecution was not required to prove intent. However, the trial court did ultimately impose a fine for the convictions, not a custodial sentence as requested by the prosecution,¹³³ which suggests that the court viewed the defendant's actions less seriously.

Later proceedings in the case also suggest that the negative defense strategy continued to play a role in argument and analysis, although the defense had less success with the facts at this level. The prosecution appealed the lighter sentence imposed by the trial court to the Singapore High Court.¹³⁴ The High Court reversed the trial court's finding on mens rea and held that the relevant section did require intent, but found that Yue had intended to incite violence and had therefore been properly convicted.¹³⁵ The High Court noted the District Court's agreement with the testimony that Yue had acted out of angst and the expert psychiatrist's testimony that Yue desired to get attention and enhance his self-esteem.¹³⁶ But the High Court saw no difference between the trial court's finding that Yue intended to post material that contained incitements to violence and a finding that he had an intention to incite violence.¹³⁷ The High Court was persuaded that Yue had intended to incite violence, in part due to his online comment regarding the doctored picture that "[i]f their political downfall is not within grasp, we should know what and how next to escalate it."¹³⁸ The High Court rejected Yue's description of his intent as

133 *Yue*, [2012] SGDC 115, ¶¶ 28–31.

136 *Id.* ¶ 8.

134 *See Yue*, [2012] SGHC 188, [2012] 1 SLR 39, ¶ 2.

137 *Id.* ¶ 39.

135 *Id.* ¶¶ 39–41.

138 *Id.* ¶ 40.

well as the defense assertion that he did not intend the natural consequences of his actions.¹³⁹

Yue thus lost the appeal at the High Court, but even at this level the analysis of the law referenced his negative character and used it as a touchstone for the relevant legal principle. In interpreting the statutory language, the appellate judge discussed the balance of freedom of expression and protection of the public from violence. The judge stated,

While the personal and public benefits of free expression would sufficiently recompense for inevitable encounters with *the rude, the obstinate, the obtuse and even the offensive*, it is no part of the constitutional bargain that citizens must bear violence or disobedience to law and order—or the threat thereof—as the price of free expression.¹⁴⁰

The defense's introduction of Yue's negative, attention-seeking character was an integral part of the testimony. The strategy persuaded the trial court and affected development of the law at the appellate level, even though Yue's conviction was ultimately affirmed. This case study demonstrates that negative client portrayal can be used by lawyers with at least some degree of success, and in terms of results it arguably comprises stronger proof of persuasiveness than the U.S. case of *Young*.

C. Case Study Comparison & Theoretical Ramifications

These two cases from different common-law jurisdictions, involving a jury trial and a judge trial, offer examples of how lawyers can make negative aspects of the client a primary plank in the client's story. In both cases, the defense acknowledged the client's negative characteristics and even joined the decisionmaker in criticizing them. Neither defense strategy attempted to make the defendant likeable or subordinate the defendant's negative aspects to a positive portrayal. In fact, the dynamic worked in exactly the opposite manner: counsel used the strength of the negative client portrayal to bolster the client narrative and the position taken on the legal issue.

In these persuasive legal narratives, lawyers are proving not that the client is unlikeable generally, but that the client is unlikeable in a very particular way, intimately tied to the elements of the party's claim or defense. In the Singapore case, the *actus reus* was conceded but counsel asserted that the client's bad character demonstrated an intent different from what the law required; the client had a negative intention but not the alleged illegal intention. In the U.S. case, counsel disputed the *actus reus*

139 *Id.*

140 *Id.* ¶ 38.

and argued that the bad character demonstrated a lack of the intelligence and organization that the prosecution said was necessary for the commission of the murder. Here, the negative client portrayal negated the prosecution's required aspects of proof, but instead of proving a different parallel intention, the defendant asserted a character at odds with what the *actus reus* required.

Narratives with negative client portrayals may work in part because they increase client or even lawyer credibility. Because negative qualities reflect badly on the client, they would not usually be highlighted, so focusing on these qualities contrary to expectation may suggest authenticity or believability. Another way to theorize the persuasiveness of these narratives would be to invert the notion of fidelity.¹⁴¹ Comprising more than one notion, fidelity can be understood in part as good reasons for action and belief, consistent with or faithful to experienced reality. In the case of narratives with negative client portrayals, instead of good reasons for action and belief, the narrative displays negative fidelity, bad but not illegal reasons for action and belief, which are believable because they are consistent with experienced reality.

These examples illustrate the use of narratives incorporating negative client portrayals in order to address an absence in advocacy literature, but they should not be taken to mean that persuasive legal narrative should now be understood as a duality, a choice between positive and negative. The best approach to client portrayal is arguably not the one-trick pony of positive client portrayal, or the duality of positive or negative portrayals, but a continuum of portrayals. Even the *Young* and *Yue* cases, both on the negative end of the continuum, differ from one another. The U.S. example of disgust and anger for a lying husband who murdered his pregnant wife is further along the negative end of the continuum, while the Singapore example of criticism and pity for the attention-seeking defendant is closer to the center.

Both examples are criminal cases, which raises the question of whether certain areas of law or legal issues are conducive to negative client narratives. In general, criminal law prohibits behavior which is more harmful than the behavior prohibited by civil law. The mens rea of criminal law are also distinctly different, and more negative, than the level of intent required for civil-law liability, so criminal defendants may present greater potential for negative client portrayals. But this kind of narrative does not appear to be limited to defendants. For example, freedom-of-speech cases under the U.S. Constitution can produce clients with

141 Rideout, *supra* note 116, at 55, 69–78.

messages of hate that are entitled to constitutional protection; in these cases a factual narrative with a negative client portrayal may be a requirement, not a choice.

In the 1977 case of *National Socialist Party v. Skokie*,¹⁴² neo-Nazis applied for a permit to march in the heavily Jewish community of Skokie, Illinois, which included persons who had survived the holocaust.¹⁴³ The party leader of the National Socialist Party of America (NSPA) described the party as being a Nazi organization and proposed to publicly protest against regulations regarding the use of the village's public parks for political assemblies.¹⁴⁴ Demonstrators planned to wear the uniform of the party, which included a swastika, and hold banners with variations on the statement, "Free Speech for the White Man."¹⁴⁵ The NSPA was a group devoted to inciting racial and religious hatred, primarily against people of the Jewish faith and non-Caucasians.¹⁴⁶ The Skokie Board of Commissioners passed an ordinance requiring marchers to post a \$350,000 insurance bond, and another ordinance prohibiting them from "performing any of the following actions within the village of Skokie, Illinois:"

[M]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.¹⁴⁷

The county court issued an injunction against the group's intended march; the party applied for a stay to the Illinois Court of Appeals, which denied it. The party then petitioned to the Illinois Supreme Court, which denied the stay as well. The U.S. Supreme Court accepted certiorari and agreed with the Nazi group that these restrictions violated its right to freedom of speech under the First Amendment to the U.S. Constitution.¹⁴⁸ The Court stated that if "a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards . . . including immediate appellate review," and that absent such review, the State was required to allow a stay of the lower court's refusal to allow the protest.¹⁴⁹ The Court's holding established that the Nazi Party could not be prohibited from marching peacefully because of the content of their message. In the

142 432 U.S. 43 (1977).

143 *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978).

144 *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 366 N.E.2d 347 (Ill. App. Ct. 1977).

145 *Skokie*, 373 N.E.2d 21.

146 *Id.*

147 432 U.S. 43 (1977).

148 *Id.* at 43–44.

149 *Id.* at 44.

context of freedom of speech law, the heart of the legal issue may present a narrative of an extremely negative client, and portraying such a client more positively in those cases would not properly frame the legal issue or be based on the evidence in the case.

Yue is a criminal case, but it can also be understood in the general context of freedom of speech. In assessing the defendant's behavior, the court discussed the balance of freedom of expression and protection of the public from violence, and noted,

While the personal and public benefits of free expression would sufficiently recompense for inevitable encounters with *the rude, the obstinate, the obtuse and even the offensive*, it is no part of the constitutional bargain that citizens must bear violence or disobedience to law and order—or the threat thereof—as the price of free expression.¹⁵⁰

The *Young* and *Yue* case studies offer practical examples of how some lawyers do in fact use persuasive legal narratives with negative client portrayals. These examples could be characterized as aberrations or outliers, if negative client portrayals were not so consistent with theories of persuasion and the concept of case theory in particular. Lawyers present their cases using a theory of the case, which represents their persuasive position on the law and the facts.¹⁵¹ How a lawyer conducts the trial is governed by the case theory,¹⁵² including the use of persuasive legal narrative. But persuasive legal narrative is subordinate to the overall theory of the case, once it is established,¹⁵³ and case theory has no inherent requirement that the client be portrayed positively. Narrative presentation of fact allows the audience to understand and believe the party's motivations in a manner that resolves legal issues in the party's favor. The goal of persuasive legal narrative is to portray the party's challenges, conflicts, and choices, in an authentic manner that supports the case theory.¹⁵⁴ Narrative must work in that context, and can be based on positive or negative elements in the client's case. A theory of the case may use distinctly unlikeable aspects of parties in order to persuade, for example, to ask the fact finder to pity but not necessarily like the client. Or the context may call for the fact finder to be disgusted by the client, in a way

150 *Yue*, [2012] SGHC 188, [2012] 1 SLR 39, ¶ 38 (emphasis added).

151 See MAUET, *supra* note 11 at 8–9, 60–61, 250.

152 *Id.* at 8–9; see also MARILYN J. BERGER, JOHN B. MITCHELL & RONALD H. CLARK, TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY (4th ed. 2015).

153 The case theory should be developed with the client and reflect the client story to the degree possible. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1995).

154 See Steven Lubet, *The Trial as Persuasive Story*, 14 Am. J. Trial Advoc. 77, 78 (1990).

that proves the client would never have done the alleged acts, as the defense in *Young* demonstrates. The appropriate reactions to a party's narrative may be pity, shock, or even disgust—but if the narrative supports the case theory and carries its argumentative weight, then the persuasive legal narrative is successful.

Actually, case theory does not require a narrative version of the facts at all. In practice, lawyers distinguish between the larger-scale goals of trial, reflected in the case theory, and the smaller-scale goals of persuasive legal narrative. If the evidence is so against a party that it offers no acceptable narrative to tell, then as a matter of trial strategy a lawyer and client may decide not to put forth their own version of the facts. When criminal-defense attorneys do not present an alternative version of the facts but instead use procedural devices to prevail—such as arguing that the prosecution has not met its burden of proof, or challenging the evidence supporting certain facts¹⁵⁵—they are not using persuasive legal narrative to present a version of events. As a matter of case theory, then, there will be instances when persuasive legal narrative is simply not employed. When a case is truly without narrative recourse, the most persuasive and ethical strategy may be to challenge the opposing party's evidence and not provide a counter narrative at all.

