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General Guidelines

Submission of articles and essays

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

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

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

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

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

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

Technical requirements

Three parts to the submission

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

Maximum length of submissions

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

Microsoft Word (native) and explanation

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

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

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LC&R follows standard legal citation form, contained in both the *ALWD Guide to Legal Citation* (6th ed.) and in *The Bluebook* (21st ed.). Please note that all accepted authors will be asked to provide copies of source materials that are unavailable through normal legal-research methods (including title and copyright pages). We prefer scanned materials shared via Dropbox.

Submission and process

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

Process

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

Submission of Book Reviews

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

Questions

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

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

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PREFACE

Instead of a single theme, Volume 17 of *Legal Communication and Rhetoric* takes the reader on a journey from error to uncertainty to transformation. By immersing themselves in a wide variety of legal doctrines, the authors included in this volume bring to light themes of the malleability of interpretation and persuasion, how it can go wrong, and how it can ultimately lead to inclusion and justice.

We begin with "Reign of Error: District Courts Misreading the Supreme Court over *Rooker–Feldman* Analysis" by Thomas D. Rowe Jr. and Edward L. Baskauskas, the reviser and drafter, respectively, of Chapter 133 of Moore's Federal Practice, which includes coverage of the *Rooker–Feldman* doctrine. Rowe and Baskauskas bring their unique expertise to their article that delves into how several district courts have misinterpreted the Supreme Court's decision in *Lance v. Dennis* by following lower court language that was specifically disapproved of in *Lance.* In addition to explaining the contours of the doctrine, the authors investigate how so many district courts could fundamentally misinterpret Supreme Court doctrine. Their findings serve as good warning for practitioners who may be tempted to quote judicial language without fully understanding its meaning in the context of the entire court opinion.

Moving from civilian courts to military discharge review boards, in "(Not the) Same Old Story: Invisible Reasons for Rejecting Invisible Wounds," Jessica Lynn Wherry looks at the danger of legal misinterpretation and applies it to veterans seeking to upgrade other-than-honorable-discharges on the grounds of mental health conditions such as post-traumatic stress disorder. Wherry takes a storytelling approach to understand why military tribunals continue to reject mental health claims despite guidance requiring "liberal consideration" for these "invisible wounds" incurred during military service. Using recent cases, she shows that board members acting in a judge-like role have a habit (as all people do) of sticking to stories they are already familiar with even if doing so is contrary to current military policy and deprives deserving servicemen and women of the benefits of an honorable discharge.

Misinterpretation due to intentional ambiguity is the main theme of Elizabeth Fajans and Mary R. Falk's article "Hendiadys in the Language of the Law: What Part of 'and' Don't you Understand?" This article

examines the rhetorical device hendiadys, which is a phrase that combines two words or phrases using the word "and" instead of using one word to modify the other, such as "sound and fury" instead of "furious sound." Hendiadys is used in literature both as emphasis and a way to create ambiguity in the text's meaning. Ambiguity, as Fajans and Falk point out, is antithetical to good lawmaking. In their article, Fajans and Falk show how hendiadys has begun to be used by some scholars and judges when interpreting legal text despite the lack of evidence that the authors intended to use this device. Doing so, they argue, is contrary to both the purpose of hendiadys and effective lawmaking.

Ambiguity gets redeemed in "Get with the Pronoun" by Heidi K. Brown. In her article, Brown makes a case for using the singular "they," long decried by English grammar traditionalists as imprecise and incorrect. Brown argues that "they" can enhance clarity and inclusion, particularly in legal writing involving persons of unknown gender, those whose identities require confidentiality, and those who identify as non-binary. Noting that several states have adopted the singular "they" in their legislation, Brown concludes that lawyers should likewise eschew tradition and use personal pronouns with due consideration for how these simple words can improve their writing and show sensitivity to what these words can mean for their clients and the future of the legal system.

Furthering the theme of inclusion is Stephen Boscolo's article, "Using Judicial Motives to Persuade Judges: A Dramatistic Analysis of the Petitioners' Brief in *Lawrence v. Texas*." This article dives deep into the briefs submitted to the Supreme Court in the seminal case *Lawrence v. Texas* and analyzes their effectiveness using Kenneth Burke's Theory of Dramatism. Operating as a lens to view the persuasive storytelling inherent in telling a client's story, Dramatism breaks up stories into their dramatic parts: plot, characters, setting, etc. and uses these parts to better understand a writer's motives. By emphasizing and deemphasizing different dramatic parts, the writer's own worldview becomes clearer. Moreover, as Boscolo shows, when a legal writer aligns their motives with that of their judicial audience, they can be extremely persuasive.

The final article, "The Language of *Love v. Beshear*: Telling a Client's Story While Creating a Civil Rights Case Narrative," written by JoAnne Sweeny and Dan Canon, ties together several of the themes of this volume: inclusion, storytelling, and persuasion. *Love v. Beshear* was one of the marriage equality cases that made its way to the Supreme Court, ultimately leading to *Obergefell v. Hodges*. Sweeny and Canon combine storytelling scholarship with personal knowledge of the strategies employed by the lawyers for the Loves and other plaintiffs (Canon was one of the Loves' attorneys) to make their clients more sympathetic to their judicial

audience. In addition to analyzing the client stories told by the plaintiffs' attorneys, which described a wide variety of plaintiff experiences, this article compares those stories to those told by the media and, ultimately Justice Kennedy in the Supreme Court opinion, which emphasized "normal" families, effectively omitting the stories of the other plaintiffs.

This volume's book reviews give readers a myriad of paths towards good writing and storytelling, including advice from judges, legal experts, and writers of popular fiction and non-fiction. For books by judges and legal experts, Maikieta Brantley reviews Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word, by the Hon. Robert E. Bacharach; Tessa L. Dysart reviews A Republic, If You Can Keep It, by Justice Neil Gorsuch; Kristen E. Murray reviews Benjamin Dryer's Dreyer's English: An Utterly Correct Guide to Clarity and Style; Tammy Pettinato Oltz reviews Data-Driven Law: Data Analytics and the New Legal Services, by Ed Walters, et al.; Elizabeth Sherowski reviews Narrative and Metaphor in the Law, edited by Michael Hanne and Robert Weisberg; and Sharon A. Pocock reviews Broke: Hardship and Resilience in a City of Broken Promises, by Jodie Adams Kirshner. For some lighter reading, Ryan D. Tenney reviews Malcom Gladwell's Blink, and Pamela A. Wilkins reviews Philip Pullman's Daemon Voices: On Stories and Storytelling.

During the transition between Volume 16 and the production process for Volume 17, two of our excellent lead editors ended their terms to create space to focus on other projects. We are saying farewell to Sarah Adams-Schoen and Jason Cohen. These two editors have a publication track record in their own right. Sarah works in and teaches environmental law, focusing most specifically on climate change. Her expertise is sought after by government agencies, national and state committees, and foundations. She is an important clinical educator and we were incredibly lucky to have someone with her expertise working with our authors to make their articles as fine as they could be. Sarah's insights into our own publication policies were always spot-on and welcomed. We will miss having her wise guidance on our editorial board. Jason's scholarship focused on public speaking, and one of his articles was published in Volume 8 of this journal: *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*. Jason was an active and vocal member of the editorial board, letting us know where he thought we could all do better. He was also a positive voice supporting other editors' views and helping push the journal forward. Authors who worked with him often wrote in, citing his verve and wisdom as one of the positives they took away from the publishing experience. We will also miss him a great deal. To each

of these editors, we say good-bye with great regard and affection, wishing them much success in their writings and work.

Not only do we say good-bye to Sarah and Jason, but this volume marks a significant—and bittersweet—transition of the journal's decade-long Editor-in-Chief Ruth Anne Robbins to Editor-in-Chief Emeritus. Ruth Anne's impact on *LC&R* is truly immeasurable. She has been an inspiring leader, a tireless advocate, and a supportive mentor to so many of us. We will not miss her because we will hold on to her for as long as she will allow us. (We've even rewritten the bylaws to create the Emeritus role!) We will save our emotion-inducing good-bye in case she ever decides to completely leave the journal, but for now, we express our deepest gratitude and respect for all that she has done to advance the discipline.

Dr. JoAnne Sweeny
Ruth Anne Robbins, Susan Bay, & Jessica Wherry
(Summer, 2020)

ARTICLE

Reign of Error

District Courts Misreading the Supreme Court over *Rooker–Feldman* Analysis

Thomas D. Rowe Jr. & Edward L. Baskauskas*

I. Introduction

The *Rooker–Feldman* doctrine, named after two Supreme Court cases from 1923 and 1983,[1] posits that the Supreme Court is the only federal court that can exercise appellate review of state-court decisions. Federal district courts and courts of appeals are not to do what amounts to reviewing state courts' judgments.[2] In 2005, the Supreme Court in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*[3] articulated a set of stringent criteria for federal courts to follow in deciding whether a case encounters a *Rooker–Feldman* bar. But since the Court's decision a year later in *Lance v. Dennis*,[4] a significant minority of district courts have taken lower-court language quoted but disapproved in *Lance* as the starting point for *Rooker–Feldman* analysis. We have found eighteen decisions in nine districts from 2006 through mid-2020 that take this demonstrably misgrounded approach.

This essay examines the Supreme Court's recent precedents establishing the contours of the *Rooker–Feldman* doctrine, including the

* Thomas D. Rowe Jr. is Elvin R. Latty Professor Emeritus, Duke University School of Law. Edward L. Baskauskas is a former adjunct professor of law at Golden Gate University School of Law. They serve, respectively, as reviser and drafter for Chapter 133 of MOORE'S FEDERAL PRACTICE, which includes coverage of the Rooker–Feldman doctrine. The views expressed here are their own. Thanks for comments on an earlier draft to Professor Rowe's wife, Professor Emerita Susan French.

1 Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

2 Federal habeas corpus for state prisoners is a statutorily authorized exception. *See* 18 James Wm. Moore et al., Moore's Federal Practice § 133.33[1][d], at 133-60.6 (3d ed. 2020).

3 544 U.S. 280 (2005).

4 546 U.S. 459 (2006) (per curiam).

Lance decision,[5] and the scope and possible effects of the lower courts' misreading of *Lance*.[6] The essay then explores what can be no less important for practicing lawyers, judges, and law clerks than the jurisprudence—possible deficiencies in research methods and in the drafting of the per curiam *Lance* opinion that might have contributed to the recurring error.[7]

II. Background: *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* and *Lance v. Dennis*

After disparate and sometimes expansive lower-court treatments of the *Rooker–Feldman* doctrine, the Supreme Court's unanimous 2005 decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* articulated a narrow set of conditions in which the doctrine bars lower-court subject-matter jurisdiction. The doctrine "is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[8]

The following year in *Lance*, the Court summarily vacated a three-judge district-court decision by the U.S. District Court for the District of Colorado that had found a *Rooker–Feldman* bar based on its view that the doctrine applied when applicable preclusion law could bind prior nonparties, regarded as being in privity, to an adverse prior state-court decision. The Supreme Court stated that the lower court had "erroneously conflated preclusion law with *Rooker-Feldman* . . . [,] [which] is not simply preclusion by another name."[9]

5 *See infra* part II.

6 *See infra* parts III, IV.

7 *See infra* part V.

8 544 U.S. at 284. Some lower courts have distilled from *Exxon Mobil*'s formulation a list of four requirements for the application of *Rooker–Feldman*. *See* Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 166 (3d Cir. 2010) ("Breaking down the holding of *Exxon Mobil*, we conclude that there are four requirements that must be met for the *Rooker–Feldman* doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." (internal quotation marks and brackets omitted)); Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005) ("From [*Exxon Mobil*'s] holding, we can see that there are four requirements for the application of *Rooker–Feldman*. First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced—i.e., *Rooker–Feldman* has no application to federal-court suits proceeding in parallel with ongoing state-court litigation. The first and fourth of these requirements may be loosely termed procedural; the second and third may be termed substantive." (internal quotation marks, brackets, and footnote omitted)).

9 546 U.S. at 466.

Before repeating its approach from *Exxon Mobil*, quoted above, the *Lance* Court had described the proceedings below, including quotations of the district court's statement of requirements for *Rooker–Feldman* to apply. This was the passage that, though simply part of the *Lance* Court's procedural history, several lower courts have taken as the Court's authoritative statement of the criteria for applying the doctrine:

> (1) "[T]he party against whom the doctrine is invoked must have actually been a party to the prior state-court judgment or have been in privity with such a party"; (2) "the claim raised in the federal suit must have been actually raised or inextricably intertwined with the state-court judgment"; and (3) "the federal claim must not be parallel to the state-court claim."[10]

There is much overlap between the *Lance* district court's formulation and the Supreme Court's in *Exxon Mobil*, but also notable differences. Most prominently, the court below in *Lance* included, and acted in reliance on, the privity language in its first criterion, which is missing from the *Exxon Mobil* articulation and is the point on which the *Lance* Court vacated the lower court's decision. The "actually . . . a party" phrasing in *Lance* partly coincides with the Supreme Court's narrower "state-court losers" terminology. *Exxon Mobil*'s limiting factor about "complaining of injuries caused by state-court judgments" is absent from the *Lance* criteria as stated by the district court but is perhaps implicit in "the claim raised in the federal suit must have been actually raised" in the state-court litigation. The "inextricably intertwined" alternative in the *Lance* district court's second criterion is absent from the *Exxon Mobil* Court's statement. The *Exxon Mobil* Court's "inviting district court review and rejection" language is missing from the *Lance* district court's formulation—although that factor may be implicit in the district court's understanding. Finally, "must not be parallel" is just an alternative way of referring to "state-court judgments rendered before the district court proceedings commenced."

III. Erroneous District-Court Reliance on the Requirements from the Vacated Lower-Court Opinion

We have found ninetine district-court decisions that quote, in whole or in large part, or paraphrase the recount of the Colorado district court's statement of *Rooker–Feldman* analysis from the Supreme Court's *Lance* opinion. Remarkably, all but one of the nineteen quote or paraphrase the

10 *Id.* at 462 (quoting Lance v. Davidson, 379 F. Supp. 2d 1117, 1124 (D. Colo. 2005)).

Court's description accurately but fail to note that this is not what the Supreme Court is saying to do.[11]

Fortunately, the great majority of lower federal courts do not fall into the error of following the Colorado district court's statement of *Rooker–Feldman* analysis that got its decision vacated.[12] Still, it is surprising how many have done so. Also, except in one instance,[13] the slip-up does not appear to have led to erroneous applications of the doctrine, at least not yet. Four D.C. District decisions, for example—*Bradley v. DeWine*,[14] *Terry v. First Merit National Bank*,[15] *Terry v. DeWine*,[16] and *Jung v. Bank of America, N.A.*[17]—involved a situation common in *Rooker–Feldman* litigation: a mortgagor who lost in state-court foreclosure proceedings, seeking to have a federal court undo the foreclosure by making claims of federal-law violations in connection with the state-court adjudications. Federal courts regularly and properly shoo away such state-court losers, as did the D.C. District judges in these decisions. Such cases fit the *Exxon Mobil* criteria to a T.

The error of following the *Lance* recitation of the lower court's analysis is widespread. In addition to the four cases described above, we have found it in a fifth case from the D.C. District,[18] we have found

11 The exception is Commodities Export Co. v. City of Detroit, No. 09-CV-11060-DT, 2010 WL 2633042, at *10–11 (E.D. Mich. June 29, 2010) (rejecting as frivolous an argument based on quoted language from *Lance*, pointing out that the party making that argument "accurately quotes those certain words from the Court's opinion in *Lance*, but the cited material comes from the Court's recitation of the *district court* opinion which the Court then proceeded to vacate"), *aff'd on other grounds sub nom.*, Commodities Export Co. v. Detroit Int'l Bridge Co., 695 F.3d 518 (6th Cir. 2012).

12 In a recent six-month period, for example, thirty-one decisions from twenty district courts recited and applied the *Exxon Mobil* criteria while citing *Lance* as additional authority for those criteria or related points. During that same period, no decisions made the error of using the *Lance* district court's criteria. Search performed Apr. 8, 2020, of Westlaw Edge database of U.S. District Court decisions that cited both *Lance* and *Exxon Mobil* during the preceding six months.

13 *See* Lewis v. L.A. Metro. Transit Auth., No. CV 19-1456 PSG, 2019 WL 6448944, at *4–5 (C.D. Cal. Sept. 10, 2019), discussed *infra* at notes 41–43 and accompanying text.

14 55 F. Supp. 3d 31, 41–42 (D.D.C. 2014) (Bates, J.).

15 75 F. Supp. 3d 499, 508–09 (D.D.C. 2014) (Kollar-Kotelly, J.).

16 75 F. Supp. 3d 512, 523–24 (D.D.C. 2014) (Kollar-Kotelly, J.). Professor Rowe has sent letters to all three of the D.C. District judges who decided these four cases from that court, pointing out the error of relying on the district court's language quoted in the Supreme Court's *Lance* opinion (assuring them that their results were almost certainly correct!). He has received no replies. However, in a later case involving *Rooker–Feldman* and citing Judge Bates's *Bradley* decision, *supra* note 14, and her own ruling in *Terry v. DeWine*, Judge Kollar-Kotelly did not cite or quote *Lance*. *See* Laverpool v. Taylor Bean & Whitaker REO LLC, 229 F. Supp. 3d 5, 15–21 (D.D.C. 2017).