The choice of whether to use persuasive legal narrative as a part of the case theory, and the appropriate goal once narrative is adopted, are two separate questions. When persuasive legal narrative is adopted as a plank in trial strategy, the goal should be to convey that knowledge of the client which allows the fact finder to accept the case theory. The narrative needs to be appropriately nuanced to fit the facts of the case and the quirks of the party, and though the evidence in many cases may allow for a primarily positive client portrayal, the process of identifying the most persuasive client narrative should be understood as a continuum of different kinds of client characteristics, including the possibility of a primarily negative client portrayal.

IV. Conclusion

Persuasive legal narrative is a complex argumentative tool. Some clients can and perhaps should be made more likeable, but the semi-automatic nature of the preference for positive client portrayals needs reconsideration and adjustment. The use of positive client portrayals is not preordained; to borrow Robbins's admonition regarding narrative

¹⁵⁵ See the challenge strategy identified in Bennett & Feldman, *supra* note 3, at 98.

point of view, positive client portrayals are “a concept to be used, not a rule to be followed.”¹⁵⁶ Recognizing narratives with a primarily negative client portrayal, as explored in this article, better accounts for the full range of what lawyers do in practice. It also lessens the likelihood that adversarial pressure to win will lead lawyers to fashion unethical persuasive narratives, and that in turn better serves the truth-finding function of the dispute-resolution process. Incorporating negative client portrayals also provides an opportunity to generate a more nuanced theory of persuasive legal narrative in common-law trials. Every case presents potentially different dynamics, and analysis of lawyerly argument should therefore allow for a balance of positive and negative client portrayals.

This study is preliminary and offers some first steps about how to advance this portion of applied legal storytelling. The examples presented here suggest that persuasive legal narratives can include negative client portrayals, but further study can consider additional cases in greater detail. Primarily negative client portrayals can also be better distinguished from each other, and the advantages and limits of negative client portrayals can be explored. Comparisons of persuasive legal narratives from different countries are more challenging but could produce insight into how the context for lawyer argument affects client portrayal. Lawyers can disagree about what is most persuasive, but such jurisdictional differences may illuminate currents relevant to matters beyond individual cases or advocacy.

¹⁵⁶ Foley & Robbins, *supra* note 4, at 480.

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The Digital Natives Will Not Save Us

Reflections on *The Shallows*

The Shallows: What the Internet Is Doing to Our Brains

Nicholas Carr (W.W. Norton & Co. 2010), 271 pages

Mary Beth Beazley, rev'r*

"I declare! Sometimes it seems to me that every time a new piece of machinery comes into the door, some of our wits fly out at the window!"

— Aunt Abigail, in Dorothy Canfield, *Understood Betsy* (1917), at p. 64 (referring to the introduction of the mechanical clock)

"Calm, focused, undistracted, the linear mind is being pushed aside by a new kind of mind that wants and needs to take in and dole out information in short, disjointed, often overlapping bursts—the faster, the better."

— Nicholas Carr, *The Shallows*, at p. 10 (referring to the introduction of the World Wide Web)

*The Shallows*¹ is one of the most important books on my Faculty Bookshelf, where I keep the books that have changed the way I teach, think, or write.² Although it was published nearly ten years ago, it remains an important work for those of us who teach legal writing, and for lawyers and judges as well. *The Shallows* will help you to understand why and how the Internet is changing the way we think. And of course, I make my living

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1 NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* (2010).

2 Other books on my faculty bookshelf include Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009); Carol S. Dweck, Ph.D., *Mindset: The New Psychology of Success* (2007); and Joseph M. Williams & Joseph R. Bizup, *Style: Lessons in Clarity and Grace* (12th ed. 2016).

trying to teach students how to think. If you do, too, you should think about reading *The Shallows*.

I. Our malleable brains

The Shallows taught me that our brains are malleable, and that when we use our brains over and over in certain ways, they may develop ruts—not ruts in what we think, but in the ways that we accomplish that thinking. Our brains crave novelty the way our tongues crave sugar, and that’s a problem: the Internet, and the products that exploit access to the Internet, guarantee us novelty at any time or at any place. Sugar is great for dessert, but if we eat it too often, it crowds healthier foods out of our diet. Likewise, novelty is great for a break, but too much of it distracts our brains from the focus that feeds deep learning and deep thinking.

That focus matters to us and to our students because lawyers are knowledge workers: we use knowledge and make new knowledge as part of our work.³ The best way to make new knowledge is to make new and sophisticated intellectual connections in our long-term memories. To get to our long-term memory, however, information has to travel through our highly-distractible working memory.⁴

Carr explains that working memory is overwhelmed on the Web, because instead of consulting one source of information, “we face many information faucets, all going full blast.”⁵ And our ability to process suffers: “When the [cognitive] load exceeds our mind’s ability to store and process the information . . . we’re unable to retain the information or to draw connections with the information already stored in our long-term memory. We can’t translate the new information into schemas. Our ability to learn suffers, and our understanding remains shallow.”⁶

Carr supports his claims by describing his own relationship with the Internet, starting with his “analogue youth” and moving to his “digital adulthood,” where “[r]eading online felt new and liberating.”⁷ This new and liberating feeling, however, soon faded. In 2007, he notes, “a serpent of doubt slithered into my infoparadise.”⁸ He laments that “I used to find it

³ E.g., Jason Coomer, Willie Buehler & Bob Binder, *The Attorney As Knowledge Worker*, 68 TEX. B.J. 794, 794 (2005).

⁴ See, e.g., CARR, *supra* note 1, at 125; V. ZEIGLER-HILL & T.K. SHACKELFORD EDS., *ENCYCLOPEDIA OF PERSONALITY AND INDIVIDUAL DIFFERENCES*, DOI 10.1007/978-3-319-28099-8_1039-1 (2016). Note that “working memory” is now a more commonly-used term than “short-term memory.”

⁵ CARR, *supra* note 1, at 125.

⁶ *Id.* at 125.

⁷ *Id.* at 11, 15.

⁸ *Id.* at 16.

easy to immerse myself in a book or a lengthy article. . . . Now my concentration starts to drift after a page or two. I get fidgety, lose the thread, begin looking for something else to do. . . . The deep reading that used to come naturally has become a struggle.”⁹

I recognized Carr’s struggle. When I’m reading a hard-copy book, I find my brain thinking about my phone, wondering if I can check it. When I read online, I have an itchy finger, looking for something to click on. If I’m critiquing a paper in MSWord and get frustrated (that happens sometimes), I feel a physical urge to open a new tab, to escape.

That fidgety, unfocused feeling is the result of how our behavior has changed our brains. Recent research indicates that even the adult brain is “malleable, or ‘plastic.’”¹⁰ Unfortunately, for many, that malleability has allowed our brains to grow accustomed to constantly switching to new tasks. The more fully our brains adjust to that new method of thinking, the more they want to keep thinking that way: “The chemically-triggered synapses that link our neurons program us, in effect, to want to keep exercising the circuits they’ve formed. Once we’ve wired new circuitry in our brain . . . ‘we long to keep it activated.’”¹¹

Carr argues that as our working memory gets overloaded, it becomes “much harder for our frontal lobes to concentrate our attention on any one thing And . . . the more we use the Web, the more we train our brain to be distracted—to process information very quickly and very efficiently but without sustained attention.”¹² In other words, it’s not our imagination: we’re training our brains to need novelty more frequently, to break focus to respond to vibrations, pings, and pop-ups. And the more we give in to those stimuli, the more we starve our long-term memories, and the shorter our attention spans get.

II. Technology giveth and it taketh

Something good about our hunger for novelty is that it drives us to invent new things, but Carr argues that as humans create new kinds of technology, technology creates new kinds of humans. He focuses especially on “intellectual technologies” (like the Internet) that allow us to “extend or support our mental powers—to find and classify information, to formulate and articulate ideas, to share know-how and knowledge, to

9 *Id.* at 5–6.

10 *Id.* at 21.

11 *Id.* at 34 (internal citation omitted).

12 *Id.* at 194.

take measurements and perform calculations, to expand the capacity of our memory.”¹³

As Carr puts it, “[e]very tool imposes limitations even as it opens up possibilities.”¹⁴ When technology takes over a task that we used to do by hand, we forget (or never learn) how to do that task, and that skill is lost. Not being able to tell time by the sun may be fine; we now carry phones eternally synched to Greenwich Mean Time. But the Internet presents a problem at once deeper and more significant: It affects ability to focus and to think. We need that ability not just so that we can read maps and remember the capital of Oklahoma;¹⁵ we need it to develop new ways to get to the places on those maps and new ways to run the governments in those state capitals—and for so much more.

As Carr explains, technology both enhances and limits our abilities. When we use binoculars, for example, we can see very far away, but we miss things that are close by, because we have to sacrifice that ability to use the binoculars. Of course, you don’t walk down a street holding binoculars to your face, because you would soon stumble and realize your mistake. But we often don’t comprehend the mental stumbling that results from our overuse of the Internet.¹⁶

The Internet’s portability and speed allow us to read anywhere, communicate anywhere, and work anywhere. And the fact that we can do these things anywhere usually means that we allow the Internet to *be* anywhere, to intrude anywhere. Unfortunately, the Internet’s ability to intrude means that it is almost always taking up space in our brains, crowding out other information before we can transfer it to our long-term memories.

III. Technology and empathy

Like many people, you may be thinking that the “digital natives,” that is, those who have been born into the digital world, will be better able to cope with the digital onslaught. Alas, the digital natives can’t control biology. They are coping with the digital onslaught the way my generation coped with the sugar onslaught. (Don’t ask.) And just as some food companies exploit that sugar craving to get us to eat more vanilla yogurt,¹⁷

13 *Id.* at 44.

14 *Id.* at 209.