17 No. 18-962, 2018 WL 6680579, at *5 (D.D.C. Dec. 19, 2018) (Contreras, J.), *aff'd per curiam*, No. 19-7049, 2020 U.S. App. LEXIS 1426 (D.C. Cir. Jan. 15, 2020). The authors sought leave to file a brief as amici curiae urging the D.C. Circuit to issue a published opinion correcting the district court's error of relying on the district court's language quoted in the Supreme Court's *Lance* opinion, but the court of appeals dismissed as moot the motion for leave and summarily affirmed the district court's judgment. Quoting *Exxon Mobil*'s formulation but making no mention of *Lance* or the *Lance* district court's formulation, the D.C. Circuit concluded that the district court had properly determined that *Rooker–Feldman* barred the plaintiff's claims. *See* Order at 1–2, Jung v. Bank of Am. N.A., No. 19-7049, 2020 U.S. App. LEXIS 1426, at *3–4 (D.C. Cir. Jan. 15, 2020) (per curiam).

18 McGary v. Deo Ravindra, No. 19-3249, 2020 WL 4335613, at *3–4 (D.D.C. July 28, 2020).

it in cases from the Southern District of Alabama;[19] the Northern,[20] Central,[21] and Southern[22] Districts of California; the Southern District of Mississippi;[23] the District of New Mexico;[24] and the District of Puerto Rico.[25] Even the District of Colorado, whose decision was vacated in *Lance*, has on two occasions restated and applied the same criteria (but minus the privity language specifically disapproved in *Lance*) directly after quoting the *Exxon Mobil* formulation.[26] The details of the decisions relying on the *Lance* recitation of the Colorado district court's criteria are irrelevant for present purposes. As we read the cases, the several district courts quite likely reached the correct *Rooker–Feldman* result in all instances but one (and in that instance the correct *Rooker–Feldman* result probably would not have changed the ultimate outcome[27]). Most found a *Rooker–Feldman* bar; four did not. What is important is the error in taking, as what the Supreme Court is prescribing, a set of criteria that the Court has supplanted.

IV. Possible Effects of the Error

If the courts relying on the *Lance* criteria are reaching mostly correct results or outcomes anyway, is there ground for concern about the prolif-

19 Williams v. Patterson, No. 12-592-WS-M, 2013 WL 4827932, at *4 (S.D. Ala. Sept. 10, 2013); Mitchell v. Bentley, 11-00687-KD-M, 2012 WL 2862265, at *4 (S.D. Ala. Apr. 20, 2012), *report and recommendation adopted*, 2012 WL 2862147 (S.D. Ala. July 11, 2012), *aff'd sub nom.* Mitchell v. Governor of Ala., 500 F. App'x 854 (11th Cir. 2012) (per curiam), *cert. denied*, 569 U.S. 973 (2013).

20 Roe v. Cal. Dep't of Developmental Servs., 16-cv-03745-WHO, 2017 WL 2311303, at *11–12 (N.D. Cal. May 26, 2017).

21 Lewis v. L.A. Metro. Transit Auth., No. CV 19-1456 PSG, 2019 WL 6448944, at *4–5 (C.D. Cal. Sept. 10, 2019); Robinson v. Mortg. Elec. Registration Sys., CV 19-2185 PSG, 2019 WL 2491550, at *6 (C.D. Cal. June 14, 2019); Richards v. County of Los Angeles, No. CV 17-0400 PSG, 2017 WL 7410985, at *6 (C.D. Cal. Oct. 20, 2017), *aff'd*, 723 F. App'x 556 (9th Cir.) (mem.), *cert. denied*, 139 S. Ct. 419 (2018).

22 Coulter v. Murrell, No. 10-CV-102-IEG, 2010 WL 2985165, at *3 (S.D. Cal. July 27, 2010); Yeager v. City of San Diego, No. 05CV2089-BEN, 2007 WL 7032933, at *7 (S.D. Cal. June 1, 2007), *aff'd*, 310 F. App'x 133 (9th Cir. 2009) (mem.), *cert. denied*, 558 U.S. 1013 (2009). The chambers of the two different judges deciding these cases in the same district may have made the same mistake independently; in any event, the later decision does not cite the earlier one.

23 Rustin v. Rustin (*In re* Rustin), No. 04-50890-NPO, 2011 WL 5443067, at *4 (Bankr. S.D. Miss. Nov. 9, 2011).

24 Hawks v. Mattox, No. CIV 09-0436, 2009 WL 10681595, at *2 (D.N.M. Dec. 22, 2009).

25 Nuñez-Nuñez v. Sanchez-Ramos, 419 F. Supp. 2d 101, 115 n.8 (D.P.R. 2006).

26 Avery v. Bd. of Cty. Comm'rs, No. 17-cv-01016-WJM-KMT, 2017 WL 9615892, at *4–5 (D. Colo. Nov. 20, 2017), *report and recommendation adopted*, 2018 WL 1466241 (D. Colo. Mar. 26, 2018); Turf Master Indus. v. Bd. of Cty. Comm'rs, No. 09-cv-00890-MEH-MJW, 2009 WL 2982846, at *5–8 (D. Colo. Sept. 15, 2009). *But cf.* Martinez v. Ritter, No. 09-cv-02699-CMA-MEH, 2010 WL 2649951, at *2–3 (D. Colo. June 9, 2010) (restating *Lance* district court's three criteria, without privity language, but then applying *Exxon Mobil* formulation), *report and recommendation adopted*, 2010 WL 2649985 (D. Colo. June 30, 2010).

27 *See* Lewis v. L.A. Metro. Transit Auth., No. CV 19-1456 PSG, 2019 WL 6448944, at *4–5 (C.D. Cal. Sept. 10, 2019) (applying the *Lance* district court's formulation to conclude that *Rooker–Feldman* barred claims for relief that had been denied by the state court, when proper analysis under *Exxon Mobil* would have required application of claim preclusion to dismiss those claims); *see also infra* notes 41–43 and accompanying text.

eration of a formulation that does not match what the Supreme Court has prescribed?

The overlaps of the Supreme Court's *Exxon Mobil* formulation with that of the *Lance* district court outnumber the differences, which are mostly unimportant.[28] But the inclusion of the "inextricably intertwined" concept in the *Lance* district court's second requirement is both significant and potentially troublesome. The phrase was much used in *Rooker–Feldman* litigation in lower federal courts before *Exxon Mobil* and had a foundation in *Feldman* itself,[29] but it played no role in the analysis in *Exxon Mobil*. The Court there did use the phrase, but only in describing the *Feldman* opinion and in summarizing the proceedings below. The term does no work as the Court analyzes and decides *Exxon Mobil*.

So the Court has not repudiated the "inextricably intertwined" language but has articulated an approach that makes no mention of it, and it has not used the term in any of its decisions mentioning *Rooker–Feldman* since its description of the lower-court proceedings in *Lance*. While the phrase does keep appearing in some post–*Exxon Mobil* decisions in lower federal courts and in our view may properly play a role in limited circumstances,[30] some courts of appeals have concluded that it "has no independent content and serves only as a label for claims that are barred by the *Rooker–Feldman* doctrine."[31]

The Tenth Circuit, which encompasses the *Lance* district court as well as the New Mexico district court that has made the *Lance* error,[32] has dispensed with the "inextricably intertwined" language in its *Rooker–Feldman* analysis, doubting that it adds anything useful to the *Exxon Mobil* formulation.[33] The D.C. Circuit, where five district-court decisions making the *Lance* error have been rendered, has yet to deal with the role

28 *See supra* part III.

29 *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 n.16 (1983) ("If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision."); *id.* at 487 (some of the federal plaintiffs' "allegations are inextricably intertwined with the District of Columbia Court of Appeals' decisions, in judicial proceedings, to deny [their] petitions. The District Court, therefore, does not have jurisdiction over these elements of [their] complaints.").

30 *See* Thomas D. Rowe Jr. & Edward L. Baskauskas, *"Inextricably Intertwined" Explicable at Last?* Rooker-Feldman *Analysis After the Supreme Court's* Exxon Mobil *Decision*, 1 Fed. Cts. L. Rev. 367, 377–82 (2006).

31 18 Moore's, *supra* note 2, § 133.33[2][e][ii], at 133-60.52.

32 *See* Hawks v. Mattox, No. CIV 09-0436, 2009 WL 10681595, at *2 (D.N.M. Dec. 22, 2009).

33 *See* Campbell v. City of Spencer, 682 F.3d 1278, 1282–83 (10th Cir. 2012) ("What did the words 'inextricably intertwined' add? . . . It is unclear whether a claim could be inextricably intertwined with a judgment other than by being a challenge to the judgment. . . . We think it best to follow the Supreme Court's lead, using the *Exxon Mobil* formulation and not trying to untangle the meaning of *inextricably intertwined*. The essential point is that barred claims are those 'complaining of injuries caused by state-court judgments.' In other words, [for *Rooker–Feldman* to apply,] an element of the claim must be that the state court wrongfully entered its judgment." (citation omitted)).

of "inextricably intertwined" in a reported opinion. In two unreported decisions, it has used "inextricably intertwined" in the *Rooker–Feldman* context without explicitly addressing the role that the term should play in *Rooker–Feldman* analysis after *Exxon Mobil*.[34]

The views of other circuits on "inextricably intertwined," including those in which the other district-court cases making the *Lance* error have been decided, vary and do not warrant further discussion here.[35] District courts need to check circuit precedent since *Exxon Mobil* and not use "inextricably intertwined" just because it had become a widely used mantra before that decision—and especially not out of reliance on the lower court's *Lance* criteria.

A further possibility for mischief, we can hope a remote one, is that courts looking to the Supreme Court's quotation of the *Lance* district court's formulation and including the privity concept (from the first requirement of that formulation) might fall into the same error—fusing privity preclusion with *Rooker–Feldman*—that led the *Lance* Court to vacate the decision below. Someone in privity with a prior state-court loser might well, of course, lose in a second proceeding, but on substantive preclusion rather than procedural jurisdiction grounds. And the disposition could differ; some courts say that *Rooker–Feldman* dismissals are neither with nor without prejudice but are purely jurisdictional,[36] whereas a loss on preclusion grounds would be with prejudice.

The *Lance* district court's formulation lacks the *Exxon Mobil* Court's reference to state-court losers "complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments" (the second and fourth *Exxon Mobil* requirements listed above).[37] In most instances there will be little reason for concern that district courts relying on the lower court's language will be led astray; after all, most of the cases that have relied on it seem to us still to have gotten their results right. But the Supreme Court's injury and review-and-rejection factors help focus inquiries. They can also sort out situations involving the likes of injuries suffered from adversaries' pre-litigation conduct and unremedied in state-court litigation, or harms caused by

34 *See* Jarvis v. District of Columbia, 561 F. App'x 11, 11 (D.C. Cir. 2014) (mem.) ("Appellant's claims are 'so "inextricably intertwined" with a state court decision that "the district court is in essence being called upon to review the state court decision."'" (citing and quoting a pre-*Exxon Mobil* D.C. Circuit decision)); Rodriguez v. Editor in Chief, 285 F. App'x 756, 759 (D.C. Cir. 2008) (per curiam) (certain of the federal plaintiff's "claims challenge decisions by the Virginia state bar and the Virginia courts or are inextricably intertwined with such decisions. To the extent that those decisions were final at the time of the filing of the complaint, the claims are barred by the *Rooker-Feldman* doctrine.").

35 *See generally* 18 Moore's, *supra* note 2, § 133.33[2][e][ii], at 133-60.52 to .52(2).

36 *See id.* § 133.33[2][f], at 133-60.52(12).

37 Exxon Mobil Corp. v. Saudi Basic Indus., 544 U.S. 280, 284 (2005).

illegal actions in efforts to collect on state-court judgments.[38] In such cases, *Rooker–Feldman* does not bar federal jurisdiction over matters already litigated in state courts, unless the federal plaintiffs complain of injuries caused by the state-court judgments or invite district-court review and rejection of those judgments.[39]

Because these elements are missing from the *Lance* district court's formulation, a mechanical application of that formulation can lead to an incorrect *Rooker–Feldman* result in a case in which the plaintiff seeks a judgment that would be inconsistent with a state-court judgment but does not seek to modify or set aside that judgment.[40] (Again, the federal plaintiff might lose because of preclusion from the state-court judgment; but as the Supreme Court made clear in *Lance*, that is a separate issue.) This is what happened in *Lewis v. L.A. Metropolitan Transit Authority*.[41] After the state court dismissed the plaintiff's claims with prejudice, he brought essentially the same claims in a federal suit. The claimed injury arose from the defendant's pre-litigation conduct and not from the state court's judgment, which simply left that conduct unpunished. The district court applied the *Lance* district court's formulation to conclude that *Rooker–Feldman* barred federal jurisdiction.[42] But under *Exxon Mobil*, this was error; the district court should instead have analyzed the plaintiff's claims under the rubric of claim preclusion.[43]

The third criterion from the vacated *Lance* district-court opinion quoted in the Supreme Court's summary vacatur is not problematic. The requirement that "the federal claim must not be parallel to the state-court claim" tracks *Exxon Mobil*'s third factor, that the state-court

38 *See generally* 18 Moore's, *supra* note 2, § 133.33[2][d][ii], at 133-60.28 to .38.

39 *Exxon Mobil*, 544 U.S. at 293 (*Rooker–Feldman* does not "stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion" (internal quotation marks, brackets, and ellipsis omitted)); *see* Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 88 (2d Cir. 2005) ("[A] federal suit complains of injury from a state-court judgment, even if it appears to complain only of a third party's actions, when the third party's actions are produced by a state-court judgment and not simply ratified, acquiesced in, or left unpunished by it.").

40 *See, e.g.*, Mayotte v. U.S. Bank Nat'l Ass'n, 880 F.3d 1169, 1173–76 (10th Cir. 2018) (no *Rooker–Feldman* bar, because federal suit sought damages for defendants' conduct predating state-court orders entered pursuant to state's nonjudicial-foreclosure procedure: "Plaintiff is not seeking to set aside either order. Her claims are based on events predating the [state nonjudicial-foreclosure] proceedings. She could certainly obtain damages from the defendants without setting aside the foreclosure sale. . . . [I]nconsistent judgments are the province of preclusion doctrine . . . .").

41 No. CV 19-1456 PSG, 2019 WL 6448944 (C.D. Cal. Sept. 10, 2019).

42 *Id.* at *4–5.

43 *Exxon Mobil*, 544 U.S. at 293; *see also Mayotte*, 880 F.3d at 1174–75 ("What *is* prohibited under *Rooker-Feldman* is a federal action that tries to *modify or set aside* a state-court judgment because the state proceedings should not have led to that judgment. Seeking relief that is *inconsistent* with the state-court judgment is a different matter, which is the province of preclusion doctrine." (citation omitted)).

judgment must have been "rendered before the district court proceedings commenced."[44] Fine, and maybe no harm no foul, but there seems little point in phrasing the concept differently from what the Supreme Court has prescribed. As Professor Rowe used to tell his law students, "If the Supreme Court gives you a recipe, cook with it."

V. Why Does This Keep Happening?

A. Multiple Independent Occurrences

The error of following the *Lance* district court's formulation appears to have arisen independently in each court that has made the error. The cases come early and late, with the one from the District of Puerto Rico decided in the same year as *Lance* and the latest one from the D.C. District handed down in 2020.[45] The courts do not cite a source other than *Lance* itself and various other *Rooker–Feldman* cases that do not make the error; three of the decisions, one of those from the Central District of California, the one from the Northern District of California, and the one from the District of Puerto Rico, do not even cite the Supreme Court's leading *Exxon Mobil* opinion, relying solely on its summary follow-on in *Lance* and giving only the criteria from the lower-court decision that the Supreme Court vacated.[46] We have found no separate common origin for the mistake such as a misstatement in a treatise or article.[47]

The different district courts do not cite each other, although the two most recent opinions of the U.S. District Court for the District of Columbia cite an earlier decision of that court from a different judge.[48] The five decisions in that district are from four different judges; maybe the

44 *Exxon Mobil*, 544 U.S. at 284.

45 *See* McGary v. Deo Ravindra, No. 19-3249, 2020 WL 4335613, at *3–4 (D.D.C. July 28, 2020).

46 *See* Richards v. Cty. of L.A., No. CV 17-0400 PSG, 2017 WL 7410985, at *6 (C.D. Cal. Oct. 20, 2017), *aff'd*, 723 F. App'x 556 (9th Cir.) (mem.), *cert. denied*, 139 S. Ct. 419 (2018); Roe v. Cal. Dep't of Developmental Servs., 16-cv-03745-WHO, 2017 WL 2311303, at *11–12 (N.D. Cal. May 26, 2017); *Nuñez-Nuñez*, 419 F. Supp. 2d at 115 n.8. Curiously, one opinion from the Southern District of Alabama recites and then applies the *Lance* district court's formulation point by point, while asserting in a footnote that "we will apply the *Rooker-Feldman* doctrine as interpreted by *Exxon*." *See* Williams v. Patterson, No. 12-592-WS-M, 2013 WL 4827932, at *4, n.8 (S.D. Ala. Sept. 10, 2013).

47 The error does crop up in a 2011 article that, because of its timing, could not have been a common origin of the district courts' mistakes (and none of the post-2011 decisions making the error cites the article). *See* Peter C. Alexander, *Bankruptcy, Divorce, and the* Rooker–Feldman *Doctrine: A Potential Marriage of Convenience*, 13 J.L. & Fam. Stud. 81, 99–104, n.120 (2011) (using *Lance* district court's formulation and wrongly citing that court's decision as "aff'd on other grounds" by Supreme Court). And the misreading of *Lance* has appeared in one state administrative decision that we have found. *See* N. Cent. Elec. Coop. v. Otter Tail Power Co., Case No. PU-11-701, 2012 WL 3174113 ¶ 21 (N.D. Pub. Serv. Comm'n June 14, 2012) (discussing precedent effects of related state- and federal-court decisions, but deciding the case on grounds other than *Rooker–Feldman*), *aff'd sub nom.* N. Cent. Elec. Coop. v. N.D. Pub. Serv. Comm'n, 837 N.W.2d 138 (N.D. 2013).

48 *See McGary*, 2020 WL 4335613, at *3 (Kelly, J.) (citing Bradley v. DeWine, 55 F. Supp. 3d 31, 41–42 (D.D.C. 2014) (Bates, J.)); Jung v. Bank of Am., N.A., No. 18-962, 2018 WL 6680579, at *5 (D.D.C. Dec. 19, 2018) (Contreras, J.) (same), *aff'd*, No. 19-7049 (D.C. Cir. Jan. 15, 2020).

first judge there didn't notice, with the chambers deciding the later cases trusting the soundness of the first decision's (demonstrably misgrounded) approach.[49] The same might have happened in the Southern District of California, where two decisions were rendered by different judges, and the later decision does not cite the earlier one.[50] The three decisions in the Central District of California are from the same district judge.[51] The two decisions in the Southern District of Alabama were based on reports and recommendations by one magistrate judge.[52]

If the error occurred just once or twice, one might wonder if law clerks got sloppy, or if advocates were careless at best (dishonest at worst[53]) and adversaries asleep at the switch. But the repeated, independent occurrences suggest that something more systematic is at work.

B. Reading Comprehension

Eleven of the eighteen opinions, from seven district courts, repeat the requirement of "privity" from the *Lance* district court's formulation.[54] But as already noted, the Supreme Court in *Lance* specifically rejected

49 *See supra* notes 14–18. *But cf.* Eugene Volokh, Academic Legal Writing 101–03 (2d ed. 2005) ("Whenever you make a claim about some source, you nearly always must read the original source. Do *not* rely on an intermediate source—whether a law review article or a case—that cites the original. . . . Intermediate sources may seem authoritative, but they're often unreliable, whether because of bias or honest mistake. You can't let their mistakes become your mistakes.").

50 Coulter v. Murrell, No. 10-CV-102-IEG, 2010 WL 2985165, at *3 (S.D. Cal. July 27, 2010) (Gonzalez, C.J.); Yeager v. City of San Diego, No. 05CV2089-BEN, 2007 WL 7032933, at *7 (S.D. Cal. June 1, 2007) (Benitez, J.), *aff'd*, 310 F. App'x 133 (9th Cir.) (mem.), *cert. denied*, 558 U.S. 1013 (2009).

51 *See* Lewis v. L.A. Metro. Transit Auth., No. CV 19-1456 PSG, 2019 WL 6448944, at *4–5 (C.D. Cal. Sept. 10, 2019) (Gutierrez, J.); Robinson v. Mortg. Elec. Registration Sys., CV 19-2185 PSG, 2019 WL 2491550, at *6 (C.D. Cal. June 14, 2019) (Gutierrez, J.); *Richards*, 2017 WL 7410985, at *6 (Gutierrez, J.).

52 *See* Williams v. Patterson, No. 12-592-WS-M, 2013 WL 4827932, at *4 (S.D. Ala. Sept. 10, 2013) (Steele, J., adopting report and recommendation of Milling, M.J.); Mitchell v. Bentley, 11-00687-KD-M, 2012 WL 2862265, at *4 (S.D. Ala. Apr. 20, 2012 (Milling, M.J.), *report and recommendation adopted*, 2012 WL 2862147 (S.D. Ala. July 11, 2012) (DuBose, J.), *aff'd sub nom.* Mitchell v. Governor of Ala., 500 F. App'x 854 (11th Cir. 2012) (per curiam), *cert. denied*, 569 U.S. 973 (2013).

53 The possibility that counsel were deliberately trying to mislead courts seems slim in most of the cases, because it is usually hard to see a possible advantage in getting a court to use the *Lance* district court's formulation rather than that of the Supreme Court in *Exxon Mobil*. An exception would be if a party were trying to get the court to apply *Rooker–Feldman* to bar jurisdiction over a claim by a federal-court plaintiff in privity with a prior state-court loser, which is exactly what the Supreme Court disapproved in *Lance*. It does appear that a defendant in *Commodities Export Co.*, *supra* note 11, may have unsuccessfully tried such a ploy. *See* Commodities Export Co. v. City of Detroit, No. 09-CV-11060-DT, 2010 WL 2633042, at *10–11 (E.D. Mich. June 29, 2010) (rejecting as frivolous argument that *Rooker–Feldman* should apply on basis of privity, pointing out that party making that argument "accurately quotes those certain words from the Court's opinion in *Lance*, but the cited material comes from the Court's recitation of the *district court* opinion which the Court then proceeded to vacate."), *aff'd on other grounds sub nom.* Commodities Export Co. v. Detroit Int'l Bridge Co., 695 F.3d 518 (6th Cir. 2012). In some of the other cases relying on the *Lance* district court's language, their quotations omit the language about privity at the end of the first requirement. *See infra* note 54. And whether the opinions include that language or not, privity issues have not been present in the *Rooker–Feldman* analysis in any of the other cases.

54 The U.S. District Court for the District of Colorado, whose decision was vacated in *Lance*, omitted privity from the formulation in later cases. *See* Avery v. Bd. of Cty. Comm'rs, No. 17-cv-01016-WJM-KMT, 2017 WL 9615892, at *4 (D. Colo. Nov. 20, 2017), *report and recommendation adopted*, 2018 WL 1466241 (D. Colo. Mar. 26, 2018); Turf Master Indus. v. Bd. of Cty. Comm'rs, No. 09-cv-00890-MEH-MJW, 2009 WL 2982846, at *5–8 (D. Colo. Sept. 15, 2009). The U.S. District Court for the District of Columbia is the only other court whose opinions adopting the *Lance* district court's formulation omit privity. *See* McGary v. Deo Ravindra, No. 19-3249, 2020 WL 4335613, at *3 (D.D.C. July 28, 2020); Jung v. Bank of Am., N.A., No.

privity as a relevant consideration in deciding whether *Rooker–Feldman* applies.[55] The issue in *Lance* was not complex, and the per curiam opinion is straightforward.

The conclusion is inescapable and troubling: the authors of these district-court opinions did not actually read the Supreme Court's full *Lance* opinion (or worse, they read but did not comprehend what *Lance* was saying about the lower court's privity requirement). Even if a district judge might unquestioningly adopt the analysis of a previous opinion within the district, the initial failure to read or comprehend *Lance* happened at least seven separate times in these district courts.

Most district judges have law clerks or research staff whose job is to help guard against such errors. And even if the judge and his or her staff are too overburdened to read and comprehend authorities they are relying on to craft their analysis, counsel representing a party[56] has a strong incentive to point out when the district court relies on incorrect law. So in each of these cases, the *Lance* error was likely the product of slack efforts by multiple actors.

How can it be that so many judges, lawyers, and research staff feel confident quoting and relying on a Supreme Court decision they haven't bothered to read in full? Perhaps modern research techniques played a small role.

Technological advances provide ever-more-efficient research tools, but in this instance the ease of searching electronic databases of judicial opinions might have facilitated the error. We performed a search of Westlaw Edge's database of U.S. Supreme Court cases using the question *What are the elements of the Rooker–Feldman doctrine* (no quotation marks or other punctuation). With the results sorted by relevance, the first two cases displayed were *Exxon Mobil* and *Lance*. And selecting "Most detail" brought up the passage in which the *Lance* Court quoted the lower court's statement of *Rooker–Feldman*'s "requirements."[57] For a researcher

18-962, 2018 WL 6680579, at *5 (D.D.C. Dec. 19, 2018), *aff'd*, No. 19-7049 (D.C. Cir. Jan. 15, 2020); Terry v. DeWine, 75 F. Supp. 3d 512, 523 (D.D.C. 2014); Terry v. First Merit Nat'l Bank, 75 F. Supp. 3d 499, 508 (D.D.C. 2014); Bradley v. DeWine, 55 F. Supp. 3d 31, 41 (D.D.C. 2014).

55 Lance v. Dennis, 546 U.S. 459, 466 (2006) (per curiam); *see supra* note 9 and accompanying text.

56 Plaintiffs were represented by counsel in only six of the eighteen cases in which the *Lance* error was made. *See Lewis*, 2019 WL 6448944; *Robinson*, 2019 WL 2491550 ; Roe v. Cal. Dep't of Developmental Servs., 16-cv-03745-WHO, 2017 WL 2311303 (N.D. Cal. May 26, 2017); *Mitchell*, 2012 WL 2862265, *report and recommendation adopted*, 2012 WL 2862147 (S.D. Ala. July 11, 2012), *aff'd sub nom.* Mitchell v. Governor of Ala., 500 F. App'x 854 (11th Cir. 2012) (per curiam), *cert. denied*, 569 U.S. 973 (2013); Rustin v. Rustin (*In re* Rustin), No. 04-50890-NPO, 2011 WL 5443067 (Bankr. S.D. Miss. Nov. 9, 2011); *Turf Master*, 2009 WL 2982846.

57 Search conducted Jan. 30, 2020. Also on that date, we searched the LEXIS Advance database of U.S. Supreme Court cases using the question *What are the requirements of the Rooker–Feldman doctrine* (again, no quotation marks or other punctuation). The search brought up *Lance* as the first case in the expanded results; selecting "Graphical view" and clicking on the first graphical marker within the *Lance* Court's opinion brought up the passage in which the Court quoted the lower court's statement of *Rooker–Feldman*'s "requirements."

who is not already familiar with the history of the *Rooker–Feldman* doctrine and the significance of *Exxon Mobil*'s narrowing of the doctrine,[58] it might seem like a good idea to go directly to *Lance* for what appears (outside its context) to be the Court's most recent definitive statement of *Rooker–Feldman*'s requirements.[59] If the researcher is working on a case that clearly fails to satisfy one or more of those requirements, and the researcher is pressed for time, it might be tempting to skip the remainder of *Lance* and not to bother with the older *Exxon Mobil* opinion.

That the Supreme Court presented the *Lance* district court's formulation as an enumeration of "requirements" might add to a harried researcher's confidence that he or she has found a definitive statement of current law.[60] By contrast, the correct criteria are stated in *Exxon Mobil* and reiterated in *Lance* as plain, unenumerated text.[61] The attraction and power of an enumerated list seem to be confirmed by some lower courts' use of enumeration in stating the *Exxon Mobil* criteria.[62]

It is worth noting that the *Lance* Court's recitation of the district court's formulation of *Rooker–Feldman* "requirements" is not the subject of any headnote in the unofficial reporters of Supreme Court decisions (or in the Westlaw Edge or LEXIS Advance report of *Lance*).[63] Thus the reporters' editors correctly understood that the *Lance* Court's quotation of the district court was intended only as a description of the lower court's statement, not an endorsement of it. And a researcher working the old-fashioned way with *West's Federal Practice Digest 4th & 5th* or the *U.S. Supreme Court Digest, Lawyers' Edition*[64] (or the online equivalent,

58 *See* Exxon Mobil Corp. v. Saudi Basic Indus., 544 U.S. 280, 283–84 (2005) ("Variously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases . . . . The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."); *see also supra* notes 8–9 and accompanying text.

59 *See* Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 Harv. J.L. & Tech. 223, 246–47 (2008) ("During a typical electronic word search, [in contrast to a search using print digests and key numbers], a researcher will likely receive far less information about a case prior to reading its text. Usually, the only immediate information that an electronic researcher will have about a case (before being exposed to the case text) is that it meets the criteria of her individually crafted search. This is because electronic search results are frequently listed with the case citation followed by a short snippet of text from the case highlighting where in the case the searched-for terms appear. Researchers are invited to jump directly into not just the case text, but the section of the case text deemed most responsive to the search terms." (footnote omitted)).

60 *See Lance*, 546 U.S. at 462; *see also supra* note 10 and accompanying text; *infra* note 70 and accompanying text.

61 *See supra* note 8 and accompanying text.

62 *See supra* note 8.

63 *See* Lance v. Dennis, 126 S. Ct. 1198, 1198–99 (2006) (per curiam); *see also* Peter A. Hook & Kurt R. Mattson, *Surprising Differences: An Empirical Analysis of LexisNexis and West Headnotes in the Written Opinions of the 2009 Supreme Court Term*, 109 L. Libr. J. 557, 559 (2017) ("Each headnote represents a point of law extracted from the case . . . ." (quoting Steven M. Barkan et al., Fundamentals of Legal Research 38 (9th ed. 2009))).

64 *See* Hook & Mattson, *supra* note 63, at 559 ("Prior to computer-assisted legal research, a researcher typically started by referencing a multivolume printed digest. Digests contain all of the cases assigned headnotes with particular topics for a particular jurisdiction . . . .").

searching the West Key Number System or the LEXIS Advance headnotes from Supreme Court cases) would not find an entry presenting the *Lance* Court's recitation of the lower court's *Rooker–Feldman* "requirements" as a statement of current law.[65]

C. Drafting of the Per Curiam *Lance* Opinion

As noted,[66] all the district-court decisions that make this error cite as authority the Supreme Court's *Lance* decision. Even those that got the message about privity[67] take the remainder of *Lance*'s recounting of the lower court's formulation as a definitive statement of law. Could it be that the Court's per curiam opinion itself sowed the seeds of misinterpretation?

The *Lance* Court introduced its quotations from the lower court with the following words: "The *Rooker–Feldman* doctrine, the court explained, includes three requirements: . . . ."[68] The main clause in this passage is the statement of what the doctrine "includes." That the Court was tracking the lower court is presented as incidental information; the words "the court explained" are set off by commas as a nonrestrictive, parenthetical element.[69] As a matter of grammatical structure, that element could be omitted without changing the meaning of the main clause, which is a straightforward statement that the "*Rooker–Feldman* doctrine . . . includes three requirements." That statement, of course, is not correct; the real requirements for the doctrine were articulated in *Exxon Mobil*. But the *Lance* Court's use of the present indicative form of the verb "includes" could give an inattentive reader the impression that the statement is presented as an accurate description of current law.

The Court could have reduced the potential for misinterpretation by structuring the main clause as a statement about what the lower court said, rather than one about what *Rooker–Feldman* includes. And selecting words that ascribed less authoritativeness to the lower court's view could have helped clarify that the Court was not adopting or endorsing that

65 In the West Key Number System as displayed on Westlaw Edge, headnotes from the *Lance* district court's opinion are accompanied by red flags, reflecting vacatur of the opinion. *See* West Key Number System, 106k509.2 (headnotes from Lance v. Davidson, 379 F. Supp. 2d 1117 (D. Colo. 2005)). Similarly, a search of LEXIS Advance displays stop signs accompanying headnotes from the *Lance* district court's opinion. *See* LEXIS Advance results for search of U.S. Federal Cases, Headnotes, for "requirements of Rooker-Feldman doctrine" (headnotes from Lance v. Davidson, 379 F. Supp. 2d 1117 (D. Colo. 2005)).

66 *See supra* note 46 and accompanying text.

67 *See supra* note 54.

68 Lance v. Dennis, 546 U.S. 459, 462 (2006) (per curiam).

69 *See* William Strunk Jr. & E.B. White, The Elements of Style 2 (3d ed. 1979) ("Enclose parenthetic expressions between commas."); Marjorie E. Skillin & Robert M. Gay, Words into Type 189 (3d ed. 1974) ("A nonrestrictive phrase or clause is one that could be omitted without changing the meaning of the principal clause; it should be set off by commas.").

view.[70] For example: "The district court opined that the *Rooker–Feldman* doctrine included three requirements: . . . ." Such an articulation would have made clear that the Court was giving the lower court's view solely as part of the procedural history of the case and not as current law that the lower court "explained."

Grammatical and stylistic niceties aside, the per curiam *Lance* opinion read as a whole does show that the Court did not adopt or endorse the lower court's *Rooker–Feldman* formulation.[71] And it is not easy to excuse the inattention—by counsel on both sides, and by a judge and his or her law clerk—that occurs each time the misunderstanding of *Lance* appears in a court opinion.

VI. Conclusion

However small the effects of these several decisions' repeated error in stating the approach for *Rooker–Feldman* analysis, the mistake seems to be getting into some judicial food chains. It first took place shortly after the *Exxon Mobil* and *Lance* decisions and has been repeated, including recently, over the years since. The sooner it gets removed, before others consume it to their possible detriment, the better.

More broadly, these decisions exemplify the danger of relying on a passage from a court opinion—even a Supreme Court opinion—without reading enough of the opinion to understand the context and purpose of the passage.

Finally, these decisions serve as a reminder that a reviewing court should take care to avoid framing a description of the proceedings below in terms that might mistakenly be read as an adoption or endorsement of the lower court's analysis.

70 The authoritative appearance of the district court's *Rooker–Feldman* "requirements" was likely enhanced by the Supreme Court's presentation of them as an enumerated list, in contrast to the Court's later presentation of the *Exxon Mobil* formulation as plain, unenumerated text. *See Lance*, 546 U.S. at 462, 464; *see also supra* notes 9–10 and accompanying text; *supra* notes 60–62 and accompanying text.

71 For a court that read *Lance* right, see Commodities Export Co. v. City of Detroit, No. 09-CV-11060-DT, 2010 WL 2633042, at *10–11 (E.D. Mich. June 29, 2010), *aff'd on other grounds sub nom.* Commodities Export Co. v. Detroit Int'l Bridge Co., 695 F.3d 518 (6th Cir. 2012), *see also supra* note 11.

ARTICLE

(Not the) Same Old Story

Invisible Reasons for Rejecting Invisible Wounds

Jessica Lynn Wherry*

Thousands of former military servicemembers have been discharged with other-than-honorable discharges due to misconduct that can be traced to a mental health condition. In May 2017, the Government Accountability Office reported that sixty-two percent of the 91,764 servicemembers discharged "for misconduct from fiscal years 2011 through 2015 . . . had been diagnosed within the 2 years prior to separation with [post-traumatic stress disorder], [traumatic brain injury], or certain other conditions that could be associated with misconduct."[1] In that five-year period, 57,141 servicemembers were discharged from the military for what may have been behavior that resulted from a mental health condition rather than willful misconduct.[2]

With an other-than-honorable discharge, veterans are "generally ineligible to receive VA benefits, including education, housing, employment, disability compensation, burial benefits, and in many cases, even healthcare."[3] They may also be banned from joining veterans' service

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1 U.S. Gov't Accountability Office, GAO-17-260, DOD Health: Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations 12 (2017), https://www.gao.gov/assets/690/684608.pdf.