15 Oklahoma City.

16 Admittedly, we do sometimes stumble while we walk down the street looking at our phones . . .

some tech companies exploit our novelty craving to get us to use more apps, more often.¹⁸

When we overuse our apps, we allow the Internet to use up even more of our working memory. Worse, we may be affecting countless cognitive functions, from how we interact with each other to our emotional and empathic processes. Researchers who study collaborative groups have found that collaborators speak with each other almost 50% more often when they work with paper than when they work with tablets.¹⁹ The researchers suggest that “digital devices capture more visual and cognitive resources, which force participants to pay less attention to each other and results in noticeably compromised collaboration.”²⁰

The Internet’s similar impact on empathy makes sense when we understand what happens when we read in a focused, linear fashion – as we do when we read fiction. Carr notes that when we are engaged in deep reading, we are conducting a steady transfer of information from working to long-term memory.²¹ More significantly, scientists who have conducted brain scans of people reading fiction found that “readers mentally simulate each new sensation encountered in a narrative” [And] [t]he brain regions that are activated often “mirror those involved when people perform, imagine, or observe similar real-world activities.”²²

Carr fears that our ability to engage in “meditative thinking,” which Martin Heidegger saw as “the very essence of our humanity,” might become a victim of this “headlong progress.”²³ Carr warns that “[t]he tumultuous advance of technology could . . . drown out the refined perceptions, thoughts, and emotions that arise only through contemplation and reflection.”²⁴

17 For example, a Guardian opinion columnist notes that the upward trend in weight began around 1976, and he cites filmmaker Jacques Peretti (“The Men Who Made Us Fat”), who argues that “food companies have invested heavily in designing products that use sugar to bypass our natural appetite control mechanisms, and in packaging and promoting these products to break down what remains of our defenses.” George Monbiot, *We’re in a new age of obesity. How did it happen? You’d be surprised*, THE GUARDIAN, Aug. 15, 2018.

18 E.g., D. B. Dillard-Wright Ph.D., *Technology Designed for Addiction: What are the dangers of digital feedback loops?* PSYCHOL. TODAY, Jan. 4, 2018, <https://www.psychologytoday.com/us/blog/boundless/201801/technology-designed-addiction>.

19 Jonathan Haber et al., *Paper vs. Tablets: The Effect of Document Media in Co-located Collaborative Work*, AVI ’14 PROC. OF THE 2014 INT’L WORKING CONFERENCE ON ADVANCED VISUAL INTERFACES 89–96, 94 (2014), <http://dl.acm.org/citation.cfm?doid=2598153.2598170>.

20 *Id.*

21 See CARR, *supra* note 1, at 124–25.

22 *Id.* at 74 (internal citations omitted).

23 *Id.* at 222 (internal citation omitted).

24 *Id.* (internal citation omitted).

Carr argues that “[t]he price we pay” for technology’s power is “alienation. . . . The tools of the mind amplify and in turn numb the most intimate, the most human, of our natural capacities—those for reason, perception, memory, emotion.”²⁵ He warns that “[w]e shouldn’t allow the glories of technology to blind our inner watchdog to the possibility that we’ve numbed an essential part of our self.”²⁶

Notably, he describes an experiment that measured subjects’ abilities to empathize with those who suffered from physical vs. psychological issues.²⁷ Researchers discovered that it takes time for the brain to transcend the body and begin to understand “the psychological and moral dimensions of a situation.”²⁸

The researchers believe that their experiment shows that “the more distracted we become, the less able we are to experience the subtlest, most distinctively human forms of empathy, compassion, and other emotions.”²⁹ One researcher argues that “we need to allow for adequate time and reflection,” for certain kinds of thinking, “especially moral decisionmaking about other people’s social and psychological situations.”³⁰ She notes that if things are happening “too fast,” we may never fully experience emotions about other people’s psychological states.³¹ Carr doesn’t believe that the Internet is undermining our “moral sense,” but he worries that it may be “altering the depths of our emotions as well as our thoughts.”³²

IV. Do I recommend this book?

You may be surprised to hear that I don’t find this book depressing. Yes, it’s a bit disheartening to recognize your own issues with focus and attention. But *The Shallows* is an important book because we are all living with a cognitive candy store in our back pockets, and we have to learn how to fight the cognitive bulimia that is starving our long-term memories of intellectual nutrition.

For there is a difference between information and knowledge, between making quick decisions and exercising sophisticated judgment. Carr argues that unlike the Web, our brains are not for storing infor-

25 *Id.* at 211.

26 *Id.* at 212.

27 *Id.* at 220–21.

28 *Id.* at 221 (citation omitted).

29 *Id.*

30 *Id.* (quoting Mary Helen Immordino-Yang, a member of the research team) (endnote omitted).

31 *Id.*

32 *Id.*

mation, they are for processing it. When our minds are well-nourished, they contain a “wealth of connections” that leave the Internet in the dust:

[T]he Web is itself a network of connections, but the hyperlinks that associate bits of online data are nothing like the synapses in our brain. . . . They have none of the organic richness or sensitivity of our synapses. . . . When we outsource our memory to a machine, we also outsource a very important part of our intellect and even our identity. William James, in concluding his 1892 lecture on memory, said, “The connecting *is* the thinking.” To which could be added, “The connecting *is* the self.”³³

Thus, we can’t always solve our problems by turning to the Web to add facts to our ideas like we’re adding ketchup to French fries. To promote knowledge-making and intellectual discovery, we must keep filling our long-term memories with information and experiences so that the knowledge can be in there cooking, so we can make those connections when we need them.

I can’t tell you where those connections will lead, but I know they will be better connections if we understand the mysteries of *The Shallows*.

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Never Stop Fighting Injustice

Crusader for Justice: Federal Judge Damon J. Keith

Peter J. Hammer and Trevor W. Coleman (Wayne State University Press 2013), 368 pages

Sha-Shana Crichton, rev'r*

Each year, I assign a book to my first-year legal writing class as an extra-credit assignment. In furthering the goal of training law students to become effective and culturally competent lawyers and professionals in the global marketplace, I select books that focus on issues of social justice, effective writing, the legal profession, and current affairs. A recent selection, *Crusader for Justice: Federal Judge Damon J. Keith*, provides an excellent blueprint to achieving these goals. *Crusader for Justice* is relevant and invaluable for its message on resilience, preparation, the power of good mentors, and perseverance in the face of adversity and discrimination especially in this time when our nation is plagued with divisive rhetoric and an assault on diversity and civility.

Crusader for Justice: Federal Judge Damon J. Keith, written and edited by Peter J. Hammer and Trevor W. Coleman with the foreword by author Mitch Albom, aptly captures the life and works of federal judge Damon J. Keith. The book opens with a dedication to Judge Keith's late wife, Dr. Rachel Boone Keith, to whom he refers as "his precious bride."¹ The dedication is a powerful testimony to Judge Keith's character and a glimpse at the source of his strength: family and faith.² It comes as no surprise therefore, that the authors refer to Judge Keith's family, his faith, his life experiences, and his tenure at Howard University School of Law as the "ballast" that he relied upon throughout the years.³ The authors masterfully capture Judge Keith's appreciation for the village that raised,

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¹ Damon J. Keith, *Dedication to Dr. Rachel Keith Boone*, in PETER J. HAMMER & TREVOR W. COLEMAN, *CRUSADER FOR JUSTICE: FEDERAL JUDGE DAMON J. KEITH* v (2014).

² *Id.* at 112, 157, 159.

sustained, and enabled him, a black man, to soar to the heights of one of the nation's longest serving and most respected federal judges.⁴

Crusader for Justice comprises 27 chapters and three sets of photograph inserts. Throughout the book, Judge Keith refers to the pivotal role Howard Law played in preparing him educationally and psychologically to practice law and to navigate the challenges of a racially segregated society. As such, I think of the book as divided into three main parts: Judge Keith Pre-Howard Law School, Judge Keith at Howard Law, and Judge Keith Post-Howard Law.

In Part I of the book we meet a young Damon Keith whose family moved from the segregated south to Detroit, Michigan in search of a better life. Judge Keith's father, Perry Keith, arrived in Detroit in 1915.⁵ Like many black migrants at the time, he experienced institutional racism in the form of inhumane living conditions, overcrowding, and excessive rents.⁶ Perry Keith found work at Ford as a machinist, and in 1917 he sent for his wife Annie and their five children.⁷ Their sixth child, Damon Jerome Keith, was born five year later.⁸

Perry Keith planted the seeds of integrity, the value of hard work, and the importance of a sound education in his young son.⁹ Judge Keith believed that college was an unattainable goal because of his family's limited finances,¹⁰ but Perry Keith's dream that his son would go to college materialized when Judge Keith's maternal cousin, Ethel McGee Davis, agreed to pay his expenses to attend West Virginia State College ("WVSC").¹¹ Mrs. Davis' husband, Dr. John Warren Davis, was the president of WVSC.¹² Dr. Davis mentored young Judge Keith, encouraged him to think about the nation-wide "struggle for racial justice," and exposed him to "highly esteemed black leaders," and "black intellectualism and civic activism."¹³ Damon excelled academically and socially at WVSC.¹⁴ He graduated in 1943.¹⁵ His father and sister attended his graduation, however, Perry Keith died days later.¹⁶

After graduation, Judge Keith joined the Army and fought in World War II. He experienced racism and racial animus which inspired him to "never stop fighting injustice back home."¹⁷ Judge Keith's mentor, Dr.

3 *Id.* at 157.

4 *See id.* at xiv.

5 *Id.* at 6.

6 *Id.*

7 *Id.*

8 *Id.* at 6–7.

9 *See id.* at 7–9, 24.

10 *Id.* at 15.

11 *Id.*

12 *Id.* at 14.

13 *Id.* at 20.

14 *Id.* at 20–21.

15 *Id.* at 23.

16 *Id.* at 23, 25.

17 *Id.* at 33.

Davis, advised him that if he was serious about making a difference, he should attend Howard Law,¹⁸ where the students were taught to use the law to eliminate racial discrimination and to effect social change.¹⁹ This heralds Part II of the book—Judge Keith at Howard Law.

Judge Keith’s admiration for Howard Law’s venerable former dean and civil rights icon, Dean Charles Hamilton Houston, jumps from the pages. Like Judge Keith, Dean Houston experienced racism by fellow Americans when he served his country during World War I.²⁰ Judge Keith reflects on Dean Houston’s mission to empower Howard Law students to fight for social justice by creating a learning environment that was intellectually rigorous yet infused with positive emotions that promoted confidence and resilience—an environment Judge Keith refers to as “a vibrant, thriving, intellectual haven.”²¹ Then, and now, Dean Houston’s legacy permeates the halls of Howard Law.