2 *Id.*

3 Sundiata Sidibe & Francisco Unger, Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD 3 (2016), https://www.vetsprobono.org/library/item.655356-Unfinished_Business_Correcting_Bad_Paper_for_Veterans_with_PTSD; *see also* Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 Kansas L. Rev. 513, 564 (2019); Marcy L. Karin, *"Other Than Honorable" Discrimination*, 67 Case W. Res. L. Rev. 135, 137–39 (2016) (discussing how the Uniformed Services Employment and Reemployment Act (USERRA) has not protected veterans with other than honorable discharge and explaining that these discharges "have disproportionately impacted people with service-connected injuries like post-traumatic stress disorder and traumatic brain injury, servicemembers who have experienced military sexual trauma, and people with caregiving responsibilities"); U.S. Dep't of Defense Instruction 1300.15, Military Funeral Support 3–4 (Dec. 27, 2017), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130015p.pdf.

organizations, face challenges in employment, and experience homelessness.[4] These veterans are also "more likely to suffer mental health conditions . . . and to be involved with the criminal justice system, and they take their lives twice as often as other veterans."[5] Beyond health care and economic resources, veterans with other-than-honorable discharges suffer a diminished status. They are "not permitted to wear their uniforms or receive a military burial."[6] In sum, their service is not honored and an other-than-honorable discharge "impos[es] a lifetime stigma that marks the former service members as having failed family, friends, and country."[7]

These veterans kicked out of the military with an other-than-honorable discharge may request a post-discharge change to their discharge characterization—known as a "discharge upgrade." Veterans who seek an upgrade in the fifteen years following discharge can do so through a uniform process, typically proceeding pro se, by submitting a standardized form to a discharge review board.[8] There are two grounds for granting an upgrade: equity and impropriety.[9] Generally, equity is a question of fairness and consistency.[10] Equity considers how policy or procedural changes cast doubt on the fairness of the original discharge decision, and it creates space to provide relief based on a holistic view of an applicant's quality of service and capability to serve.[11] Impropriety is a matter of prejudice to the veteran due to "an error of fact, law, procedure, or discretion."[12] The

4 Sidibe & Unger, *supra* note 3, at 3. "Bad paper" means "other-than-honorable, bad conduct, or dishonorable discharge, and may include a general discharge as well." Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. Rev. 1709, 1724 (2017).

5 Wishnie, *supra* note 4, at 1724; *see also* Human Rights Watch, Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors 4–5 (2016), https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors. Note that I am not saying discharge status caused these effects, but there is a correlation. *See, e.g.*, *id.* at 77 ("A strong correlation exists between PTSD, substance abuse, and persistent misconduct." (citations omitted)).

6 Human Rights Watch, *supra* note 5, at 5; 38 U.S.C. § 2302 (2018); 38 U.S.C. § 101(2) (2018) (limiting benefit to "veteran" defined as "person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable"); *Eligibility for Burial in a VA National Cemetery*, U.S. Dep't of Veterans Affairs, https://www.va.gov/burials-memorials/eligibility/ (last visited Apr. 15, 2020).

7 Wishnie, *supra* note 4, at 1725.

8 Military records correction boards accept discharge upgrade requests for veterans seeking an upgrade more than fifteen years since discharge. The records correction boards also take appeals of discharge review board decisions. This article focuses on discharge review board decisions because they are the first level of review and because a significant population of veterans discharged for behavior that may have been misconduct were discharged within the last fifteen years. 10 U.S.C. § 1553(a) (2018); *see also Army Discharge Review Board FAQ*, Army Review Bds. Agency, https://arba.army.pentagon.mil/adrb-faq.html (last visited Apr. 15, 2020) ("[Y]ou may appeal the written discharge review decision by applying to the Army Board for Correction of Military Records (ABCMR).").

9 32 C.F.R. § 70.9(a) (2020).

10 32 C.F.R. § 70.9(c).

11 *Id.*

12 32 C.F.R. § 70.9(b)(1)(i).

board then considers the request, typically based on the paper file only, and almost always denies the upgrade request.[13]

In the past few years, the Department of Defense (DoD) has become increasingly aware of mental health conditions related to post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, and sexual harassment. There is a significant amount of research and scholarship on the connections between PTSD and behavior, including how PTSD symptoms can manifest in a way that looks like misconduct.[14] In 2014, recognizing the connections between mental health and misconduct and how those connections require a change in the way misconduct is viewed in discharge upgrade decisions, DoD issued policy guidance to the administrative boards charged with reviewing discharge upgrade applications.[15]

The policy guidance requires the boards to give "liberal consideration" to "veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment."[16] The policy guidance did not change the standard for granting an upgrade—the grounds are still inequity or impropriety. Instead, within the equity standard, liberal consideration shines a light on mental health conditions as "[i]nvisible wounds," and requires boards to "consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later."[17] Indeed, liberal consideration mandates a relaxed view of misconduct as mitigated by a mental health condition. Liberal consideration also requires a change in how facts are interpreted under the standard: behavior that was understood as misconduct may actually be

13 As many as ninety to ninety-nine percent of applications are denied. Human Rights Watch, *supra* note 5, at 5 ("Despite the high stakes for veterans, there is little meaningful opportunity to appeal a bad discharge (also called applying for an 'upgrade')."). Decisions take up to a year or more. *Check Status/Result of You[r] Application*, Council of Review Bds., https://www.secnav.navy.mil/mra/CORB/Pages/NDRB/csra.aspx (last visited Apr. 15, 2020); *see also* Robert Powers, President, Naval Discharge Review Bd., Sec'y of the Navy, Council of Review Bds., NDRB Presentation to Veterans Legal Assistance Conference of 2019, at slide 4 (June 7, 2019) (slides on file with author) (showing an average length of ten months to decision for documentary review and twenty-two months to decision for personal appearance hearing).

14 *See, e.g.*, *What is Posttraumatic Stress Disorder?*, Am. Psychiatric Ass'n, https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd (last visited Apr. 15, 2020); *PTSD Basics*, Nat'l Ctr. for PTSD, https://www.ptsd.va.gov/understand/what/ptsd_basics.asp (last visited Apr. 15, 2020); Nat'l Ctr. for PTSD, Iraq War Clinician Guide, 58–60 (2d ed. 2004), https://www.phoenixhouse.org/wp-content/uploads/2010/12/iraq_clinician_guide_v2.pdf.

15 *See* Memorandum from Chuck Hagel, Sec'y of Defense, to Secretaries of The Military Departments (Sept. 3, 2014), https://www.secnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf [hereinafter Hagel Memo].

16 *See* Memorandum from A.M. Kurta, Acting Under Sec'y of Defense for Personnel and Readiness, to Secretaries of The Military Departments, Attach. ¶ 3 (Aug. 25, 2017), https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf [hereinafter Kurta Memo] (supplementing the Hagel Memo).

17 *Id.* at Memorandum.

behavior consistent with a mental health condition, and equity demands relief in those circumstances.

When this policy was announced in 2014 and supplemented in 2017 to provide more detailed implementation guidance, veterans advocates were optimistic about what liberal consideration would mean for veterans discharged with an other-than-honorable discharge.[18] However, despite some initial increases in upgrade rates, over time, the policy has not been implemented as expected. Recent reports from the boards suggest that liberal consideration has not provided the intended relief as the typically low rate of upgrades continues.[19] Consistent with these reports, there are two pending class actions against the Army[20] and Navy[21] for failure to implement liberal consideration. Federal district courts certified a class in both lawsuits, recognizing the boards' failure to fully implement liberal consideration.[22] The court in each case also denied the motions to dismiss, and the cases are now pending with judicial settlement conferences set for 2020.[23]

This article seeks to explore why liberal consideration has not had its intended effect. Rather than take on a comprehensive evaluation of the liberal consideration policy,[24] the article looks to storytelling and rhetorical principles to consider a possible explanation for the boards' failure to embrace liberal consideration. The article applies a narrow slice of storytelling scholarship—how humans respond to stories—to the specific context of discharge review board decisions.

The growing body of scholarship about storytelling and legal practice is rooted in the traditional context of the adversarial legal system,[25] but this article proposes a broader applicability. In the traditional context,

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18 *See* Nikki Wentling, *Pentagon Expands Policy to Upgrade Vets' Bad Paper Discharges*, Stars & Stripes, Aug. 29, 2017, https://www.stripes.com/news/pentagon-expands-policy-to-upgrade-vets-bad-paper-discharges-1.485038.

19 Powers, *supra* note 13, at slide 3.

20 Kennedy v. Esper, No. 16cv2010 (WWE), 2019 WL 7290933, slip op. (D. Conn. Jan. 9, 2019); *see also Kennedy v. Esper*, Yale L. Sch., https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-esper (last visited June 14, 2020).

21 Manker v. Spencer, No. 3:18-cv-00372 (CSH), 2019 WL 5846828, slip op. (D. Conn. Nov. 7, 2019); *see also Manker v. Spencer*, Yale L. Sch., https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/manker-v-spencer (last visited June 14, 2020).

22 In *Kennedy v. Esper*, the case against the Army, the court certified a class of Army veterans of the Iraq and Afghanistan era. Kennedy v. Esper, No. 16cv2010 (WWE), 2018 WL 6727353 (D. Conn. Dec. 21, 2018). In *Manker v. Spencer*, the case against the Navy, the court certified a class of Navy and Marine Corps veterans of the Iraq and Afghanistan era. Manker v. Spencer, 329 F.R.D. 110 (D. Conn. 2018).

23 *Kennedy*, 2019 WL 7290933, at *2; *Manker*, 2019 WL 5846828, at *20; Posting of Michael Wishnie, michael.wishnie@yale.edu, to veteransclinics@lists.wm.edu (Nov. 30, 2019 6:11 PM) (on file with author).

24 I discuss the liberal consideration policy in more depth in Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 Calif. L. Rev. __ (forthcoming 2020). That article (and this article) grew out of my experience in the Navy, my pro bono work for veterans, and my longstanding respect for all who serve in the military.

25 *See* Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling and to This Symposium*, 14 Legal Writing 3, 3 (2008) ("Storytelling is the backbone of the all-important theory of the case, which is the essence of all client-centered lawyering.").

lawyers are the storytellers telling their clients' stories. The judges are the story-receivers and they make decisions based on their evaluation of those stories. The client, of course, also plays a role, but an indirect one, through an advocate's decisions about how to best present a client's case.

In this article, I redefine those traditional roles in the context of the discharge upgrade system where most applicants are pro se, board members are not judges, and decisions are almost always limited to the paper file. Specifically, I see the DoD Policy Memo[26] standing in as the advocate and liberal consideration as the story the advocate tells. The Memo stands in as advocate for the typically pro se veteran-applicants by recognizing mental health conditions and their relationship to behavior, and laying out how to apply liberal consideration to support an upgrade.[27] In tandem with the specific facts the veteran-applicant includes in the request, liberal consideration is the story that overlays any application invoking a mental health condition as a mitigating circumstance. In their role as story-receiver, board members are like judges in legal storytelling literature even though board members are not legally trained. In their judge-like role, board members evaluate stories as part of their decision-making in applying standards to facts. Given the policy mandate to give liberal consideration to cases involving mental health conditions, board members also have a significant role in bringing the story into the decisionmaking process.

Humans, including board members, respond to stories in three ways: response-shaping, response-reinforcing, and response-changing.[28] Stories that teach something new are response-shaping.[29] Stories that reflect the audience's existing knowledge are response-reinforcing.[30] And stories that try to break patterns of existing knowledge or beliefs are response-changing.[31] Our responses to stories are heavily influenced by our past experiences with similar, or what appear to be similar, stories. The more we think a certain way about, or categorize, a certain fact or set of facts, the more our brain becomes embedded with that particular thought pattern and the more closed off it becomes to alternative stories and especially to a story that demands a response-change.

26 I use the general term "DoD Policy Memo" to mean the liberal consideration policy as a whole, including the original Hagel Memo and the Kurta Memo's supplemental guidance. *See* Hagel Memo, *supra* note 15; Kurta Memo, *supra* note 16.

27 Of course, the pro se applicant may also be telling a story, and some may be able to tell a coherent story, but the DoD Policy Memo stands in on behalf of the veteran no matter the substantive quality of the application. Advocates, too, can use the principles of liberal consideration in representing their veteran clients.

28 Robbins, *supra* note 25, at 6–7.

29 *Id.* at 7.

30 *Id.*

31 *Id.*

This article explores how liberal consideration as a policy could be thwarted by board members' preference for response-reinforcement and a resistance to response-change in the form of invisible rigid categories and neural pathways. There are probably a number of reasons why boards are failing to properly or fully implement liberal consideration,[32] but what if one of the reasons—or even the primary reason—is invisible? What if board members are not able to receive and process liberal consideration as a new story? What if board members are not aware of their resistance to the new story?

In exploring answers to these questions, this article does not attempt to engage with the full body of storytelling scholarship. Rather, it draws on response-reinforcement and related rhetorical principles of categories and neural pathways to explore one possible explanation for why the discharge review boards have not fully implemented liberal consideration. The article engages with Professors Lucy Jewel's and Linda Berger's work about how judges and all humans think in terms of categories and neural pathways to explore board members' decisionmaking as an example of response-reinforcement. Building on the ways humans respond to stories, section I briefly summarizes two relevant rhetorical principles, rigid categories and neural pathways, in the context of response-reinforcement. Section II further explains liberal consideration as a new story. In section III, the article applies the principles of rigid categories and neural pathways to offer one possible explanation for the boards' failure to fully implement liberal consideration. The article concludes with suggestions for going forward.

I. Response-Reinforcement Roots: Categories and Neural Pathways

As humans, we like stories to be consistent with stories we have heard before, and our brains are trained to reinforce what we already know—or think we know. This preference for response-reinforcement can be further understood by considering Professor Jewel's analysis about how harmful rhetoric creates toxic neural pathways in relation to racial minorities and other subordinated groups in ways that reinforce stereotypes.[33] Neurorhetoric, "the study of how rhetoric shapes the human brain," uses

32 For example, bias may be at play here. Or it may be that the requests for upgrade do not merit relief even within the liberal consideration construct. This article is not trying to determine the possible multiple reasons for liberal consideration's failure to increase the rate of discharge upgrades, but rather considers just one possibility by taking a narrow look through the lens of storytelling to suggest what may be underneath the boards' lack of implementation.

33 *See generally* Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 Md. L. Rev. 663 (2017).

"neuroscience to understand how rhetoric stimulates activity that can actually change the shape and form of the brain."[34] The brain is shaped by words and phrases or ideas that "become cemented in the brain."[35] Once cemented, those words and phrases or ideas influence responses to stories by cutting off alternatives that are in conflict with the cemented ideas.[36] In this brief background section, I focus on two interrelated concepts: categories and entrenched neural pathways.[37]

First, categories are a way to make sense of information in an efficient way. How we categorize information is relatively complex, and the actual categories are "often based on subjective choices that are products of one's culture and individual experiences."[38] Categories can be constraining because they limit thinking to a "'common stock of ideas,'" when there may be other ideas beyond those categories.[39] Categories can change or arise in response to changes in the world. But categories can also blind the brain to any alternatives. This blindness is particularly problematic when categories cause unconscious—invisible—thinking and decision-making. If used "rigidly and uncritically, [categories] generate less-robust legal reasoning and may also become a tool for reproducing injustice in the law."[40] For example, in discussing racially coded categories' collective entrenchment, Professor Jewel explains that

> [c]oded categories are harmful because they encourage rapid unconscious thinking that has the effect of hardwiring stereotypes into the pathways of the brain. The rapid way in which a term raises these unspoken conclusions makes it difficult to imagine other narrative possibilities or engage in reasoned deliberation about the issue.[41]

Thus, the power of categories in humans' responses to stories may thwart response-change even when a change is warranted.

Second, the more our brains think a certain way, the more entrenched that thinking becomes. This entrenched thinking creates neural pathways in the brain, and these pathways are reinforced by repeated thinking in

34 *Id.* at 663, 665.

35 *Id.* at 671.

36 *Id.*

37 This article does not even scratch the surface as far as explaining these and other principles of neurorhetoric, and instead merely lays out a brief foundation for its later suggestions for why liberal consideration has not been fully implemented.

38 Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 Legal Comm. & Rhetoric 39, 45 (2016).

39 *Id.* at 51.

40 *Id.*

41 Jewel, *supra* note 33, at 664.

response to certain similar information. The idea that "some or a few attributes of a category stand for the whole" leads to stereotyping and an inability to see alternatives, while also sustaining a level of efficiency.[42] As "neuroscientific theory" explains, "the more a particular thought pattern is repeated, the deeper it gets into our brains. Thus, the repeated use of specific language forms creates collective neural pathways that become collectively entrenched."[43]

Through canalization and attenuation, entrenched thinking becomes further entrenched as ideas become cemented in the brain. Canalization is like the tracks created by repeatedly sledding over the same path.[44] The path becomes deeper, faster, and more efficient at keeping the sled on the track with nothing in its way. The more a brain experiences the same thought in response to certain facts, the deeper and faster that thought becomes in response to similar facts.[45] Attenuation can cut off alternative pathways because the brain has a limited capacity and the neural pathways compete in a way that "'the connections that are used are kept and those that go unused are eliminated.'"[46] Thus, the more entrenched our ideas, "the more certainty we have with respect to the associated thought," and the harder it is to break that thought pattern and be open to alternatives.[47]

Neurorhetoric also suggests that there is a physical connection to thought. A "'gut feeling'" is an example of "the embodied nature of thought."[48] This physical connection is recognized in the term "somatic marker."[49] As Prof. Jewel explains, Neuroscientist Antonio Damasio's term somatic marker is rooted in "soma coming from the Greek word for body and marker reflecting the impact that previous thought experiences have had on our brains."[50] Just as entrenched neural pathways influence our thinking, "[s]omatic markers represent canalized thought patterns that guide the direction, rapidly and unconsciously, of our thought processes."[51]

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42 *Id.* at 667–68.

43 *Id.* at 681. This collective entrenchment is seen in how judges "draw on embedded knowledge structures, and they tend to turn first to whatever 'commonsense background theory [is] prevalent in the legal culture of their era.'" Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259, 284 (2009).

44 Jewel, *supra* note 33, at 670.

45 *Id.*

46 *Id.* at 671.

47 *Id.* Repetitive thinking that "continu[ally] activat[es] . . . the same neural pathways by the same stimulus," is "highly difficult to undo." *Id.*

48 *Id.* at 672.

49 *Id.*

50 *Id.*

51 *Id.*

Our brains are marked by these repeated thoughts, and those somatic markers "function as a 'biasing device,'" further cutting off alternative responses to information that appears similar to past information.[52] Thus, "rhetoric can get inside our brains and bodies and make us think and feel things without the intervention of conscious rationality."[53]

Categories and entrenched neural pathways are consistent with response-reinforcement as a reaction to a story. The brain likes what it already thinks and knows, or what it thinks it knows. Faced with new information, the brain will try to place that information within existing categories and neural pathways rather than develop a new category or pathway. At the same time, this preference for response-reinforcement continues to guard against new ideas and new stories. In applying these concepts to discharge upgrades, the article next explains liberal consideration as a new story. It then applies these rhetorical concepts to explore why liberal consideration has not spurred board members to response-change in their consideration of discharge upgrade requests.

II. Liberal Consideration: A New Story

As I articulated in the introduction to this article, my view of the DoD Policy Memo as storyteller and liberal consideration as story is different from the traditional paradigm of lawyer as storyteller and client's case as story framed favorably. Given the distinct features of the discharge upgrade process, there is very little opportunity for traditional storytelling. For example, the brevity of the form limits storytelling by asking a series of questions with check boxes and small fields for very brief open narrative. Furthermore, the typical pro se veteran-applicant likely does not know how to supplement the form with a persuasive narrative. Given the prevalence of pro se applicants, the DoD Policy Memo stands in as an advocate for the veteran-applicant and tells the liberal consideration story about how the veteran's mental health condition mitigates misconduct to justify an upgrade. In this article, I am taking an outside look in to try to understand a possible reason the liberal consideration story is not having its intended effect.

Liberal consideration is a distinct departure from the historic view of misconduct as willful behavior deserving punishment. Liberal consideration does not change the standard for granting an upgrade—that remains inequity or impropriety. But it does change—or intends to

52 *Id.*

53 *Id.* at 671–72.

change—the lens through which board members evaluate a veteran's request for upgrade in the specific context of mental health conditions and their effects on behavior.

Liberal consideration tells a new story about how to understand misconduct. When a veteran's upgrade request identifies a mental health condition as a basis for relief, liberal consideration explains the connection between mental health conditions and behavior, weaving together a story based on the veteran's facts and the research supporting the connections between mental health conditions and behavior. The liberal consideration story explicitly recognizes that there are mental health conditions and experiences that excuse, explain, or mitigate what seems to be bad behavior (and what has been historically viewed as bad behavior).[54] Under the principles of liberal consideration as a policy, the board members must consider "changes in behavior; . . . deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; [and] substance abuse" in evaluating whether a veteran suffered from a mental health condition that produced behavior misidentified as misconduct.[55]

For this unique administrative body, board members have a responsibility as decisionmakers to evaluate the facts in light of liberal consideration, to receive the liberal consideration story and apply it to the veteran's facts. Unlike a situation where the law changes and an advocate then adapts her strategy, here, the law has not changed, but rather how to perceive facts under the law has changed. Board members are uniquely positioned as the (often) sole implementers of that change in perception. Through liberal consideration, the DoD Policy Memo as storyteller is trying to dislodge board members' strict view of misconduct as willful acts and induce them to see that same misconduct as part of a different story in light of the research demonstrating a connection between mental health conditions and behavior. Moreover, the DoD Policy Memo mandates that board members consider liberal consideration even if the veteran-applicant does not explicitly mention it, as long as the veteran asserts a mental health condition as a basis for relief.

Liberal consideration as story presents the opportunity for response-changing, by creating "new knowledge" about how to interpret facts within the equity standard. This new knowledge is the explicit recognition of and explanation for the relationship between mental health conditions and misconduct, and how that relationship mitigates misconduct to justify an upgrade. Liberal consideration is a new story: a veteran's misconduct

54 Hagel Memo, *supra* note 15; Kurta Memo, *supra* note 16.

55 Kurta Memo, *supra* note 16, Attach. ¶ 5.

was actually the result of a mental health condition and the veteran deserves relief. And yet, the boards continue to regularly deny upgrade requests, reflecting the "'historic hostility' in the military toward veterans with other-than-honorable discharges."[56] This resistance to upgrades reflects board members' response-reinforcing approach and further entrenches the boards' historical resistance to granting relief by closing off alternative views of the facts.

III. Response-Reinforcement: Invisible Reasons for Rejecting Invisible Wounds

The board members' response-reinforcing approach continues despite the DoD Policy Memo requiring a different interpretation of what seems to be, but is not, the same old story. Given the military's unique good-order-and-discipline-based culture and war-driven existence,[57] categories and entrenched neural pathways may be at play in the board members' decisionmaking. The uniquely military rhetoric used to maintain order and discipline likely creates deeply embedded and, ultimately, toxic neural pathways in the specific context of mental health in the military. With the deeply-rooted idea of a soldier or sailor as one who is strong and supports the mission over self, failure to do so is seen as failure, as weakness. When there is a physical injury that occurs as a result of military service, the servicemember may be honored even though the servicemember is physically unable to continue to fight. However, when there is a mental injury—an invisible wound—that occurs as a result of military service, the servicemember may be categorized as weak, failing to meet her duty, or otherwise unworthy of honor. That category is reflected at the time of discharge with an other-than-honorable discharge characterization, and then again when the discharge review boards regularly affirm the original decision rather than grant relief.

Consistent with the class action lawsuits against the Army and the Navy that allege the boards' failure to fully implement liberal consideration, Naval Discharge Review Board (NDRB) decisions from 2017–2019 include a number of examples that illustrate how response-reinforcement may be thwarting liberal consideration.[58] Those decisions suggest a deeply-

56 Wentling, *supra* note 18 (quoting Professor Michael Wishnie).

57 *See* Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 Clev. St. L. Rev. 123, 128–29 (2017) (discussing the military's "need to maintain good order and discipline" and "primary goal" to win wars).

58 As a practical matter, the NDRB decisions are used here because they are the decisions I had access to even after the Department of Defense online reading room that formerly provided access to all the boards' decisions was shut down for an indeterminable amount of time. I started my research in January 2019 with the NDRB decisions and fortunately downloaded about 500 decisions before the reading room disappeared. Relatedly, I focused on the NDRB decisions because I am a veteran of the United States Navy.

embedded skepticism and rejection of the idea that a mental health condition can be a legitimate explanation for a failure to follow the rules. Veterans are repeatedly denied relief even with evidence of a diagnosed mental health condition. This disbelief and rejection continue despite the policy mandate to give liberal consideration to cases involving mental health conditions; liberal consideration is a policy intended to offer all veterans with invisible wounds "a reasonable opportunity for relief" and to require the boards to give consideration to the "unique nature of these cases."[59] Two potential invisible reasons for the boards' continued rejection of invisible wounds center on the neurorhetoric concepts discussed above: categories and neural pathways.

A. Rigid Categories Rooted in Military Culture

Board members are typically mid-ranking career military officers.[60] Though they are not judges and are not legally trained, board members are tasked with applying standards to facts to reach a decision. In making these discharge upgrade decisions, board members likely do the same as judges: "draw on embedded knowledge structures, and they tend to turn first to whatever 'commonsense background theory [is] prevalent in the legal culture of their era.'"[61] Instead of "legal culture," we can think of board members as looking for commonsense theories prevalent within their military culture. For example, one commonsense theory may be disciplinarian in the context of the "need to maintain good order and discipline," and board members may operate consistent with commanders' "central disciplinarian role."[62] In addition, culture and individual experiences may be particularly influential on categories within the military given the deeply-rooted culture of giving and following orders.

Categories help humans streamline information, as part of cognitive rhetoric that helps explain how human minds respond to stimuli, or facts. Just as a warm and caring person may be categorized as motherly or maternal,[63] military personnel may be categorized as strong and committed to mission over self. The alternative to being strong and mission-focused is being weak and unable to contribute to the mission.

59 Kurta Memo, *supra* note 16.

60 Sec'y of the Navy: Naval Discharge Review Board (NDRB) Procedures and Standards, SECNAVINST 5420.174D 403.a.(2)-(3) (Dec. 22, 2004), https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5420.174D.pdf.

61 Berger, *supra* note 43, at 284.

62 *See* Weber, *supra* note 57, at 129.

63 Jewel, *supra* note 33, at 667; Berger, *supra* note 43, at 277.

The physical nature of being in the military contributes to these categories because physical strength is an inherent part of military service. Sailors, for example, learn the Navy's core values[64] during recruit training—boot camp—where group physical activity is the focus. Sailors learn to function as a group; if one sailor fails to meet a goal, the entire group of recruits fails and has to start over. The bodily experience of boot camp and regular physical training requirements permanently embed the idea of strength and prioritizing mission over self within the military "category," which also includes the ability to conform to military requirements. Put another way in military cultural terms, based on these characteristics, one is categorized as either fit or unfit for service.

The board members' failure to implement liberal consideration—a policy intended to recognize the relationship between misconduct and mental health conditions—may be in part explained by the power of categorization, specifically that of fit vs. unfit. When there is some misconduct—a violation of the Uniform Code of Military Justice (UCMJ)—that misconduct is almost invariably treated as a basis for unfitness rather than recognized as behavior consistent with a mental health condition. Instead of recognizing the complexity of each individual veteran's experience, including the specific stressor that gave rise to PTSD, how a veteran coped with PTSD, and how any behavior that looks like misconduct could actually be consistent with PTSD, board members seem to revert to a simpler category: fit or unfit.[65] Thus, the board members may assume that "some or a few attributes of a category stand for the whole"[66] when the attribute is misconduct standing for unfit as the whole, making the veteran undeserving of an upgrade.

Before PTSD was recognized as a mental health condition, servicemembers or veterans who claimed they experienced PTSD were categorized as weak, dishonorable, and unfit for further service. Consistent with the mind's desire to "simplify complex information,"[67] rather than try to understand the complex mental health effects of combat or other aspects of military service, the military's standard response has been to blame the individual for failing to meet mission and justify discharge due to the person's unfitness for service. Even now, with PTSD as a recognized mental health condition and decades of research to explain what PTSD is and how it affects behavior, the complexity remains. That complexity

64 The Navy's core values are Honor, Courage, and Commitment. *Dep't of the Navy Core Values Charter*, Sec'y of the Navy Ethics, https://www.secnav.navy.mil/Ethics/Pages/corevaluescharter.aspx (last visited Apr. 15, 2020).

65 *See* Jewel, *supra* note 33, at 672 (discussing the connection between physical experience and thought).

66 *Id.* at 668.

67 *Id.* at 667.

is easily resolved by reverting to well-known categories of fit and unfit, placing those with PTSD in the unfit category.[68]

In over 100 of approximately 500 decisions involving mental health conditions released between August 2017 and January 2019, the Board relied on the category of unfit in concluding that "the record reflects willful misconduct that demonstrated [the veteran] was unfit for further service."[69] The category of unfit was commonly used to reject veterans' claims that PTSD or other mental health condition mitigated behavior as a justification for an upgrade. The decisions have very little, and often no, explanation for how or why PTSD or other mental health condition did not mitigate misconduct, but rather just repeat the long-used phrase.[70] This lack of explanation suggests the power of the categories and the deeply-rooted connection between misconduct and unfitness for duty; the categories block the board members from receiving the liberal consideration story.

"Drug use" is another term or specific type of misconduct that particularly illustrates how categories prevent implementation of liberal consideration. Drug use is a violation of the UCMJ and, for the Navy, means automatic separation from service.[71] But this automatic separation and zero tolerance view of drug use is at odds with liberal consideration. Liberal consideration recognizes that a mental health condition can mitigate what otherwise may appear to be willful misconduct. Liberal consideration explicitly discusses drug use as a coping mechanism for PTSD, and in doing so, identifies a specific alternative narrative.[72] Rather than viewing drug use exclusively as willful misconduct, liberal consideration recognizes that drug use may be a symptom of a mental health condition incurred while in service, and therefore a basis for upgrade. This alternative narrative does not appear in the Board's decisions.

For example, in a case involving drug use, the veteran offered evidence of a sexual assault report, mental health conditions, and a post-service

68 Simcox, *supra* note 3, at 562 ("Oftentimes, the behavior associated with PTSD and TBI is behavior that puts servicemembers directly at odds with their commanders and the larger military culture."). Some of the "symptoms associated with PTSD and TBI, such as poor impulse control, loss of temper, impaired thinking, and poor exercise of judgment, may appear indistinguishable from the behavior of a servicemember who has chosen to rebel against the good order and discipline so necessary to the military's culture." *Id.*

69 *E.g.*, ND17-01088, at 3 (2018) (on file with author).

70 *See* Jewel, *supra* note 38, at 51. ("[W]hen categories are used rigidly and uncritically, they generate less-robust legal reasoning and may also become a tool for reproducing injustice in the law.").

71 10 U.S.C. § 912a (2018) (subjecting wrongful use, possession, manufacture, or distribution of controlled substances to punishment "as a court-martial may direct").

72 Kurta Memo, *supra* note 16, Attach. ¶ 5. The Kurta Memo also urges a relaxed view toward drug use as a reflection of many states' legalization of marijuana use, and explains that "[t]he relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case." *Id.* Attach. ¶ 26.i.

PTSD diagnosis originating from an in-service military sexual trauma (MST) to justify her request for an upgrade.[73] The veteran "attribute[d] her drug use to MST brought about after the alleged sexual assault."[74] Rather than engage with an assessment of whether the MST and other mental health conditions excused or mitigated the drug use, as required by liberal consideration, the board members focused solely on the existence of drug use to reach a negative decision on the basis of drug use as willful misconduct.

Specifically, in this case, the veteran admitted to using drugs prior to enlistment, something she had not admitted to at the time of enlistment.[75] The board members used that against her in combination with her statement that she used drugs once to self-medicate for food poisoning while on active duty. A former instance of self-medicating—although a willful violation of the UCMJ—has nothing to do with the instance of drug use to cope with PTSD that led to her discharge. The Board's decision, though, suggests that board members used those facts against the veteran in concluding that the mental health condition did not mitigate the drug use.[76] The decision mentioned mitigation, but did not engage in any sort of balancing to determine or explain why the mental health condition did not mitigate the drug use.[77] The decision did not even acknowledge that drug use is a recognized coping mechanism for PTSD; that lack of acknowledgement suggests that board members' rigid response to drug use thwarted liberal consideration's alternative, response-changing guidance.

In addition to rigid thinking, categories probably create efficiencies for the board members to quickly decide one upgrade application and move on to the next one in the pile. Relying on willful misconduct as an explanation for a veteran's behavior is an easy way to resolve an application because misconduct typically justifies an other-than-honorable discharge characterization.[78] But here, the efficiencies are at the cost of full implementation of liberal consideration, a necessarily complicated policy change intended to infuse a better understanding and assessment of mental health conditions and behavior. To the extent categories are used to avoid full implementation of liberal consideration, they blind the

73 ND17-01269, at 3 (2018) (on file with author).

74 *Id.*

75 *Id.* at 3–4.

76 *Id.* at 4.

77 *See id.*

78 Jewel, *supra* note 38, at 53 (describing Justice Holmes' overly simple analysis in determining that an airplane is not a vehicle because "vehicle" is commonly understood as "only includ[ing] vehicles running on land").

board members from seeing alternatives, even though these alternatives are expressly identified and mandated by the DoD Policy Memo.

B. Entrenched Neural Pathways and Embedded Knowledge Structures: Justification for Denying Relief Despite Liberal Consideration

When reaching decisions, board members likely draw on embedded knowledge structures, perhaps even more so than judges, because of the well-defined categories of military culture. With the military culture categories as a baseline, embedded knowledge structures are steeped in military ideals such as strength over weakness, and board members may easily justify their decisions by viewing veterans' requests for upgrades as stories about weakness even though liberal consideration explicitly rejects that approach when mental health conditions are involved. Board members' consistent reactions to requests for relief on similar grounds suggest that board members have thoughts "cemented in the brain," and that those thoughts—e.g. zero tolerance for drug use, PTSD does not overcome willful misconduct—"appear[] with great rapidity and arise[] unconsciously."[79] Indeed, many of the decisions include exact copy and paste text, where the decision gives the same "reason" for rejecting a veteran's upgrade request. Those repeated "reasons" for denying relief demonstrate board members' inability to see the alternatives liberal consideration recognizes and legitimizes, as well as illustrate the power of the brain to repeatedly seek the same neural pathway.