Among the profoundly impactful experiences Judge Keith had during his tenure at Howard Law was meeting Howard Law alumnus and civil rights hero, Supreme Court Justice Thurgood Marshall and observing him practice his oral arguments in the law school’s moot courtroom.²² Judge Keith’s experiences at Howard Law prepared, inspired, and motivated him to “use the law as a means for social change.”²³

Part III of the book chronicles Judge Keith’s journey from a recent law school graduate, a newly minted black lawyer, to the esteemed Senior Circuit Judge of the Sixth Circuit. Judge Keith is unsurprisingly candid about his experiences with racism, especially as a young lawyer, and the impact of racism on the legal profession.²⁴ He vividly recalls the difficulty he and other black lawyers had in finding suitable jobs because of their race.²⁵ While preparing to take the bar exam, Judge Keith worked as a tree trimmer.²⁶ When that job ended, with no alternative prospects of an income, he took a job as a janitor for the *Detroit News*.²⁷ Judge Keith performed his tasks with diligence and without complaint even when a patron expressed incredulity that Judge Keith was on his way to becoming a “black lawyer.”²⁸ With his trademark resilience and tenacity of purpose, Judge Keith ignored naysayers and maintained a laser focus on the prize—passing the bar and eradicating social injustices.

18 *Id.* at 37.

19 *Id.* at 37, 39.

20 *Id.* at 38.

21 *Id.*

22 *Id.* at 39.

23 *Id.* at 41.

24 *Id.* at 44–45, 56, 72–75.

25 *Id.* at 44–45.

26 *Id.* at 41.

27 *Id.* at 42–44.

28 *Id.* at 44.

Judge Keith vividly describes the day he first took the bar exam, as if it is permanently seared in his brain.²⁹ He had prepared diligently for the exam, but when he arrived at the examination room and observed that there were “several hundred whites” versus “fewer than a half dozen black faces,”³⁰ he became engulfed with memories of experiencing and observing racism and discrimination.³¹ Judge Keith recalled feeling “stung by a sensation of unworthiness,” and an inferiority that “hung over him like a cloud,” which hindered his ability to concentrate on the exam.³² He failed the bar exam.³³ On the second try, he traded his feelings of unworthiness and inferiority for confidence and optimism.³⁴ This time, he passed the bar examination.³⁵

Judge Keith became the first black attorney at Wayne County’s Friend of the Court.³⁶ While the job provided a steady income, Judge Keith found the work to be intellectually unstimulating, and inconsistent with his life’s mission.³⁷ As Judge Keith struggled with the call to pursue his mission of fighting social injustices,³⁸ his family and friends attempted to dissuade him by reminding him of the dearth of job prospects available to black lawyers, many of whom found work only in the post office or as janitors.³⁹ Judge Keith knew this to be true. White clients would not hire black lawyers.⁴⁰ Black clients also shunned black lawyers because they saw “how poorly black lawyers were treated in court,” and they knew racism in the legal system would affect the outcome of their case.⁴¹

Never the one to shy away from a challenge, Judge Keith entered private practice with a careful plan to succeed. He had expected difficulty in finding clients because of the racial stigma attached to black lawyers, but as a firm believer in the fundamental fairness of the legal system, he had not expected that the judges would have allowed their racial biases to influence how they treated black lawyers and how they decided their cases.⁴² His experiences proved otherwise. Black lawyers and black clients were treated unfairly.⁴³ Black lawyers were often belittled and not given the “dignity and respect” of other lawyers,⁴⁴ while black clients were given harsher punishments.⁴⁵ Instead of viewing this as an obstacle and

29 *Id.* at 42.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 43.

34 *Id.* at 44.

35 *Id.*

36 *Id.* at 47.

37 *Id.* at 55.

38 *Id.* at 56.

39 *Id.* at 56–57.

40 *Id.* at 44.

41 *Id.* at 45–46.

42 *Id.*

43 *Id.* at 45–46, 73–74.

44 *Id.* at 45–46.

45 *Id.* at 45–46, 73–74.

deterrent, Judge Keith saw this as an opportunity to work harder to effect change. These experiences inform how he treats all lawyers that appear before him: fairly and with respect and dignity.⁴⁶

Racial diversity in the legal profession is critical to ensuring equal justice for all. Yet, there was a dearth of judges of color.⁴⁷ Judge Keith was confirmed as the second African-American judge in the Eastern District of Michigan in 1967.⁴⁸ During his decade-long tenure on the district court bench,⁴⁹ and later on the Sixth Circuit, Judge Keith moved the hands of justice exponentially towards protecting civil rights. He acknowledges that his life experiences inform, but do not dictate his judicial decisions.⁵⁰ He is bold, tenacious, and fearless in his approach, yet his decisions are based on an incisive review of the facts and interpretation of the law. The book includes a description of several of Judge Keith's groundbreaking civil rights decisions, including *Davis v. School District of Pontiac, Inc.*⁵¹ (addressing racial segregation in Detroit public schools), *Garrett v. City of Hamtramck*⁵² (addressing housing discrimination), *Stamps v. Detroit Edison Co.*⁵³ (addressing employment discrimination), and *United States v. Sinclair*⁵⁴ (requiring President Nixon to disclose whether the government had used electronic surveillance to monitor anti-war activists without a warrant).

Judge Keith's prescient warning to safeguard freedom of the press as a bedrock of democracy in *Detroit Free Press v. Ashcroft*⁵⁵ secures his position as a trailblazer for justice. Judge Keith noted "Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."⁵⁶ Judge Keith's decisions resulted in threats to his and his family's safety⁵⁷ and a lawsuit by the Nixon administration based on Judge Keith's decision in *Sinclair*.⁵⁸ The Supreme Court affirmed Judge Keith's decision 8-0.⁵⁹

⁴⁶ *Id.* at 46, 75.

⁴⁷ *Id.* at 45.

⁴⁸ *Id.* at 110.

⁴⁹ *Id.* at 163.

⁵⁰ *Id.* at 112, 148, 155.

⁵¹ *Id.* at 112–20 (discussing *Davis v. School District of Pontiac, Inc.*, 309 F. Supp. 734 (E.D. Mich. 1970)).

⁵² *Id.* at 129–36 (discussing *Garrett v. City of Hamtramck*, 335 F. Supp. 16 (6th Cir. 1971), *rev'd.*, 503 F.2d 1236 (6th Cir. 1974)).

⁵³ *Id.* at 121–27 (discussing *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973)).

⁵⁴ *Id.* at 138–43 (discussing *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971)).

⁵⁵ *Id.* at 210–19 (discussing *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002)).

⁵⁶ *Detroit Free Press*, 303 F.3d at 683.

⁵⁷ HAMMER & COLEMAN, *supra* note 1 at 118–19, 134–35.

⁵⁸ *Id.* at 138, 143.

⁵⁹ *Id.* at 144.

The picture of Judge Keith's family would not have been complete without his law clerks, whom he considers as family.⁶⁰ He contributes to their professional and personal development by teaching them legal skills and critical life lessons such as "how to treat people and handle problems."⁶¹ Judge Keith has hired and mentored "more minority clerks than any federal judge in U.S. history."⁶² This speaks volumes about his commitment to ensuring diversity in the legal profession.

As a reader and observer, I think Judge Keith demonstrates his greatest lessons through his resilience, restraint, integrity, humility, discipline, and humanity. Even as a respected jurist having served several years on the federal bench, he was stereotyped as a porter, subjected to the indignity of being called "boy," and ordered to park someone's car.⁶³ His usual grace and restraint when faced with racial insults, prejudice, and discrimination signals his strong emotional intelligence.⁶⁴ This leads me to echo Justice Clarence Thomas' remark that Judge Keith is "a model of how you should conduct yourself . . ." ⁶⁵

Crusader for Justice is a book that every lawyer, law student, and pre-law student should read. I strongly suggest that the libraries in every HBCU and in law schools across the United States purchase and encourage their students to read *Crusader for Justice*. I have read this book several times for motivation, encouragement, and inspiration.

60 *Id.* at 221.

61 *Id.* at 225.

62 *Id.* at 223.

63 *Id.* at 172, 175.

64 See DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (2012).

65 HAMMER & COLEMAN, *supra* note 1, at 187.

“[T]he Pursuit of Happiness”¹

How to be (Sort of) Happy in Law School

Kathryne M. Young (Stanford University Press 2018), 290 pages

Tessa L. Dysart, rev’r²

Let’s face it: there is a dearth of happiness in the legal profession. Lawyers are more depressed, suffer from more anxiety, and drink more than other professionals, such as doctors.³ Law students are unhappy too—suffering at alarming rates from depression, anxiety, self-harm, and substance abuse.⁴ None of this information is new to readers of this Journal—folks like Debra Austin and Lawrence Krieger have been writing about student well-being for years.⁵ It is also not a surprise to me as a legal writing professor, since I interact frequently in small group or individual settings with students. I see first-hand the stress, depression, and anxiety they are feeling. So what can the legal community do about it?

Enter Kathryne M. Young, a Stanford Law graduate who concurrently worked on her PhD in Sociology while in law school. Young’s new book, *How to be (Sort of) Happy in Law School*, provides tips and strategies that we, as attorneys, can share with law students to help them thrive in law school. And, in the process, we might find some ways to make ourselves a little happier, too.

¹ THE DECLARATION OF INDEPENDENCE para. 2 (1776).

² Assistant Director of Legal Writing and Associate Clinical Professor of Law at The University of Arizona James E. Rogers College of Law.

³ Press Release, Hazelden Betty Ford Foundation, ABA, *Hazelden Betty Ford Foundation Release First National Study on Attorney Substance Use, Mental Health Concerns*, CISION PR NEWSWIRE (Feb. 3, 2016), <https://www.prnewswire.com/news-releases/aba-hazelden-betty-ford-foundation-release-first-national-study-on-attorney-substance-use-mental-health-concerns-300214321.html>.

⁴ KATHRYNE M. YOUNG, *HOW TO BE (SORT OF) HAPPY IN LAW SCHOOL* 145 (2018).

⁵ Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649 (2018); Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 1 J. ALWD 258 (2002).

Young's book is based on an extensive mixed-methods survey that she conducted while at Stanford. In addition to surveying over 1,100 students at more than 100 diverse law schools and 250 alumni from over 50 schools, she also interviewed students, alumni, and law school drop-outs—including those who loved law school and those who hated it. Young incorporates many quotes from her interviews and surveys into the book.

The book is divided into five main sections: (1) Getting a handle on your situation, (2) Being yourself, (3) The elusive search for balance, (4) Managing relationships, and (5) Academic success. Young makes effective use of subheadings, allowing the reader to pinpoint with ease the discussions about, for example, why you aren't crazy or how you should manage your romantic life. Young expressly does not discuss in great detail the structural changes to law school that would make students happier—such as more feedback and graded assignments. But, she urges faculty reading the book to work on those efforts.