The pattern of using the same language to reject upgrade requests may actually "cut off" alternative responses, including granting an upgrade. The Board's decisions suggest a strong case of attenuation, where the repeated rejection of upgrade requests for certain reasons "continu[ally] activat[es] . . . the same neural pathways by the same stimulus," and that repetitive action makes the rejection "highly difficult to undo."[80] Especially in the military context, where a strict attention to order and discipline overrides everything, these neural pathways block alternatives. The repeated language also demonstrates how "rhetoric can get inside our brains and bodies and make us think and feel things without the intervention of conscious rationality."[81] The nature of the Board's decisions suggests that board members work very much in a repetitive, neural-pathway-creating and entrenching way. Thus, not only is it likely

79 Jewel, *supra* note 33, at 671.

80 *See id.*

81 *Id.* at 671–72.

that there is copying and pasting text (from phrases to sentences to full paragraphs) from one decision to another, but board members' brains are repeatedly reinforcing the faulty reasoning used to justify the decisions.

In particular, the NDRB regularly denies relief by concluding that the record does not show that PTSD or another mental health condition was a sufficient mitigating factor to excuse misconduct, often with little explanation for this conclusion. The Board's decisions regularly demonstrate a hard stance against any misconduct and appear to default to treating misconduct as willful rather than recognizing that misconduct can actually be something else: behavior consistent with coping with a mental health condition. For example,

> Though the Applicant may feel that MST and other mental health conditions may have been an underlying cause to her misconduct, the record reflects willful misconduct that demonstrated she was unfit for further service. There is not sufficient evidence to suggest that the Applicant's claim of MST or other mental health conditions mitigated the Applicant's misconduct.[82]

This language is repeated or nearly repeated in over 100 decisions between August 2017 and January 2019. This hard stance is an embedded knowledge structure—misconduct should be punished—that impedes the application of liberal consideration.

In contrast, liberal consideration explicitly recognizes that servicemembers experiencing a mental health condition may behave in ways others would not; it recognizes drug use as consistent with coping with PTSD and even calls for a relaxed view of drug use consistent with society's changing view as reflected by decriminalization in many states.[83] Liberal consideration creates a new story: a servicemember served, experienced a mental health condition due to that service, and then, because of the mental health condition, did something that, although previously treated as misconduct, was actually behavior consistent with a mental health condition. In this new story, the veteran does not deserve to be punished, but rather deserves relief. Yet, board members appear closed off to that alternative view, sticking instead to the historical approach to see misconduct as misconduct, and not as behavior consistent with a mental health condition.

Another example of repeated language highlights the embedded knowledge structure of how seeking assistance means a person has a

82 ND17-01269, at 4.

83 Kurta Memo, *supra* note 16, Attach. ❡❡ 5, 26.e, 26.i.

mental health condition and not seeking assistance must mean there was no mental health condition.

> Additionally, there is insufficient evidence in the record, nor did the Applicant provide any documentation, to indicate she attempted to use the numerous services available for servicemembers who undergo mental health problems, personal problems or are victims of a sexual assault during their enlistment, such as the Navy Chaplain, Medical or Mental Health professionals, Navy Relief Society, Family Advocacy Programs, the Red Cross or a Sexual Assault Victim Advocate/Response Coordinator. Therefore, the NDRB is unable to establish this contention as a basis for mitigation or consideration as an extenuating circumstance.[84]

In 22 decisions (from that same set, August 2017 to January 2019), the Board repeated this "reasoning," concluding that if someone did not seek assistance, they then did not have a mental health condition, because if someone did have a mental health condition, surely, they would seek assistance. Though this language is not repeated as often as other examples, this language illustrates how far board members may go to find ways to reject the alternative story liberal consideration presents and to reinforce the traditional view. Here, the lack of evidence is used against the veteran on no basis other than board members' assumptions that someone who truly needed help would seek help. That assumption is in direct conflict with liberal consideration's principles that a "veteran's testimony alone, oral or written, may establish the existence of a condition or experience"[85] and that "[m]ental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected."[86]

Liberal consideration recognizes that not seeking help may be consistent with a mental health condition, even though there are numerous resources available within the military. Many veterans seeking an upgrade do not have an in-service diagnosis of PTSD or other mental health condition. This makes sense because if a servicemember had an in-service diagnosis, she may have received health care while in service and perhaps never behaved in the ways she did that led to her other-than-honorable discharge. Liberal consideration makes room for veterans without an in-service diagnosis to be eligible for relief based on a post-

84 ND17-01098, at 3–4 (2018) (on file with author).

85 Kurta Memo, *supra* note 16, Attach. ¶ 7.

86 *Id.* Attach. ¶ 26.e.

service diagnosis or even on their statement alone when that mental health condition mitigates the misconduct. However, in many cases when there is no in-service diagnosis, board members take the next step to also find no record of the veteran seeking assistance while in the military. Board members then use that lack of seeking help to justify their decision that there was no mental health condition because in the board members' embedded knowledge structure, if a servicemember needed help, they would seek out the help that was available to them. And that story is simple, not requiring board members to try to understand the complexity of someone else's decision not to seek help.

One final example involves a more overt rejection of liberal consideration. In reviewing misconduct and whether a mental health condition mitigated it, the Board decisions often refer to equity and consistency with prior decisions involving similar behavior to justify the lack of mitigation in a current decision. In 144 of the decisions from the NDRB set, the Board used the exact same phrase to sum up its refusal to grant relief:

> The NDRB found the characterization of the Applicant's discharge was equitable and consistent with the characterization of discharge given others in similar circumstances.[87]

Though this language appears in some decisions that did not involve mental health conditions, and therefore did not require liberal consideration, the language was used primarily in cases requiring liberal consideration. For those cases involving liberal consideration, this statement represents a contradiction with—or flat-out rejection of—liberal consideration as a new story. Applying the new principles of liberal consideration inherently means that pre-liberal consideration decisions cannot justify post-liberal consideration decisions. Furthermore, in many of these decisions where the Board relies on "precedent," of past decisions, the Board also discusses how the misconduct at issue was isolated. The isolated nature of misconduct is identified by liberal consideration as supportive of relief, recognizing that an upgrade "does not require flawless military service," and that "some relatively minor or infrequent misconduct" is consistent with an Honorable discharge.[88] Yet board members refuse to see it that way, or simply cannot see it that way because of the ever-deepening neural pathway that rejects the alternatives liberal consideration presents. For board members, it seems that misconduct is misconduct is misconduct.

87 ND17-00889, at 3 (2018) (on file with author).

88 Kurta Memo, *supra* note 16, Attach. ¶ 26.h.

These examples represent how board members' invisible thinking (or lack of thinking) may thwart liberal consideration. The typically negative outcomes become "part of [the board members'] collective brain structure," and reaching an alternative outcome requires intentional work to recreate new pathways that will recognize and apply liberal consideration.[89] Ultimately, neurorhetoric may impede board members from making individualized judgments without even knowing that this effect is happening. In making these judgments, board members are likely guided by somatic markers that "represent canalized thought patterns that guide the direction, rapidly and unconsciously."[90] Although these somatic markers may create an efficiency in board members' ability to quickly recognize facts they have seen before and make decisions consistent with past decisions on those recognized facts, the efficiency is at the cost of reasoned, individualized decisions with the benefit of the liberal consideration story. Thus, as an entity, the Board has developed and reinforced a bias against granting upgrades, and that bias cannot be overcome simply by a policy change due to board members' canalized thought patterns that did not disappear just because liberal consideration created the space for a new understanding of misconduct.

To some extent, neurorhetoric as an explanation for the failure of liberal consideration is a relief. The policy itself may not be failing, but instead, the problem may be a matter of implementation. Board members need to intentionally shift their thinking in ways that are consistent with liberal consideration's response-changing principles, and veterans and their advocates can help push that shift. Indeed, board members have an obligation to receive—and decide within—the liberal consideration story, even when it is not presented as part of an upgrade request.

IV. Response-Changing: Toward Actual Liberal Consideration

"[T]he identification and deployment of alternative discourses have the potential to carve out healing pathways that can reshape brains."[91] DoD has identified alternative discourses by promulgating the liberal consideration policy, but the boards' deployment has fallen short. Board members still need to do the work of suspending disbelief and engaging with the alternative, response-changing liberal consideration story. More

89 Jewel, *supra* note 33, at 681.

90 *Id.* at 672.

91 *Id.* at 665.

specifically, board members need to intentionally implant positive pathways by recognizing PTSD and other mental health conditions and their role in mitigating behavior. The more board members engage with liberal consideration to find in favor of granting upgrades, the easier it will become for board members to continue doing so as they break the pattern of denial and intentionally open up to liberal consideration's alternative story.

As Professor Jewel suggests in regard to solving or decreasing toxic racial narratives, there is hope in the young because "their brains have yet to be molded by these longstanding cultural tropes."[92] Perhaps enlisted and officer training programs targeted at junior servicemembers could be developed to educate servicemembers on mental health conditions and how those conditions affect behavior. With that understanding, future board members may be better able to see and accept the specific connection that liberal consideration makes: servicemembers deserve to be recognized, rather than punished, for their service that included suffering from a mental health condition. Even creating a space for discussion about how mental health conditions affect servicemembers' behavior would potentially create room for a new narrative that abandons the traditional narrow and exclusive categories: strong vs. weak, or fit vs. unfit.

For true change, there must be a willingness to listen to and accept alternatives. For example, in the context of racially-coded categories, "mainstream white Americans must accept that black Americans experience encounters with the police in a way that drastically differs from white experience."[93] Similarly (though I am not equating the two contexts), board members must accept that servicemembers experience mental health conditions, that mental health conditions affect behavior, and that when a mental health condition mitigates what is otherwise misconduct, the servicemember deserves an upgrade in recognition of his or her service. Board members must open their minds to understanding that behavior that looks like misconduct is actually behavior consistent with coping with a mental health condition, and they must be open to alternative narratives that recognize honorable service in the face of a mental health condition. Likewise, board members must be open to acknowledging that their own experiences without (or even with) a mental health condition may drastically differ from a veteran-applicant's experience.

While there may be a number of ways to improve liberal consideration's implementation, one way is for board members to recognize and reject existing negative neural pathways that are inconsistent with liberal consideration. This article suggests that categories and embedded

92 *Id.* at 690.

93 *Id.* at 691.

knowledge structures contribute to the boards' regular pattern of denying relief, consistent with the boards' historical approach but inconsistent with the principles of liberal consideration. Building awareness of the invisible reasons for rejecting the liberal consideration story can lead board members to consider each veteran's request in the specific context of liberal consideration, use the principles of liberal consideration to justify relief, and create new positive neural pathways to recognize and honor those who have served while enduring a mental health condition.

Liberal consideration as a policy is consistent with a three-part process for "persuad[ing] people to adopt a view that conflicts with what they already know."[94] Here, what board members already know—or think they know—is that misconduct is willful and therefore deserves an other-than-honorable discharge. To disrupt that thinking, the first step is to provide relevant evidence.[95] Second, that relevant evidence should be "inconsistent with pre-existing knowledge structures."[96] And third, the relevant evidence should be presented "in circumstances in which the audience can attend to the evidence."[97]

The DoD Policy Memo takes all three steps. First, it acknowledges the research connecting mental health conditions and behavior; that is the relevant evidence. Second, the evidence of this connection is inconsistent with historic thinking that all misconduct was willful. Third, the Policy Memo lays out specific application of liberal consideration to facts presented by veteran-applicants in their discharge upgrade requests. The Memo gives the audience—board members—a mechanism for attending to and assessing the evidence. For example, when an application presents a mental health condition as a mitigating factor, liberal consideration is triggered.

Even when presented with this relevant and inconsistent evidence, there is no guarantee of change (as is obvious from liberal consideration's lackluster results thus far), but the challenge itself should not stop board members from seeking a path to changing their embedded knowledge structures.[98] For example, with full awareness of how response-reinforcement has thwarted liberal consideration, the boards could intentionally create a new category based on the principles of liberal consideration. Instead of equating all misconduct with willful behavior, board members could explicitly discuss how mental health mitigates or does

94 Berger, *supra* note 43, at 299.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

not mitigate behavior in each decision that is based on an application that asserts a mental health condition. Grappling with the question of mitigation (rather than automatically rejecting it) could help board members' brains engage in new thinking and create new pathways. A new category or new categories could improve implementation of liberal consideration, even if only to some degree, simply by creating an awareness and potential openness to the new story. Of course, as warfare changes and as research continues to explore and explain the relationship between behavior and mental health conditions, there may be a future need for another break from relatively new embedded knowledge structures or categories.

In the unique realm of discharge review boards, most applicants for relief are pro se, and decisions are often made on the record alone. Given the typical lack of advocacy on behalf of the veterans seeking relief, board members themselves should take on the role of rejecting embedded knowledge structures. Liberal consideration creates the opportunity for board members to do just that: to liberally consider the facts and to imagine an individual veteran's request for relief within the context of PTSD or other mental health condition with the full "complexity, diversity, and fluidity of human experience."[99] In the liberal consideration story, the DoD Policy Memo is the storyteller and board members are the audience. But board members are also more than the audience; they are obligated to do more than passively listen to the story. Due to the pro se status of most applicants and the policy mandate for liberal consideration in cases involving mental health conditions, board members are obligated to engage with the story, to facilitate its telling. Armed with some possible explanation for resisting the liberal consideration story thus far, board members now have an opportunity to embrace liberal consideration as an integral part of their decisionmaking. With this better understanding of the invisible reasons for denying upgrade requests, the liberal consideration story stands a better chance of being heard and used to grant upgrades to veterans with invisible wounds.

99 *Id.* at 305.

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ARTICLE

HENDIADYS IN THE LANGUAGE OF THE LAW

WHAT PART OF "AND" DON'T YOU UNDERSTAND?

Elizabeth Fajans* & Mary R. Falk**

The rhetorical device hendiadys, first identified in the work of Virgil, is a type of conjoined phrase—that is, it joins two words by "and." But hendiadys differs from other conjoined phrases in that it expresses a single complex and sometimes unfathomable idea. The most frequently cited example is a line from Virgil's *Georgics* that translates literally as "we drink from gold and cups," and is most often rendered in English as "we drink from golden cups."[1] But scholars have long challenged this simplistic reading on the ground that it does not account for Virgil's decision to use two nouns in place of a noun and adjective: if he merely wanted to say "golden cups," he could have done so.[2] It is more likely, they argue, that the poet meant the reader to grasp at least two successive ideas (that the occasion required both "the appropriately sacred vessel and the appropriately rich material"), if not three ("each idea in turn and . . . their combination or fusion").[3] Indeed, "[t]he central word in hendiadys is usually *and*, a word we take as signaling a coordinate structure, a parallelism of thought and meaning . . . [b]ut in hendiadys . . . this normal expectation is not met or is even deliberately thwarted."[4] This is what distinguishes hendiadys from other types of conjoined phrases.

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1 George T. Wright, *Hendiadys and Hamlet,* 96 PMLA 168, 168 (1981).

2 *Id.*

3 *Id.*

4 *Id.* at 169.

Until recently, hendiadys has figured only rarely in the analysis of legal texts. The first extensive scholarly contribution, in 2016 by Professor Samuel L. Bray, argues that the constitutional phrases "cruel and unusual" and "necessary and proper" may be interpreted as hendiadys—"unusually cruel" and "properly necessary."[5] Whether you think these are reasonable readings or not, Bray's interpretation of these conjoined phrases as hendiadys shows that he misunderstands the term. First, as noted above, hendiadic phrases have multiple meanings. But by interpreting one adjective as an adverb modifying the other in these phrases, Bray attempts to fix their meaning rather than embracing the rich variety of meaning inherent in hendiadys. But second, and more importantly, he is *a priori* mistaken in his attempt to ground his interpretation in hendiadys: given its inherent indeterminacy, it simply has no place in the language of the law, whether as interpretive or persuasive strategy.[6] Quixotically or not, lawyers seek fixed meaning in words, because words are all the law has to shape reality.[7] But literature waves a pirate flag of defiance to a single, articulable meaning, and hendiadys is perhaps the ultimate challenge: it multiplies and problematizes meaning. In short, though thoughtful, Bray's article is the poster-child for inter-disciplinary misalliance. And finally, hard though it may be for legal scholars to concede, the solution to perplexing statutory or constitutional pairs may lie less in rarefied literary interpretation than in informed, ethical, and clear judicial construction.[8]

Section I of this article provides historical context for hendiadys. It looks at the use of hendiadys in literature, with emphasis on Shakespeare's *Hamlet* and the novels of William Faulkner, where the device effectively and often unsettlingly underscores themes of doubt, self-deception, multi-

5 Samuel L. Bray, "*Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 690–91 (2016).

6 Moreover, the use of hendiadys to interpret conjoined phrases in the law finds no support in the history of legal language. Cloistered in royal courts, law courts, and chambers, and derived from Latin, French and Old English, the language of the law developed at a remove from both ordinary and literary English. *See* Dale Barleben, *Legal Language, Early Modern English and their Relationship* (2003), http://homes.chass.utoronto.ca/~cpercy/courses/6362Barleben1.htm.

7 *See, e.g.*, Joshua A.T. Fairfield, *The Language-Game of Privacy*, 116 Mich L. Rev. 1167, 1169 (2018) (noting that "[l]aw is language and . . . like other languages . . . develops according to systems of negotiated meaning"); David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. Miami. L. Rev. 505, 529 (2006) (noting that "law is language, and therefore it follows that it is impossible to do jurisprudence without committing oneself to a position on the relation of signifier to signified").

8 Peter M. Tiersma explains that

> [I]nterpretation, when referring to ordinary language usage, refers primarily to a mental process that attempts to infer the communicative intentions of the speaker or writer. For any number of reasons, that process can go awry . . . [but] that is often empirically testable. . . . This type of ordinary language interpretation is also quite common in the legal sphere. . . . Yet there is also a form of legal interpretation that is quite distinct from ordinary language interpretation. This occurs when a legal actor—usually a court—declares that certain legal language will have a particular meaning. For purposes of clarity, I propose that we resuscitate the . . . obsolescent term statutory construction . . . .

Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 Wash. U. L. Q. 1095, 1096–97 (1995) (emphasis omitted).

plicity, complexity, and ambiguity. This background section also discusses the history of conjoined phrases in legal language. Section II then looks at misguided attempts to use hendiadys to understand conjoined phrases in the law, where ambiguity is far from desirable. Finally, in Section III, we look briefly at two other literary devices: synecdoche and metaphor. Although they are not as intrinsically oppositional to settled meaning as hendiadys, if used carelessly, these figures of speech can confound meaning and mask conscious or unconscious biases that threaten reasoned analysis and equitable decisionmaking. We conclude that metaphor and synecdoche have a place in the lawyer's rhetorical toolbox when handled carefully—unlike hendiadys, which we believe has no proper place in the language and interpretation of the law.

I. Background

A. Hendiadys in Literature

The very ambiguity and indeterminacy that is a trademark of hendiadys and that would make it sit uncomfortably in legal texts or, for that matter, in instructional materials on assembling an IKEA couch, is what makes it appropriate in some literary works. William Empson, the poet and critic, explains that ambiguity "is not satisfying in itself, . . . it must in each case arise from, and be justified by, the peculiar requirement of the situation. On the other hand, it is a thing which the more interesting and valuable situations are more likely to justify."[9]

In literature, hendiadys is one stylistic means of conveying problematic situations and questions.[10] It does this by defying expectation, refusing to conjoin obvious pairs and instead making perplexing connections. "The syntax of hendiadys is simply coordination but surely the power of the figure comes from the potential conflict . . . between the coordinate syntax and a semantic disjunction."[11] Hendiadys "has a syntactical complexity that seems fathomable only by an intuitional understanding of the way words interweave their meaning rather than by pains-

9 William Empson, Seven Types of Ambiguity 235 (1966).

10 Of course, structure, characters, and imagery also support these themes. In *Hamlet*, a revenge tragedy with multiple subplots, Laertes and Fortinbras serve as revenge heroes in antithesis to Hamlet. Rosencrantz and Guildenstern, onetime friends of Hamlet whose parasitic dependence upon the king renders them spies and stooges, and Reynald, an acquaintance of Laertes turned informant of Polonius, upend notions of trust and friendship. The dumb-show mimics the play-within-the-play, which is in turn a menacing double of *Hamlet*. Images are full of oxymorons and paradoxes: "mirth in funeral, and with dirge in marriage." Roles and relationships become murky once Hamlet's uncle and mother marry and become "uncle father and aunt mother." The images, structure, role reversals, and doubling produce "a sort of pathological intensification." *See* Frank Kermode, Shakespeare's Language 102 (1st ed. 2000).

11 Ellen Spolsky, *The Limits of Literal Meaning*, 19 New Literary History 419, 426 (1988).

taking lexical analysis":[12] not "bows and arrows of outrageous fortune" (components of one weapon) nor "bows and slings" (two instruments for launching missiles) or "stones and arrows" (two types of missiles), but *slings and arrows* (mixed categories).[13] Subversion of the normal coupling forces the reader to conjure successively the stone hurled by slings, the arrow sent flying by the bow, and the wounds delivered by each.[14]

Because hendiadys requires a seeming mismatch, most literary scholars would exclude from this literary device everyday expressions with clear and settled meanings like "nice and hot"; phrasal collocations or tautologies like "lord and master" or "high and mighty," in which two words are used simply for emphasis and elevation, and expressions using related terms, like "pen and ink" or "wind and rain."[15] For conjoined terms to be hendiadys, the element of the unexpected must be present, even when it deviates from its most common appearance in noun and noun or adjective and adjective form.[16]

Literary scholar Duncan Chesney opines that hendiadys's unexpected, elevated, and unsettling style is most suited to tragedy, and as "tragedy is only possible at certain historical moments of collision and radical social change,"[17] it emerges mostly during transitional eras. This may be why hendiadys is used some sixty-six times in *Hamlet,* underscoring "the play's themes of anxiety, bafflement, disjunction, and the falsity of appearance."[18]

Hamlet is the product of a transitional era. In the move from the medieval to renaissance ages, Shakespeare uses hendiadys to dramatize the sensibility that divides Hamlet from the heroes of traditional revenge tragedies. Hamlet says that when Fortinbras marches off to battle Poland *for a fantasy and trick of fame*, twenty thousand men "go to their graves like beds."[19] The hendiadys suggests that men are duped into sophomoric,

12 Wright, *supra* note 1, at 172.

13 Note that hendiadic expressions quoted in this section appear in italics.

14 *Cf.* Wright, *supra* note 1, at 182 (discussing this hendiadys).

15 *See id.* at 174. Most scholars would also exclude zeugma, which unlike hendiadys is comic and witty. Zeugma is "a kind of ellipsis in which one word, usually a verb, governs several congruent words or clauses" usually in curious yokings. *See* Duncan M. Chesney, *Shakespeare, Faulkner, and the Expression of the Tragic,* Coll. Literature, Summer 2009, at 156 n.4. Examples are Thomas Macaulay's "The Russian grandees came to Elizabeth's court dropping pearls and vermin," *see* Gertrude Block, *Language Tips*, N.Y. St. B.J., Jan. 2014, at 60, and Pope's "When husbands, or when lapdogs breathe their last," *see* Wright, *supra* note 1, at 170. These phrases have a syntactically parallel structure but seemingly disparate ideas. *Id.*

16 Some literary scholars would restrict hendiadys to its purest and most common form of noun pairs, though Wright identifies twelve forms of hendiadys, including noun and adjective-noun ("that *capability and godlike* reason"); adjective, adjective and adjective ("*wanton, wild, and usual* slips"); verb and verb ("that *live and feed* upon your majesty"). *See* Wright, *supra* note 1, at 185–88.

17 Chesney, *supra* note 15, at 144.

18 *See* Wright, *supra* note 1, at 169, 178.

19 William Shakespeare, The Tragedy of Hamlet Prince of Denmark act 4, sc. 4, ll. 63–65 (Barbara S. Mowat & Paul Werstine eds., 2012).

grandiose dreams of fame and personal advancement that turn out to be both deceptive and destructive. Although Shakespeare's early revenge tragedies took no notice of the morality of endless cycles of revenge, by the time *Hamlet* was written they are put to question.

The disturbing dichotomy between appearance and reality is also apparent in Hamlet's first encounter with the ghost of his father. There he questions,

> [W]hy the sepulcher
> Wherein we saw thee quietly interred
> Hath oped his *ponderous and marbled jaws*
> To cast thee up again.[20]

Although "*ponderous and marbled* jaws" can be translated as meaning "heavy stone doors," it also suggests that the mystery behind these doors' re-opening requires pondering, determining, whether the spewed forth apparition is holy or unholy.[21] Moreover, because the doors are likened to jaws there seems to be a biblical analogy with Jonah and the whale. Thus, hendiadys captures a complex of meanings in a single figure of speech.

The post-Reconstruction South of William Faulkner was also a historical moment of "collision and radical social change," and he used hendiadys to get at the heart of "a new South faced with the implications of its awful 'inheritance.'"[22] In *Absalom, Absalom,* Chesney explains, the language is convoluted.

> The truth of the South is foul and dire, and neither the successive narrators nor the reading audience (then or now) can readily accept it straight on. It is a truth, like all tragic truths, that can only be articulated indirectly, anamorphically, in words that undermine or disavow themselves even as they multiply and abound.[23]

For Faulkner's tale of oppression, exploitation, fratricide, incest, and miscegenation, themes similar to those in *Othello* and *Hamlet*, hendiadys seems appropriate. Faulkner clearly thought so when he borrowed the hendiadic title *The Sound and the Fury* from *Macbeth*—a mad cacophony of furious noise and roaring anger. They also appear frequently in *Absalom, Absalom*: "*fatal and languorous* atmosphere"; "*dismal and*

20 *Id.* at act 1, sc. 4, ll. 53–56 (emphasis added).

21 "Be thou a spirit of health or a goblin damned, Bring with thee airs from heaven or blasts from hell." *Id.* at act 1, sc. 4, ll. 44–46.

22 Chesney, *supra* note 15, at 144, 153.

23 *Id.* at 154.

incorruptible fidelity"; "motionless in *the attitude and action* of running"; "the *stern and meager* subscription list of the county newspaper's poems" that are issued "out of some *bitter and implacable* reserve of undefeat."[24]

If hendiadys in literature speaks to cultural transitions that cause uncertainty, conjoined phrases in the law have a very different history and impact on law. Whereas hendiadys in literature meaningfully nuances and complicates human experience, hendiadys in statutory interpretation threatens the consistency of meaning and application.

B. Conjoined Phrases in the Law

Cloistered in royal courts, law courts, and chambers, and derived from Latin, French, and Old English, the language of the law developed at a remove from both ordinary and literary English.[25] Among other distinctive features, it was characterized by conjoined phrases, also known as binomial expressions. These expressions are among the most defining and durable features of our legal language, as prevalent in early Anglo-Saxon legal documents as in contemporary form-book wills and contracts.[26] Indeed, it appears that conjoined phrases are five times more common in legal English than in ordinary or literary English.[27] Rightly or wrongly, they are perhaps the most derided aspect of legal language, eliciting jeers of "legalese!" and accusations of self-serving, obscurantist verbosity. While surely no profession or professional is without fault, other more substantive and consequential reasons also underlie law's "and" obsession.

Some conjoined phrases join two terms that were once, but are no longer, distinct from each other, like "last will and testament." Some phrases are obviously intended to convey solemnity, like the requirement that a witness in medieval England swear that "I with my eyes saw and with my ears heard," rather than merely swearing to tell the truth.[28] And

24 *Id.* at 145. This last example may mean the newspaper published odes that are read by a meager few but written and published in bitter defiance of their interest and debatable worth. *Id.*

25 Dale Barleben explains that

> modern English legal vocabulary finds its roots about the time of the Norman Conquest. Old English, Latin, and French were progenitors for legal [early modern English], as borrowings from these latter two languages helped shape the later lexicon. Old English words retained were less precise, yet were already ingrained in "boilerplate" legal language that relied on these phrases for their consistency. Latin and French, in contrast, were used more to indicate precise meanings for evolving concepts of law that needed articulation, yet also led to the impenetrability commonly associated with such language. Both Latin and French also held prestige value in their usage, which underscored the closed nature of legal language and its belonging to a self-regulating society.

Barleben, *supra* note 6. Indeed, French was the language of the law as late as the 17th century. Peter M. Tiersma, Legal Language 35 (2000).

26 Tiersma, *supra* note 25, at 15.

27 Marita Gustafsson, *The Syntactic Features of Binomial Expressions in Legal English*, 4 Text 123, 125, 132 (1984).

28 Tiersma, *supra* note 25, at 15.

some are intended to block every possible end-run by a wily opponent or ill-intentioned citizen.[29]

However, many, perhaps even the majority, of binomial expressions join two synonyms or near-synonyms for the purpose of clarity. One scholar notes the historical background as follows:

> [A] characteristic related to [legal] vocabulary . . . [by the 1590s] was the production of binomials; that is, new terminology commonly formed by combining a native term, or an integrated loan word, and its foreign (near-) synonym . . . . Terms like "bargain and sale" or "breaking and entering" are such examples, combining a French term and a term from Old English, to enumerate the specifics of a legal concept. Similar such binomials in the literary register were often also common, but functioned for completely different reasons, including, for example, the production of paradox.[30]

Such expressions also serve a related rhetorical purpose, the creation of emphasis, as in tautologies like "cease and desist"; sometimes these phrases are alliterative, like "aid and abet." As wordy and expendable as these expressions seem today, they are rooted in the drafters' attempts to make words *do something*: give the law effect in the world by inducing compliance. These locutions are not so much declarative as directive.[31] Put another way, "Cease and desist" means not just "Stop it" but "Stop it! This means you!"

Sometimes, as with "will and testament" or "cease and desist," it is obvious into which category a conjoined phrase best fits, and its interpretation is straightforward. Sometimes, however, it is far from clear how the two elements relate to each other, as for instance in uneasy drafting compromises or when the two terms in an emphatic tautology are not quite synonymous. And other pairs, though joined by "and," are syntactically ambiguous and can be read as disjunctive or conjunctive (or even both) in meaning.[32] Adding to the confusion is the interaction between

29 *Id.*

30 Barleben, *supra* note 6 (citing Terttu Nevalainen, *Early Modern English Lexis and Semantics, in* The Cambridge History of the English Language Vol. III 332–458 (Roger Lass ed., 1999)).

31 *See, e.g.,* Elizabeth Fajans & Mary R. Falk, *Linguistics and the Composition of Legal Documents: Border Crossings*, 22 Leg. Stud. Forum 735–36 (1998).

32 *See, e.g.,* Ira P. Robbins, *"And/Or" and the Proper Use of Legal Language,* 77 Md. L. Rev. 311, 317–18 ("The word 'and' can create misunderstanding when nouns connected by it are 'acting, or are being acted on, individually or collectively.' Using 'and' to connect the *subjects* of a sentence can create ambiguity in whether the subjects act individually or collectively, such as 'A and B must call C.' Must A and B complete this call while using the same phone, or can they call separately? Similar problems arise when the *objects* of a sentence are connected by 'and,' such as 'C must call A and B.' Here, the reader is left uncertain whether C is required to call A and B together or individually. Moreover, using multiple adjectives joined by 'and' to describe a plural noun can create confusion over whether both adjectives modify the noun collectively or individually. For

traditional conjoined phrases and the traditional rule of construction holding that every word should be given effect.[33]

Yet for all the need for an interpretive touchstone, it seems unlikely that calling a problematic conjoined phrase in the law hendiadys is helpful, for two reasons. First, hendiadys is an obscure literary figure. As detailed above, it was used extensively, intentionally, and to brilliant and disturbing effect by Shakespeare. Although hendiadys has not entirely disappeared,[34] later occurrences are rare and seemingly confined to literature, and it is unlikely that a conjoined phrase in the law derives from such a recondite rhetorical figure.

Second, by its nature, hendiadys escapes fixed meaning; it is not simply ambiguous or vague, but rather, simply (and almost certainly intentionally) indeterminate, immune to "painstaking lexical analysis."[35] Lawyers seek settled or at least reliable meaning,[36] however quixotic the attempt, while a writer who uses hendiadys rejects a fixed single meaning. At a minimum, it would seem that the use of hendiadys in statute, judicial opinion, or contract would be extremely unwise. Whether and with what frequency and effect it has been used in the law is a question that has only recently become a subject of debate among legal scholars.

II. Hendiadys in the Law

Although several attempts precede it,[37] and a number have followed it, the most extensive use of hendiadys to interpret legal language is

instance, the phrase 'Emily must call young and healthy residents' leaves the reader wondering whether, to receive a phone call from Emily, these residents must be both young and healthy or if they require only one of the listed characteristics. These are only a few examples where, in the right context, 'and' can confuse the reader of a contract, statute, or other document.") (quoting Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting,* 80 St. John's L. Rev. 1167, 1172 (2006)).

33 Tiersma, *supra* note 25, at 64.

34 Wright, *supra* note 1, at 171–72. Wright mentions its occasional use in Milton, in Poe's *The Fall of the House of Usher* ("*ponderous and ebony* jaws" echoes *Hamlet*), in Hawthorne's *Scarlet Letter* (the *gnawing and poisonous* tooth of bodily pain), and in Dylan Thomas's *A Refusal to Mourn the Death, by Fire, of a Child in London* (I shall not "mourn / *the majesty and burning* of the child's death").

35 *Id.* at 172.

36 The search may be for different kinds of meaning—"literal or semantic meaning, . . . contextual meaning as framed by the shared presuppositions of speakers and listeners, . . . real conceptual meaning, . . . intended meaning, . . . reasonable meaning, or . . . previously interpreted meaning"—but the search is inevitable. Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235, 1239 (2015).

37 *See, e.g.,* Jeffrey J. Grieve, Note, *When Words Fail: How Idaho's Constitution Stymies Education Spending and What Can Be Done About It,* 50 Idaho L. Rev. 99, 129–30 (2014) (criticizing the hendiadys-like interpretation by state courts of the phrase "thorough and efficient system of . . . schools" to "roughly express[] the concept of a minimally sufficient level of educational resources"). This merging of "efficient" into "thorough" "makes it difficult to isolate the effect of an efficiency requirement" and suggests that hendiadic interpretation can deprive terms of meaning even while it purportedly elucidates. *See* Bennett v. N.Y.C. Dep't of Corr., 705 F. Supp. 979, 986 (S.D.N.Y. 1989) (employing hendiadys as an interpretive strategy in adjudicating a Title VII hostile environment sexual harassment claim and noting that "defendants would read the phrase

"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution,[38] by Professor Samuel L. Bray. Analyzing those adjectival phrases in a search for original meaning, Bray concludes, first, that "cruel and unusual" may be "persuasively" read to mean "unusually cruel,"[39] arguing that

> this phrase can easily be read as a hendiadys in which the second term in effect modifies the first: "cruel and unusual" would mean "unusually cruel." When this reading is combined with the work of Professor John Stinneford, which shows that "unusual" was used at the Founding as a term of art for "contrary to long usage," it suggests that the Clause prohibits punishments that are innovatively cruel. In other words, the Clause is not a prohibition on punishments that merely happen to be both cruel and innovative. It is a prohibition on punishments that are innovative *in their cruelty*.[40]

Second, Bray concludes that "necessary and proper" may be read hendiacally to mean "'properly necessary,' something like 'appropriately necessary.'"[41]

> "[N]ecessary and proper". . . affirms that Congress has incidental powers to carry into execution the other powers granted by the U.S. Constitution. "Necessary" means the connection between the enumerated end and the incidental power must be close, while "proper" reaffirms that connection and clarifies that "necessary" is not to be taken in its strictest sense.[42]

In this article we try our best not to fall into the bottomless debate about the original meaning of the constitutional language in issue or what,

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'alter . . . conditions of employment, and create an abusive working environment,' to describe two elements: (1) altered conditions of employment, and (2) abusive working environment"). The court goes on to conclude that

> [i]n view of the Supreme Court's apparent endorsement . . . of the proposition that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," and its discussion of hostile environment generally, I read the quoted phrase from *Vinson*—"alter . . . conditions of employment, and create an abusive working environment"—as a single element, stated in what is referred to in rhetoric as a hendiadys, the expression of a single idea using two phrases connected by "and." Thus, in order to satisfy this requirement of *Vinson,* Bennett need show only that the discriminatory hostility was sufficiently pervasive to change the work atmosphere, rather than being merely episodic, and thereby to change also a condition of employment.