Overall, I found most of Young's advice to be spot on. For example, in the section on balance, she encourages students to ask for help with mental health challenges, to keep law school in perspective, to avoid "stealth time vacuums," and to still find time for activities or hobbies that they enjoy and that alleviate stress. The section on managing relationships encourages students to get to know their professors and administrators, something I greatly benefited from in law school. I was especially happy to see her recommend taking skills classes in her section on academic success. I also appreciated her advice to embrace chances for feedback and view them as opportunities to improve.

She also includes several helpful exercises to assist in these endeavors, including an exercise that asks readers to write down, for one week, how they spend every minute of every day in an effort to "recapture time around the margins and heighten your awareness of how you spend small bits of time." In the first section, she asked readers to make a list of the reasons why they went to law school and reflect on which of those reasons still applied or were actually being fulfilled by law school.

Despite all of the great advice, I found some parts of the book to be slightly in tension with each other. For example, Young rightly stresses the value of time management and using one's time judiciously, yet she also encourages students to live somewhere that makes them happy, even if they end up with a lengthy commute. Early in the book she advises students to use their money wisely and minimize debt, but some of her career and law-school-lifestyle discussions that come later in the book seem to contradict the earlier advice. Finally, there were a few points that I wish she emphasized more, like seeking wise counsel from others before dropping out and protecting your professional reputation in law school.

In general, Young's book is a great resource for law students that I plan on recommending to current or potential law students.

I also found the book to contain some excellent practical advice that can help us be happier judges, lawyers, and law professors. Most of us can use a reminder to be mindful in how we spend our time and to not neglect the fun activities that alleviate our stress. But deeper than that, we can all do well to follow Young's advice to "build [our] wings" by "taking a leap that scares [us] a little." We can finally write that article (or book), apply for that promotion or new job, advocate for status on campus, or submit a proposal for that conference, even if doing so stretches us beyond our comfort zone. Only by stretching ourselves can we really accomplish Young's final bit of advice on how to be happy—becoming who we want to be.

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Real World Takeaway in a Behind-the-Scenes Look

The Nine: Inside the Secret World of the Supreme Court
Jeffrey Toobin (Doubleday 2007), 350 pages

Karin Mika, rev'r*

Although *The Nine*¹ is not a new book, it has often made its way to being a recommended read for incoming law students and thus merits an updated review.² Written by Jeffrey Toobin in 2007, *The Nine* describes the behind-the-scenes workings of the “Rehnquist Court” during the Clinton and Bush administrations.³ “The Nine” primarily focuses on the group of Justices that included William Rehnquist, Antonin Scalia, John Paul Stevens, Clarence Thomas, David Souter, Stephen Breyer, Anthony Kennedy, Ruth Bader Ginsburg, and Sandra Day O’Connor.⁴ This configuration of the Court cemented its legacy by deciding cases including *Planned Parenthood v. Casey*,⁵ *Grutter v. Bollinger*,⁶ *Hamdi v. Rumsfeld*,⁷ and infamously, *Bush v. Gore*.⁸ The Court also overturned *Bowers v. Hardwick*⁹ during this time period by its decision in *Lawrence v. Texas*.¹⁰

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1 JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

2 See, e.g., Lee Fisher, *Tuesday Morning Message* 5.28.18: “Dean’s 2018 Reading List”, CLEVELAND-MARSHALL COLLEGE OF LAW, <https://www.law.csuohio.edu/newsevents/news/tuesday-morning-message-5292018-deans-2018-reading-list>.

3 See TOOBIN, *supra* note 1, at 1–8.

4 The book focuses primarily on what might be described as the O’Connor dominated Court, but also covers the selection and confirmation processes that led to John Roberts replacing William Rehnquist and Samuel Alito replacing Sandra Day O’Connor, who stepped down to care for her ailing husband. *Id.* at 279–318. The beginning of the book covers the transition from the Burger Court to the Rehnquist Court.

5 505 U.S. 833 (1992) (reaffirming the central tenets of *Roe v. Wade*).

6 539 U.S. 306 (2003) (upholding the University of Michigan law school’s affirmative action admissions policy).

7 542 U.S. 507 (2004) (upholding right to detain enemy combatants, but granting U.S. citizen detainees the right to Due Process).

8 531 U.S. 98 (2000).

9 478 U.S. 186 (1986).

10 539 U.S. 558 (2003).

The book is primarily known for its intimate look into how the Rehnquist Court functioned, including the politics of the decisionmaking process, and how the unique natures of personalities fit into what ultimately became the majority decisions of the Court. Although the book is a fascinating look at the functioning of the Court from both a historical and psychological perspective, it is also a gem when it comes to identifying the skills of communication necessary for effective legal advocacy.

If there is one theme evident throughout the book that would please most admirers of good legal writing, it would be the recurring emphasis on “know your audience.” The concept of knowing and understanding the expectations of one’s audience was evident in every aspect of the Court’s functioning, including the interactions the Justices had with each other. “Knowing one’s audience” was also an essential attribute of the most successful advocates who came before the Supreme Court to argue cases that would chart the destiny of law in the United States.

The book describes in detail how the Justices dealt with one another for purposes of persuasion. As most are aware, the Court, during the past two decades especially, has generally functioned with a 5-4 split on major decisions. More often than not, the swing vote of the “Nine” during this time period was Justice Sandra Day O’Connor.¹¹ Both sides needed to use the appropriate persuasive tactics to convince Justice O’Connor to side with their position. Given that Justice O’Connor was a political conservative who prioritized “Solomon like” solutions as well as advancing women’s rights, this entailed understanding what O’Connor would or would not sign on to.¹² She disliked “absolutes” where only one side had a takeaway.¹³ Nonetheless, she was adverse to reaching decisions, even those that went along with her “middle of the road” mindset, that might erode women’s rights.¹⁴

The knowledge of the “audience” became a well-choreographed play during oral arguments. As good legal advocates know, judges do not always ask questions of the advocates that they would like to have answered.¹⁵ Sometimes the judges ask carefully crafted questions so that the advocates will make points they would like to be making themselves to their fellow jurists.¹⁶ In *The Nine*, Justices often asked questions of the advocates as an attempt to persuade a Justice (often O’Connor) who might

11 See TOOBIN, *supra* note 1, at 7.

12 *Id.* at 38–40.

13 *Id.* at 7–8.

14 *Id.* at 39–40.

15 *Id.* at 129–31.

16 See, e.g., *id.* at 82–84, 133–34.

be on the fence regarding a position, or, in other cases, to rescue a position that seemed to be slipping away because of the dominance of one Justice or another, or even when an advocate became trapped by a particular line of questioning.¹⁷

The author does well to describe the strategic persuasion occurring during oral arguments. Although Clarence Thomas is known not to ask questions, Toobin described how other Justices used the argument as a persuasive performance, doing their best to capitalize on momentum, or, in some cases, derail it.¹⁸ Antonin Scalia was a master of this, often coming up with a “quip” to interrupt the momentum of an argument that seemed to be gaining favor with the swing Justices. Although Scalia’s quips often got a laugh from the audience, they were yet another type of persuasive tactic that went on during oral argument.¹⁹

The book also does well to describe the sophisticated level of persuasion necessary at the Supreme Court level for advocates coming before the Court. Attorneys before the Court are most often chosen purposely for their experience in understanding the nuances necessary in making Supreme Court arguments, and not necessarily for their expertise in a particular field.²⁰ The key to successful argument for these most elite advocates is having the intuition about what might be happening on the bench and adjusting accordingly. Toobin describes the arguments as a near intricate chess game in which the Justices are attempting to control both the argument and each other to reach a particular result,²¹ while simultaneously, the advocates are attempting to control the Justices and, of course, the outcome of the case.²²

Although the psychology of oral arguments often takes center stage in the book, Toobin does not shortchange the necessary persuasive tactics of the briefs. Toobin points out how advocates attempted to craft even the questions presented in a strategic manner so that certain Justices would respond to the position positively.²³ The book emphasizes that the most successful arguments were not necessarily the most intellectually complete, but the ones that would target the center of the Court.²⁴ For

¹⁷ *Id.* at 126–27.

¹⁸ *Id.* at 129–31.

¹⁹ *Id.* at 83.

²⁰ See, e.g., *id.* at 158–70 (discussing the “teams” assembled for arguing *Bush v. Gore*).

²¹ See, e.g., *id.* at 194–95, 219–21.

²² *Id.* at 213–14.

²³ See, e.g., *id.* at 46–47, 218.

²⁴ *Id.* at 133–36, 222–27.

that, Toobin points out, advocates needed to be aware of the history of the Court, the political climate, and personalities of the Justices.²⁵

As a perfect example of this type of persuasive strategy, in *Grutter v. Bollinger*, which involved a challenge to the University of Michigan Law School's affirmative action policy, the University asked high ranking military officers (including General Norman Schwarzkopf) to write an Amicus Brief arguing that affirmative action was necessary in order to maintain a strong military.²⁶ Although the Court acknowledged that the need for a diverse military command (brought about through racial preferences) was not directly analogous to racial preferences in law school admissions, the Military's support convinced Justice O'Connor to uphold the racial preference policy as valid.²⁷

Overall, the book provides a fascinating look into how the Supreme Court operates and how the personalities and idiosyncrasies of the Justices contribute to decisionmaking. But more than that, the book is an intriguing look at the nuances of persuasive communication on all its levels. The book reaffirms what law school teaches students: it is not enough to know the material; one must still communicate it in a way that will be persuasive for its intended audience.

²⁵ See, e.g., *id.* at 88–98 (discussing the successes of Jay Sekulow, who understood the evangelical shift that was overtaking a large segment of conservatism). *But see id.* at 168–69 (discussing the deficiencies of the advocates in *Bush v. Gore*).

²⁶ *Id.* at 213–14.

²⁷ *Id.* at 214–21.

Words, Wolves, and Show Dogs

Talk on the Wild Side: Why Language Can't Be Tamed

Lane Greene (PublicAffairs 2018), 232 pages

Zachary Schmook, rev'r*

Is the Internet making writing worse? In one survey, more than two thirds of secondary-school teachers agreed that digital technologies allow students to “[t]ake shortcuts and not put effort into their writing.”¹ Some teachers report “a potential decline in vocabulary and grammatical skills among their students.”² Editors—both inside and outside of the world of legal writing—can feel “like the little Dutch boy in the story, who saved his town from destruction by plugging a flood-wall with his finger.”³

In *Talk on the Wild Side*, Lane Greene argues this fear of language in decline is largely unfounded. In the book, Greene examines language and grammar as an “ecosystem” rather than a list of unchanging rules.⁴ While individual markers of grammatical proficiency may change or atrophy, a language’s ability to communicate persists.⁵ As some rules die out, other rules emerge to ensure information can be adequately and accurately transmitted.⁶

The book’s central metaphor is that “[I]anguage is a wild animal.”⁷ While “well adapted for its conditions and needs,” it can be “unstable,”

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1 Kristen Purcell, Judy Buchanan, and Linda Friedrich, *The Impact of Digital Tools on Student Writing and How Writing Is Taught in Schools*, PEW RESEARCH CENTER, 32 (July 16, 2013), https://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2013/PIP_NWP-Writing-and-Tech.pdf.

2 *Id.* at 36.

3 Ann Wroe, *Why Keeping THE ECONOMIST’S Style Guide Up to Date Is a Battle* (June 1, 2018), <https://medium.economist.com/why-keeping-the-economists-style-guide-up-to-date-is-a-battle-ff5f72c21de2>.

4 LANE GREENE, *TALK ON THE WILD SIDE: WHY LANGUAGE CAN’T BE TAMED* 95 (2018).

5 *Id.* at 125.

6 *Id.*

7 *Id.* at 6.

“inefficient,” or “fuzzy.”⁸ In response to this wildness, Greene observes self-appointed “tamers” who seek to impose a logical system upon language and “make it behave properly.”⁹ These tamers, though, “set themselves up for failure and disappointment” because they “misunderstand[] the deep nature of language.”¹⁰ By erroneously insisting that language should be “efficient[] and logical,” language tamers “make themselves miserable by observing the real, natural, messy thing every day.”¹¹ For Greene, “language is not so much logical as it is useful.”¹² “It is not perfect. But it is amazing.”¹³

A prominent theme throughout the book is the division between descriptivists and prescriptivists. Greene defines the former as “those who look at the facts of language . . . and come up with generalisations about why . . . changes happen.”¹⁴ In contrast, prescriptivists “are actively involved in trying to dictate what the language does.”¹⁵ Rather than two irreconcilable camps, though, Greene recognizes the two positions represent a spectrum.¹⁶ “[N]o sane person is a pure prescriptivist, declaring a rule to be valid even in the face of literally millions of high-quality citations from edited writing that show otherwise.”¹⁷

As both a language journalist and an editor, Greene sees language from both perspectives.¹⁸ In his own writing, Greene seeks to describe language changes descriptively, like a linguist might.¹⁹ Nevertheless, as an editor for *The Economist*, he also enforces the prescriptive mandates of the magazine’s style guide.²⁰

A recurring target of criticism in the book is prescriptivists who are unmoored from actual usage. Neville Martin Gwynne, author of *Gwynne’s Grammar*, serves as a foil for the second chapter, which examines the logic (and illogic) of language.²¹ Gwynne’s approach to grammar relies on the idea that “[i]f we do not use words rightly, we shall not think rightly.”²² As an example of Gwynne’s approach, Greene cites his commentary on the use of the phrase “he or she” to replace the general “he.”²³ Gwynne finds

8 *Id.*

9 *Id.* “Language is a wild animal like a wolf, . . . [b]ut there are those who want to tame language.” *Id.* “Their ideal language would be a show dog, one that will come, sit, fetch, shake hands and roll over on command.” *Id.*

10 *Id.* at 7.

11 *Id.*

12 *Id.* at 8.

13 *Id.*

14 *Id.* at 5.

15 *Id.*

16 *Id.* at 41.

17 *Id.*

18 Lane Greene, *Who Decides What Words Mean?*, AEON (Dec. 6, 2018), <https://aeon.co/essays/why-language-might-be-the-optimal-self-regulating-system>.

19 *Id.*

20 *Id.*

21 GREENE, *supra* note 4, at 32.

22 *Id.* at 33 (quoting N.M. GWYNNE, *GWYNNE’S GRAMMAR: THE ULTIMATE INTRODUCTION TO GRAMMAR AND THE WRITING OF GOOD ENGLISH 5* (2014)).

23 *Id.* at 32–33 (quoting GWYNNE, *supra* note 22).

the phrase to be “offensive to logic and common sense and shockingly illiterate.”²⁴ Even worse for Gwynne is the use of “they” or “their” as a singular pronoun.²⁵ Gwynne ironically proclaims, “Anyone who considers this modern practice acceptable has lost their mind.”²⁶

For Greene, this “grammatical sticklerism” is “ahistorical and ungrammatical.”²⁷ For a descriptivist like Greene, an examination of actual usage—both modern and historical—is the appropriate means to evaluate the singular “they.”²⁸ As it turns out, this usage has a significant pedigree, dating back to 1375.²⁹ It has been adopted by esteemed authors, including Lord Byron, George Bernard Shaw, and Jane Austen.³⁰

Of course, descriptivism alone has its limits. Most writers can’t resolve every grammatical question with “a long historical survey of messy evidence.”³¹ Fortunately, Greene sees an “an increase in good prescriptivist usage and grammar books based on evidence.”³² In particular, Greene endorses the “descriptive prescriptivism”³³ of Bryan Garner, who has periodically sparred with Greene about linguistics.³⁴ Greene finds the lawyerly skill of “amass[ing] evidence to make [a] case” well-suited to the task of developing evidence-based prescriptive rules.³⁵ Greene is most impressed with Garner’s commitment to incorporating actual usage into his prescriptions, including using graphs developed by Google Books.³⁶

Returning to the example of the singular-form “they,” Greene finds Garner’s answer superior to Gwynne’s.³⁷ Garner recognizes English’s lack of an epicene pronoun is an “inadequacy” rather than a reflection of “a ‘logic’ invisible to all but the classically educated.”³⁸ Still, even as Garner

24 *Id.* at 33 (quoting GWYNNE, *supra* note 22).

25 *Id.*

26 *Id.* (quoting GWYNNE, *supra* note 22).

27 *Id.*

28 *Id.* at 35.

29 *Id.* (citing OXFORD ENGLISH DICTIONARY ONLINE, *they*, pron., I.2, <http://www.oed.com/view/Entry/200700> (last visited Apr. 1, 2019)).

30 *Id.* at 36.

31 *Id.* at 52.

32 *Id.*

33 *Id.* at 53; see Bryan A. Garner, *Making Peace in the Language Wars*, 7 GREEN BAG 2D 227, 230 (2004), http://www.greenbag.org/v7n3/v7n3_article_garner.pdf (describing himself as a “descriptive prescriber”).

34 Bryan Garner & Lane Greene, *Which Language and Grammar Rules to Flout*, N.Y. TIMES (Sept. 27, 2012), <https://www.nytimes.com/roomfordebate/2012/09/27/which-language-and-grammar-rules-to-flout>.

35 GREENE, *supra* note 4, at 53–54.

36 *Id.* at 54 (citing BRYAN GARNER, GARNER’S MODERN ENGLISH USAGE 822 (4th ed. 2016)).

37 *Id.*

38 *Id.* at 52.

recognizes the rise in the acceptability of singular “they,” he advises readers to avoid it because the form continues to annoy many readers.³⁹ While Garner’s usage guidance is still based on his personal judgment, it is nonetheless transparent with its evidence.⁴⁰ Greene describes Garner as a “language tamer” who acknowledges the “rules of grammar [do not] descend from heaven on a cloud.”⁴¹

The third chapter continues examining the relationship between language and logical rules through the decades-long process of teaching computers to understand language.⁴² Initial attempts to create machine translation, in the 1950s, relied on distilling language to a system of rules and creating programs based on those rules.⁴³ This programming, though, turned out to be much harder than expected.⁴⁴ Any attempt to incorporate all the rules, exceptions, and irregularities inherent in natural language quickly caused the programs to begin “wheezing under the weight” of all the necessary computation.⁴⁵

As an example, Greene gives the phrases “the pen is in the box” and “the box is in the pen.”⁴⁶ A human translator has the necessary contextual knowledge to understand that “a normal-sized [writing] pen can fit into a normal-sized box, but not the other way around.”⁴⁷ A rule-based computer program, though, lacks this context.⁴⁸ Recent developments in machine translation have only been possible because programmers have moved away from rule-based programming toward analysis of “Big Data.”⁴⁹ Instead of trying to develop translation programs from the rules up (i.e., prescriptively), modern translation relies on feeding an artificial intelligence system a large corpus of writing and letting the computer deduce the appropriate usage from context.⁵⁰ This approach—with its obvious parallels to Greene’s preferred descriptivism—has resulted in significantly better machine translation.⁵¹

39 *Id.* at 54 (citing GARNER, *supra* note 36).

40 *Id.* at 55.

41 *Id.* at 54–55.

42 *Id.* at 65–91 (entitled “Machines for talking”).

43 *Id.* at 69–70.

44 *Id.* at 70–71.

45 *Id.* at 73.

46 *Id.* at 73. While “pen” can mean either a writing instrument or an animal enclosure in English, there is no equivalent homonym in French. *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 83.

50 *Id.*

51 *Id.* at 83–86.

Importantly, Greene recognizes that language evolution is not always organic. Sometimes attempts by “tamers” to dictate the rules are effective, often to the misfortune of minority populations.⁵² In Chapter Five, “Language tamers with armies and navies,” Greene surveys how language has shaped—and in turn been shaped by—politics and power.⁵³ For centuries, dominant languages “crushed” dialect diversity “in the name of building cohesive nation-states.”⁵⁴ Colonialism brought another wave of “linguistic steamrollers” that spread colonial languages through the Americas, Arabia, and East Asia.⁵⁵

Language’s relationship with power has serious implications for writing teachers, especially those who interact with students from disenfranchised communities. Greene identifies the so-called “One Right Way principle” as a key fallacy underlying the type of grammar prescriptivism he finds objectionable.⁵⁶ This fallacy has two parts: (1) “there is One Right Way to use an expression” and (2) “there is One Right Way to express a meaning.”⁵⁷ This error, however, “fail[s] to understand the basic linguistic concept of register,” or the idea that appropriate usage varies by audience and situation.⁵⁸ A speaker’s register choices create an important “second channel,” allowing communication “about the occasion, the speaker, the person spoken to, and the perceived relationships.”⁵⁹ Far from reflecting laziness or ignorance, varying register is an efficient way to communicate important, subtextual messages.⁶⁰

For teachers of legal writing—who specialize in a very formal register—it is important to remember that formal language is only one type of communication and not an objectively superior choice for all environments. Not only does this embrace the advocacy potential of Greene’s “second channel” of communication in an informal register, it also helps students accept instruction in the formal register.⁶¹

For students, constant critiques rooted in the presumed superiority of the formal register can amount to “a repeated minor humiliation.”⁶² When

52 *Id.* at 131–32 (describing nationalistic attempts after the breakup of Yugoslavia to “split the formerly unified language”).

53 *Id.* at 127–55.

54 *Id.* at 136.

55 *Id.* at 138–39.

56 *Id.* at 158–59 (citing Arnold Zwicky, *One Right Way*, ARNOLD ZWICKY’S BLOG (June 28, 2009), <https://arnoldzwicky.org/2009/06/28/one-right-way/>).

57 *Id.*

58 *Id.* at 161.

59 *Id.* at 163.

60 *Id.* Greene demonstrates the effectiveness of this second channel by comparing the persuasive impact of formal and informal register choices by George W. Bush, Barack Obama, and Donald Trump. *Id.* at 163–67.

61 *Id.* at 170.

62 *Id.*

students are taught that “grammar is a set of rules for torturing natural sentences into an unnatural form that will satisfy a teacher,” the student “has not just a humiliation, but a humiliator.”⁶³ Greene finds that the “far more sensible” approach is to “use the differences between registers as a pedagogical tool.”⁶⁴

Greene rejects the idea that grammar instruction can be boiled down to “teach them the rules.”⁶⁵ Instead, he urges an approach combining two ways of learning: “apply[ing] rules to abstract mental symbols” and “inductive, patient strengthening of the recognition of certain patterns.”⁶⁶ The key to developing this intuitive understanding is reading. Students need to “become comfortable with what the good stuff looks like.”⁶⁷ At the same time, teachers should avoid the temptation to “confuse an explicit knowledge of rules . . . with an ability to write.”⁶⁸ “Lousy writing can be grammatical; good writing can have errors.”⁶⁹

Even as he recognizes the need for prescriptive grammatical education, Greene critiques several individual rules. Some of these are commonly recognized as “myths” that are belied by the actual usage of great writers⁷⁰ (e.g. don’t end a sentence with a preposition⁷¹ or don’t split infinitives⁷²). More daringly, Greene questions some widely-accepted rules, such as the distinctions between “that” and “which,”⁷³ “can” and “may,”⁷⁴ and even “who” and “whom.”⁷⁵

Again, though, Greene’s day-job is editing a world-renowned magazine with its own style guide,⁷⁶ so he is not endorsing a completely laissez-faire approach to language.⁷⁷ Rather, he objects to prescriptivist guidance that argues in the “authoritarian abstract” to repeat “rumour and hearsay.”⁷⁸ This type of prescriptivism is especially problematic when the endorsement of the formal register is coupled with a dismissal of other dialects as inferior or “politically correct barbarism.”⁷⁹ Instead, Greene advocates a scholarly approach to grammar that relies on examining the language used by native speakers.⁸⁰

63 *Id.*

64 *Id.* at 174.

65 *Id.* at 89.

66 *Id.* at 90.

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.* at 159–61.

71 *Id.* at 156–58.

72 *Id.* at 37–38, 40–41.

73 *Id.* at 160–61.

74 *Id.* at 167–69.

75 *Id.* at 2–6, 13–14, 93–94, 125–26, 173, 182. But see *id.* at 89 (recognizing that mastering the use of “whom” is “still a part of producing high quality prose”).

76 Greene, *supra* note 18.

77 GREENE, *supra* note 4, at 40.

78 *Id.*

79 *Id.*

80 *Id.*

Overall, *Talk on the Wild Side* is an interesting (and quick) read providing an entertaining overview of modern linguistics and the dynamic nature of language. While it may provide some general inspiration for pedagogical approaches to legal writing, its primary utility is in revealing the beauty inherent in language's dynamic nature. For language lovers, it's a fascinating reminder that loving language does not mean embracing grammar pedantry. In addition, for those who have become discouraged by the "decline" in grammar skills exhibited by modern students, perhaps the discussion can ward against encroaching cynicism.

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A Scholarly Though Accessible Exploration of Humor and Law

Guilty Pleasures: Comedy and Law in America

Laura Little (Oxford University Press 2018), 214 pages

Jeff Todd, rev'r*

If Laura Little had limited *Guilty Pleasures: Comedy and Law in America*¹ to critiques of fictional characters and analyses of lawyer jokes, the book would be of but passing interest to this journal's readers, who expect pieces grounded in doctrine, research, and theory. Little does far more, however: she draws from humor scholarship² to consider the effect of law "on" humor, such as in intellectual property and defamation cases; humor "about" the law, such as jokes and other portrayals of lawyers, judges, and juries; and humor "in" the law, such as clever statements in transcripts and judicial opinions. Through a clear and sometimes funny style, and with the support of numerous examples, jokes, and 150 *New Yorker* cartoons, Little offers a book that is a good read (which is suggested by the pun in her title *Guilty Pleasures*) but that is supported by enough theory to pique the interest of legal academics and practitioners.

In some ways, her book does feel like an academic work with its 400-plus endnotes, Selected Bibliography, and sources that include law review articles or books by legal scholars.³ The Introduction describes the categories and theories of humor that inform the discussion in the book's three chapters. Scholars group humor into six basic types: formal jokes,

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1 LAURA LITTLE, *GUILTY PLEASURES: COMEDY AND LAW IN AMERICA* (2018).

2 Yes, humor scholarship is a thing, and it traces its roots at least as far back as Plato and Aristotle. *Id.* at 10; *see, e.g.*, THOMAS HOBBS, *LEVIATHAN* 48 (G.A.J. Rogers & Karl Schuhmann eds., Thoemmes Continuum 2003) (1651); SIGMUND FREUD, *THE JOKE AND ITS RELATION TO THE UNCONSCIOUS* (Joyce Crick trans., Penguin 2003) (1905). Little cites too many sources to list here, but note how some of them sound so serious that they likely drain the fun out of funny. *See* SALVATORE ATTARDO, *HUMOROUS TEXTS: A SEMANTIC AND PRAGMATIC ANALYSIS* (2001); MICHAEL BILLIG, *LAUGHTER AND RIDICULE: TOWARDS A SOCIAL CRITIQUE OF HUMOUR* (2005).

practical jokes, sarcasm, parody, satire, and puns.⁴ Scholars also recognize three major theories of humor: superiority theory, which posits that people disparage others to enhance themselves; release theory, which posits that people use humor to release tensions about repressed pleasure or anxiety about taboo matters of sex and death; and incongruity theory, which posits that humor arises from the joining of “two or more otherwise diverse or contrary phenomena.”⁵

These categories and theories combine to support Little’s observation that incongruous humor, which is often presented through parody and pun, is favored, while superiority and release humor, which is often presented through sarcasm and satire, is disfavored. Little offers hundreds of examples, and often the genres bleed into each other (as when a parody satirizes its target or the punchline to a joke is a pun), so she avoids developing these observations into claims supported by more sustained analysis and observation. Indeed, a reader expecting a deep textual explication of any particular joke or case or transcript will be disappointed. She rarely spends more than a single paragraph on any one humorous text, preferring instead to fill the book with sample after sample. To call this approach a shortcoming, however, would be to ignore what *Guilty Pleasures* is: a 200-page survey of various ways that humor and law intersect. Little does something that seems less demanding but is subtly more ambitious than a monograph that focuses on humor in one discrete part of the law: she shows how numerous diverse aspects of law and humor interconnect. If your interest is in any one legal topic, *Guilty Pleasures* may not be your destination, but it is the map—a playful, engaging map—that can guide you there.

After all, while legal professionals and law students will likely form a big part of the audience for this book, Little writes for a general audience—or, more accurately, an audience that can include educated non-lawyers, as suggested by the inclusion of so many *New Yorker* cartoons.⁶ Note that the cartoons are not mere ornamentation; *Guilty Pleasures* references each one in the text so that—along with the jokes and quotations from cases, opinions, and transcripts—they serve as examples

3 For example, she cites one book and four law review articles studying lawyer jokes written by Marc Galanter. LITTLE, *supra* note 1, at 5 n. 13 (citing MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES & LEGAL CULTURE* (2005); Marc Galanter, *Changing Legal Consciousness in America: The View from the Joke Corpus*, 23 CARDOZO L. REV. 2223 (2002); Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457 (1998); Marc Galanter, *Lawyers in the Laboratory or, Can They Run Through Those Little Mazes*, 4 GREEN BAG 2D 251 (2001); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998)).

4 LITTLE, *supra* note 1, at 5–6 (citing JON E. ROECKELEIN, *THE PSYCHOLOGY OF HUMOR* 13 (2002)).

5 *Id.* at 10–14.

6 *Id.* at 3–4.

of each point under consideration.⁷ In addition, while Little’s writing is not simple, she does strive for common words rather than legal jargon. Indeed, one subsection looks at humor about the complexity of rules of procedure and of tax law.⁸

This general-interest reader would likely find the first of the three chapters the most challenging because it deals with how substantive law treats humor. Chapter 1 covers trademark, contract, discrimination, defamation, and other torts. Though potentially difficult and dry, Little does not venture too far into the weeds, and her explanations of legal concepts should be clear enough for any reader. For example, she opens the subsection on defamation by defining “defamatory statement” and explaining the requirement to show falsity to segue into the issue of defendants asserting that the statement was “just a joke.”⁹ Yet the subsection contains enough references to legal and theoretical sources that someone like myself who has a scholarly interest in this topic can flip to the endnotes, where she cites twelve federal and state cases with parenthetical descriptors to support her claim that jokes that suggest real facts are defamatory while those that do not are non-actionable opinion.¹⁰ Readers are on notice that throughout *Guilty Pleasures*, she does not shy away from quoting profanities or the racist and sexist comments that formed parts of lawsuits.¹¹

Chapter 2 focuses on the portrayal of law in popular cultural outlets like jokes, cartoons, and movies and television shows. While the single largest part of this chapter deals with three stereotypes of lawyers as crafty and cunning, money-grubbing, and proliferating, Chapter 2 also addresses humor about judges, juries, gender and race in the law, and the legal system and legal texts. Because most of the examples involve satire—including almost all of the humor portraying lawyers—this chapter has a darker feel than the other two, particularly when one considers that some humor contrasts the common sense of the non-lawyer juror seeing

7 In discussing humor suggesting that physical desirability rather than professional merit is preferred for female attorneys, one cartoon features a woman sitting across from a man at a desk in an office setting and telling him, “I’d like to have myself declared legally blonde.” *Id.* at 113–15 (citing Leo Cullum, *Cartoon 58—TCB 22412*, THE NEW YORKER COLLECTION, THE CARTOON BANK).

8 *Id.* at 134–40.

9 *Id.* at 29.

10 *Id.* at 30, 30 n.20 (citing, *inter alia*, *Knievel v. ESPN*, 393 F.3d 1068, 1071, 1077–78 (9th Cir. 2005) (finding that a photograph with the caption “Evel Knievel proves that you’re never too old to be a pimp” could not reasonably be interpreted as actual fact); *Hamilton v. Prewett*, 860 N.E.2d 1234, 1245–47 (Ind. Ct. App. 2007) (deciding whether parody is protected as hyperbole and asserting that parody “is speech that one cannot reasonably believe to be fact because of its exaggerated nature”).

11 *E.g., id.* at 41 (quoting three jokes that disparage African-Americans that were part of an employment discrimination lawsuit); *id.* at 158 (quoting an exchange between a judge and criminal defendant with multiple obscenities).

through lawyerly spin or questioning judicial instructions.¹² Little's tone reveals some irritation with how non-humorous portrayals of lawyers often reveal them as virtuous and hard-working yet the humorous ones focus almost exclusively on negative—and largely untrue—qualities.¹³ Perhaps this darker side makes *Guilty Pleasures* more interesting for readers of this journal. For example, Little connects humor characterizing female lawyers as sexual objects, youthful, and “plucky” to the exodus of women from the legal profession: do such jokes mask the fact that more women than men get pushed out of practice before they can become older lawyers, or do they point to the legal industry's glass ceiling and thus bring the potential for awareness and change?¹⁴ Given the debate about the “transformative power” of satire—about whether it shines a light and thus inspires change, or it elicits only laughter rather than action and thus reinforces the status quo—this question may have no answer.¹⁵

Guilty Pleasures maintains a healthy balance of such serious implications of humor and law and the “fun” side of funny. Consider Chapter 3, which deals with humor that arises within legal proceedings and legal texts. Judges often write with an impersonal, detached voice, so rhetorical scholars have long argued that a more personable style would connect better with the audience and tacitly recognize that close cases are indeed close but decided fairly.¹⁶ When judges turn to satire or sarcasm to mock a party or its counsel, however, that superiority humor degrades the respectability of the judicial branch. For example, Judge Richard Posner inserted pictures of an ostrich and of a suited man with their heads buried in the sand to express his distaste for attorneys avoiding dispositive precedent.¹⁷ Lawyers and even mainstream media commentators criticized Judge Posner for bullying.¹⁸ Contrast that opinion with Justice Breyer's comment during arguments on a case involving strip searches of students about having items put in his underwear while he was a student.¹⁹ Though bordering on the taboo, the incongruity of this “oddly indecorous confession from a refined gentleman in a ceremonial posture” considering

12 *Id.* at 108–12.

13 *Id.* at 76; *see id.* at 79 (recognizing an “unfortunate truth” that “as much as Americans need them and view them as a crucial part of life in a free society, lawyers are a profession for which most citizens bear serious ill-will”).

14 *Id.* at 113–19.

15 *Id.* at 140–42.

16 *E.g.*, Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 188–89, 211 (Peter Brooks & Paul Gewirtz eds., 1996); Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 79 VA. L. REV. 1545, 1589–90 (1990).

17 LITTLE, *supra* note 1, at 166 (citing *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011)).

18 *Id.*

19 *Id.* at 159.

a serious legal issue “is surprising and charming.”²⁰ Indeed, this statement makes a weird but honest connection between a seemingly distant judge and his audience.²¹ This chapter provides many other examples for legal advocates and judges—and likely several pedagogical gems for legal writing and advocacy instructors—about weighing the perils against the potential of humor.

A question that recurs throughout *Guilty Pleasures* is whether the combination of law and humor is a bad thing because the entertainment value distracts us from the misuse of power, or a good thing that makes for better understanding of the law and legal processes and thus empowers us.²² The book never answers this false-choice question because humor, depending upon its type, can do either. This possibility of a greater understanding about the law is another reason I am glad that Little eschews a purely academic treatise or a book targeted only to those with inside knowledge of the legal profession. Readers are invited to look beyond the caricature of the dishonest lawyer by recognizing and questioning the superiority humor that masks the good that lawyers and judges do.

²⁰ *Id.*

²¹ *Id.* at 160–61.

²² *Id.* at 182–84.

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JALWD

Professor Kathryn M. Stanchi

Recipient of the Linda L. Berger Lifetime Achievement Award for Excellence in Legal Writing Scholarship

In late spring, our parent organization, ALWD, announced the selection of Professor Kathryn M. Stanchi as the second recipient of the Berger Lifetime Achievement Award for Excellence in Legal Writing Scholarship. Professor Stanchi wrote a significant amount of scholarship during her tenure at Temple University's Beasley School of Law in Philadelphia. The Berger Award is ALWD's highest scholarship award, recognizing the recipient-academic's long-term dedication to, and advancement of the legal writing discipline. The award serves to celebrate those, like Professor Stanchi, who have written influential articles, books, and essays—work that has significantly impacted others working in the area.

For those of us who write and publish in the field, Professor Stanchi is the perfect recipient for this prestigious award. She is known nationally and internationally for her work, which sets the standard for connecting the psychology of persuasion to the practice of law. Her scholarship is routinely cited in articles and textbooks. Two of her own books were published by Cambridge University Press.

Another of her projects, the United States Feminist Judgments Project, builds on an international movement and allows many other academic scholars to participate in the re-analysis of judicial decisions from a non-hegemonic perspective. As one of her nominators wrote,

[As] the leader of the United States Feminist Judgments project, a project that reimagines and rewrites major judicial opinions from a feminist perspective, [Kathy's] efforts have had a world-wide impact as the series has expanded internationally. . . . She advocated for the project to include legal writing and clinical professors, and her effort has given over 30

LRW and clinical professors the opportunity to publish with the Cambridge University Press.

During the award presentation in late May, both the president and president-elect of ALWD (Professors Jodi Wilson and Anne Mullins, respectively) spoke about Professor Stanchi's reach and influence. They commended her on her dedication to more than her own scholarly interests, but also to the academic community—legal writing and beyond. Her work, they said, “ blurs the lines between doctrine, theory, and skills.”

The editors of *Legal Communication & Rhetoric: JALWD* are all well-versed in Professor Stanchi's work—how could we not be and still call ourselves editors?—and we stand to give her our keen applause for all that she has accomplished. Her work stands as the exemplar in the field. We offer warm and hearty congratulations to one of our discipline's pillars.

A bibliography of Professor Stanchi's contributions is included, demonstrating the depth and reach of her work.

—The Editorial Board of LEGAL COMMUNICATION & RHETORIC:
JALWD, July, 2019

Kathryn M. Stanchi: A Bibliography

Books and Book Chapters

LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE (with L. Berger) (Routledge 2017).

LEGAL REASONING AND LEGAL WRITING (with R. Neumann and E. Margolis) (Wolters Kluwer 2017).

FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (co-editor with L. Berger and B. Crawford) (Cambridge U. Press 2016).

Gender Justice: The Role of Stories and Images, in METAPHOR, NARRATIVE AND THE LAW (with L. Berger) (Cambridge U. Press 2017).

The Legacy of Griswold and Eisenstadt: An Introduction To Griswold v. Connecticut and Eistenstadt v. Baird, in BRIEFS THAT CHANGED THE WORLD (Aspen Law 2012).

Executive Series Editor, Feminist Judgments Series (Cambridge U. Press)

- FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (2018);
- FEMINIST JUDGMENTS: REPRODUCTIVE JUSTICE REWRITTEN (Forthcoming 2019);
- FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN (Forthcoming 2020);
- FEMINIST JUDGMENTS: TORTS OPINIONS REWRITTEN (Forthcoming 2020);
- FEMINIST JUDGMENTS: EMPLOYMENT DISCRIMINATION OPINIONS REWRITTEN (Forthcoming 2020)

Selected Articles

Teaching with Feminist Judgments: A Global Conversation, ___ LAW & INEQ. ___ (forthcoming Spring 2020) (multiple authors).

The Necessity of Multi-Stranded Feminist Legal Theories in Judicial Opinions, 44 AUSTL. FEM. L.J. 245 (2018) (with L. Berger and B. Crawford) (peer reviewed).

- Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice*, 8 Oñati Socio-Legal Series 1215 (2019) (with L. Berger and B. Crawford) (also co-editor of symposium volume).
- Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 BALT. L. REV. 167 (2018) (with L. Berger and B. Crawford).
- Using Feminist Theory to Advance Equal Justice under Law*, 17 NEV. L. J. 539 (2017) (with L. Berger and B. Crawford).
- The Problem with ABA Standard 405(c)*, 66 J. LEGAL EDUC. 558 (Spring 2017).
- This is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 WASH. U. L. REV. 901 (2014) (with D. Bowen).
- What Cognitive Dissonance Tells Us About Tone in Persuasion*, 22 J. L. & POL'Y 93 (2013).
- The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305 (Fall 2010).
- Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.–C.L. L. REV. 611 (2008) (invited).
- Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 383 (2008).
- The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 412 (2006).
- Moving Beyond Instinct: Persuasion in the Era of Professional Legal Writing*, 9 LEWIS & CLARK L. REV. 935 (2005) (review of MICHAEL SMITH, *ADVANCED LEGAL WRITING*).
- Dealing with Hate in the Feminist Classroom*, 11 MICH. J. GENDER & L. 173 (2005).
- Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 469 (2005) (invited).
- Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387 (2002).
- Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3 (2001) (with Jan M. Levine).

Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices, 103 DICK. L. REV. 1 (Fall 1998).

Cited in EMMA COLEMAN JORDAN & ANGELA HARRIS,

- ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (Foundation Press 2005) and
- ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER (Oxford Univ. Press 2007).

The Paradox of the Fresh Complaint Rule, 37 B.C. L. REV. 146 (1996).

- Cited in *Commonwealth v. King*, 834 N.E. 2d 1175 (Mass. 2005), *State v. P.H.*, 840 A.2d 808 (N.J. 2004) and
- WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §17.5 (2d ed.).

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