The court in *Bennett* appears unaware of the problematic aspect of hendiadys, unaware that if the requirement is truly hendiadic, it might mean one thing or another. Or another. Or another. Or all at once.

38 Bray, *supra* note 5, at 687.

39 *Id.* at 688.

40 *Id.*at 690 (quoting John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation,* 102 Nw. U. L. Rev. 1739, 1745 (2008)).

41 Bray, *supra* note 5, at 691.

42 *Id.* at 694.

if any, weight is appropriately assigned to that meaning.[43] (That, of course, is easier said than done.) Our point is that however thoughtful, scholarly, and nuanced Bray's article, it is ultimately a misguided attempt to conjoin legal language with a literary figure.

First, it is far from certain that "cruel and unusual" and "necessary and proper" are hendiadys at all. Certainly nothing in Bray's research suggests that the drafters, cultivated and sophisticated men though they were, intended to employ an obscure and confounding literary figure. It is more likely that these two phrases are examples of the emphatic tautology, that age-old, if problematic and much maligned characteristic of the language of the law.[44] At the time of the drafting of the Eighth Amendment, "cruel and unusual" could more easily be intended and understood as a tautology or near tautology than as an arcane literary figure. In his article *The Original Meaning of "Cruel,"* Professor John Stinneford notes that "unusual" punishments—those not sanctioned by long usage—were by definition considered cruel in the founding era. Logically then, it is possible to argue that "unusual" adds nothing but emphasis to "cruel."[45] Similarly, it is possible that "proper" adds nothing of substance to "necessary and proper."[46] Indeed, one writer notes, "[i]t is very likely that Chief Justice Marshall viewed necessary and proper as a pleonasm with the second adjective proper importing no additional, legally significant, or justiciable meaning."[47] Bray cites authority for this proposition, but dismisses it as "giving up too quickly."[48] Sometimes, though, as Occam's Law holds, the obvious solution should not be discarded too quickly.

Further, it is possible that the real interpretive difficulty of "cruel and unusual" and "necessary and proper" is that of syntactic ambiguity: the pairs are not merely conjoined, but rather, they are also disjunctive—punishments that are cruel and punishments that are unusual are both forbidden.[49] In other words, punishments that are cruel or unusual are

43 The debate is summarized by Bray, most particularly with respect to textual analysis. *Id.* at 706–12, 720–32.

44 Bray is not unaware of the more straightforward possibilities that the two phrases he analyzes are tautologies or disjunctive. Indeed, on these points, he cites the authorities cited *infra* at notes 46, 47, 49, and 50.

45 John F. Stinneford, *The Original Meaning of "Cruel,"* 105 Geo. L.J. 441, 489 (2017); *see* John D. Bessler, Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment 180–81 (2012) (suggesting that "cruel and unusual" might be a tautology).

46 *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. Chi. L. Rev. 1721, 1728 (2002).

47 H. Jefferson Powell, *The Regrettable Clause:* United States v. Comstock *and the Powers of Congress*, 48 San Diego L. Rev. 713, 724 n.42 (2011); *see also* John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1121 (2014) ("'[N]ecessary and proper' appears to have functioned more like boiler-plate language at the founding, signaling little more than an informal and flexible standard for exercising appropriate discretion in various contexts.").

48 Bray, *supra* note 5, at 725.

49 William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning and the Case of Amar's Bill of Rights*, 106 Mich. L. Rev. 487, 499 (2007).

forbidden. Similarly, Congress may be authorized to make both those laws that are necessary and those that are proper.[50]

Of course, hypothesizing that "cruel and unusual" and "necessary and proper" are emphatic tautological or semi-tautological figures characteristic of the law or that "and" may have been intended to mean "or" does not tell us how they should be construed by courts and applied to individual cases, but it clears the air a bit.

Further, and perhaps more importantly, even if they are not tautologous or disjunctive, the two phrases in question do not seem to qualify as hendiadys. Although literary scholars do not agree upon the composition of hendiadys,[51] most examples of hendiadys, from Vergil on, are noun pairs and seventy-eight percent of 313 hendiadic pairs identified in Shakespeare's plays are nouns.[52] Here, the two phrases in question are adjectival. While this surely does not rule out hendiadys, it makes it less likely. More importantly, "cruel and unusual" and "necessary and proper" lack the elements of surprise and mystery that characterize hendiadys. It is the nature of hendiadys to produce a double-take, to strike the reader as "disturbing" and "an anomaly."[53] Although "cruel and unusual" may strike a twenty-first century reader as an odd pairing, as noted above, it was seemingly usual in the eighteenth century.[54]

However, even assuming that the two phrases are hendiadic, Bray fails to heed his own warning about the problematic nature of hendiadys. He notes that "there is no one thing that hendiadys 'means.' To recognize that a pair of words with a conjunction is a single complex expression does not establish how the components interact. The uses and possible meanings of hendiadys are multiple, overlapping, and not sharply defined."[55] Ending his discussion of "necessary and proper," he writes, "Now one could go further, and draw on other shades of meaning for 'proper.' Within a hendiadys, this kind of multiplicity of meaning is familiar."[56] Yet he continues, "*[b]ut it is a constitution we are interpreting, not a sonnet.*"[57] As if to say, because the law requires something like fixed meaning, a literary figure that defies unambiguous meaning may be conscripted in the interpretive wars.

50 *See* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause,* 55 Case W. Res. L. Rev. 243, 265–67 (2004).

51 Bray, *supra* note 5, at 695.

52 Wright, *supra* note 1, at 174.

53 *Id.* at 170.

54 *See* Bray, *supra* note 5, at 690.

55 *Id.* at 703.

56 *Id.* at 750.

57 *Id.* (emphasis added). The reference is presumably to Justice Marshall's admonition, "We must never forget that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

In the case of hendiadys, that conscript can turn out to be a double agent. Critiquing Bray's reading of "cruel and unusual" as "innovatively cruel," Stinneford accepts arguendo Bray's characterization of the Eighth Amendment language as hendiadys but counters that

> [t]his argument is incorrect to the extent it posits that the word "cruel" is morally and constitutionally neutral and that the Eighth Amendment permits cruel punishments so long as they are not innovative. *In fact, the words "cruel" and "unusual" modify each other.* [T]he word "cruel" describes the moral category of forbidden punishments, and the word "unusual" provides the concrete reference point for determining whether a punishment falls into that category.[58]

In short, a hendiadic phrase will not sit still.[59]

Since Bray's article, hendiadys has been used to interpret other conjoined pairs in the law: notably, "armed and dangerous" within the meaning of *Terry v. Ohio,*[60] and "advice and consent" in the Constitution.[61] These phrases seem no more convincingly or necessarily hendiadic than those in Bray's article.

Bray's approach to conjoined phrases has been used in a prosecutor's appellate brief to counter a defendant's argument that in the phrase "armed and dangerous," which is at the heart of *Terry v. Ohio,*[62] each word must be treated as a unique and distinctive ingredient of the reasonable suspicion needed to justify a stop and frisk.

Citing Bray's article and quoting from it at length, the prosecutor writes,

> The phrase "armed and dangerous" is a hendiadys. . . . [T]he two terms can modify each other in . . . [a]n asymmetrical fashion. . . . "Armed"

58 Stinneford, *supra* note 45, at 468 n.167 (emphasis added).

59 In her article *Before Interpretation,* Professor Anya Bernstein similarly takes issue with Bray's conclusions:

> [H]endiadys is one version of a consolidating reading, as opposed to an additive one that is 'read like a telegram—a word said, then "Stop," then another word, then another "Stop."' Bray argued for approaching two focal phrases in a consolidating, or hendiadic, way, as a matter of original understanding. Bray may be right about the original understanding of these two phrases. But I believe that both hendiadic figures and other phrases susceptible to idiomatic reading are often characterized by a fundamental indeterminacy; often, there will be no clearly correct or incorrect, option. Rather, judges exercise judgment—often unacknowledged—to make such decisions.

84 U. Chi. L. Rev. 567, 585 (2017) (quoting Bray, *supra* note 5, at 763); *see also* André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. Pub. L. 111, 112, 169–70 (2016) (criticizing Bray's analysis from an anti-originalist/textualist perspective as "another Ptolemaic epicycle in the debate" over constitutional meaning).

60 Terry v. Ohio, 392 U.S. 1, 28 (1968).

61 Josh Blackman, *Scotus After Scalia,* 11 N.Y.U. J. L. & Liberty 48, 133–35 (2017).

62 *Terry*, 392 U.S. at 28.

> is a complete and total modifier of "dangerous." It is not enough that a person be "dangerous" to permit a Terry patdown or search, because the whole point of Terry is to permit searches for weapons. But conversely, "dangerous" is not a complete and total modifier of "armed." As seen below in the cases, with some types of weapons, particularly firearms, being "armed" is, if not exactly tantamount, very close to being tantamount to being "dangerous." The terms differ in other ways—whether one is "armed" is a straight question of fact (you either have a gun on you or you do not); whether a person is "dangerous" is a predictive evaluation. And dangerousness, unlike being armed, is not a singular quality but rather is a function of two things—the amount of harm that the person can be expected to cause with their weapon, and the likelihood that the person will use the weapon.[63]

What is most notable about this thoughtful close reading by the prosecutor is that it is totally beside the point: the Supreme Court has made clear in language quoted immediately below in the prosecutor's own brief, that an officer's reasonable suspicion that a person is armed is *ipso facto* reasonable suspicion that the person is dangerous.

> In *Pennsylvania v. Mimms,* Philadelphia police officers pulled a vehicle over . . . and asked the driver to step out of the car. . . . When he did so, they noticed a large bulge under his jacket and, suspecting it was a gun, frisked him, resulting in discovery of a loaded revolver on his person . . . . The Court concluded that "there is little question the officer was justified. The bulge in the jacket permitted the officer to conclude that Mimms was armed *and thus* posed a serious and present danger to the safety of the officer." [64]

The brief writer thus seems to have given in to the temptation to use hendiadys to give his argument literary and intellectual heft—even though the Supreme Court's own language makes clear that "dangerous" serves purely as emphasis.

Hendiadys has also been recruited to interpret the Senate's "advice" and "consent" role in presidential appointments to the Supreme Court. Foreseeing epic battles over such appointments, one writer proposes a solution: "[T]he text of the Constitution provides a way to deescalate this tension: 'advice' comes before 'consent.'"[65]

63 Brief of Appellee at *10–12, Cardenas v. State of Alaska, No. A-12470, 2017 WL 6942570 (Alaska Ct. App. Sept. 11, 2017).

64 *Id.* (citing Pennsylvania v. Mimms, 434 U.S. 106, 107, 110–11 (1977)) (emphasis added).

65 Blackman, *supra* note 61, at 133.

> *Marbury v. Madison* [teaches that] . . . the Constitution prescribes a three-step appointment process. First, "the President . . . shall nominate" a person to fill an office. Second, through "the Advice and Consent of the Senate," the person "shall [be] appoint[ed]." Third, after the final act by the President—In *Marbury*, it was the President's signature on the commission, *not* the delivery—the appointment is confirmed to the position. This framework follows from the sequencing of Article II, Section II, but reads a critical word out of the Constitution: "advice." This process focuses exclusively on when the President "shall nominate" and when the Senate gives its "consent." But when does the Senate offer its "advice" to the President? If "advice" is merely another word for the Senate voting on the nominee, then it is but a "mere surplusage," is redundant for "consent," and adds nothing to the Constitution. A more thorough construction of "advice *and* consent" must take account of both provisions.
>
> As Samuel L. Bray explains in another thought-provoking piece, our Constitution is filled with a "largely forgotten figure of speech" known as a "hendiadys, in which two terms separated by a conjunction work together as a single complex expression." . . . Bray's thoughtful and unusual (hendiadys intended)[66] article does not address the "Advice and Consent" clause, but his framework offers some insights into how the phrase should be understood. Rather than two abstract concepts, the word "consent" should be understood to modify the word "advice." That is, the Senate is not being asked to offer its advice in vacuum, but in the context of exercising its power to consent to a nominee. The word "advice" has independent meaning—it is not enough to merely vote "yea" or "nay" on a nominee. The President will always make the ultimate decision of whom to select, but the Senate does have *some* role on advising him before the nomination is made, for once the nomination is made, the Senate's role is reduced to consent: "yea" or "nay."[67]

The author does not make a convincing case for hendiadys. First, "advice" and "consent" are related terms—there is nothing surprising or unusual about their pairing. Moreover, as worthy as is the aim of de-escalating the conflict over Supreme Court appointments, it is impossible to see how "consent" can be imagined to modify "advice" or how, if the conjoined phrase is indeed hendiadys, "advice" can have "independent meaning."

66 Although the compliment is apt, "thoughtful and unusual" is not hendiadys.

67 Blackman, *supra* note 61, at 133–35 (quoting Marbury v. Madison, 5 U.S. 137 (1803) and Bray, *supra* note 5).

Finally, hendiadys is too easily domesticated, confused with the emphatic tautology, as in this excerpt from an article on rhetoric directed to practitioners.

> *Hendiadys* . . . uses two nouns separated by a conjunction, instead of a noun and its qualifier, to express a single idea, . . . [e.g.,] the term "arbitrary and capricious," is one standard, not two; yet that standard almost always is expressed with these two terms. This device was a favorite of legal writers during the development of the civil law,[68] and our legal language carries on that heritage perhaps too readily. In any event, a hendiadys can be useful when one word does not adequately express a complex notion. For example, it might be argued that the term "arbitrary and capricious," while establishing a single standard, highlights aspects of the conduct under consideration that each individual word might not express adequately.[69]

Surely, as close as synonyms get, "arbitrary" and "capricious" do no more than reinforce each other. Thus, this is emphasis, not hendiadys. The coupling merely accentuates the idea that the law requires decisions and rules based on reason.

III. Synecdoche and Metaphor: More Cautionary Tales

As Pollock and Maitland wrote many years ago, "language is no mere instrument which we can control at will; it controls us."[70] Literary figures and tropes[71] are shiny objects that judges and commentators on the law can't resist.[72] But some shiny objects have sharp, ragged edges. Hendiadys is one example. The tropes synecdoche and metaphor are others. Synecdoche is a figure of speech in which a part is named but the whole is understood (silver for money or bread for food). A metaphor is a comparison of two dissimilar things that nonetheless have something in common (he was a lion in battle). Both are unlike hendiadys in that they are not intrinsically counter to fixed meaning and predictability, but they too can be used inappropriately. Synecdoche fails when it is used to show

68 The author cites no authority for this assertion.

69 Craig D. Tindall, *Rhetorical Style*, 50 Fed. Law. 24, 27–28 (2003). After describing hendiadys as two nouns, the author uses pairs of adjectives as examples.

70 Frederick Pollock & Frederick William Maitland, The History of English Law 87 (2d ed. 1968).

71 Figures are characterized by their particular syntax, while tropes are characterized by "alteration of meaning . . . whether the alteration occurs in a single word, as often in metaphor, metonymy, synecdoche, and so on, or proceeds from a governing design, as in allegory or a sustained ironic structure." Although its distinctive syntax places hendiadys in the figure category, the semantic ambiguity that also characterizes it suggests that it has the force of a trope. Wright, *supra* note 1, at 184 n.15.

72 Guilty as charged.

off erudition at the expense of reason. Metaphor is a dishonest and obfuscating form of persuasion when there is no true correspondence between the things being compared or when the perceptions that flow from the comparison encourage bias and mask oppression.

A. Synecdoche

Although not as mysterious as hendiadys, synecdoche is not as simple as it is sometimes made to appear. Indeed, even the definition in a non-specialist dictionary is complex: "a figure of speech by which a part is put for the whole, . . . the whole for a part, . . . the species for the genus, . . . the genus for the species, . . . or the name of the material for the made thing."[73] The meaning is further complicated by synecdoche's unsettled relationship to metonymy, "a figure of speech consisting of the use of the name of one thing for that of another to which it is associated (such as "crown" in "lands belonging to the crown").[74]

> Synecdoche is closely related to metonymy (and is, by some, regarded as a kind of metonymy). What distinguishes synecdoche from metonymy is that the latter reduces the whole to the part whereas the former merely attributes to the whole a quality of the part. Hence, if we were to read the expression "He is all heart" as a metonym, it would produce the nonsense supposition that he is composed entirely of heart. Read as synecdoche, however, the expression means that all of him is to be understood in terms of certain qualities associated with "heart"—namely, goodness, compassion, and the like. The key distinguishing effect is that metonymy is reductionist (reducing a whole to one of its parts) while synecdoche is integrative (unifying the various parts into a whole by way of the quality of one of the parts).[75]

Synecdoche is sometimes used as a persuasive device in the law,[76] but our major concern here, as with hendiadys, is its use an interpretive strategy. Judges in particular seem attracted to synecdoche, often when "for example," or "as a general term" would be more appropriate and intelligible. Too often the term seems proffered as a display of erudition. One typical example follows:

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73 *Synecdoche*, Merriam-Webster's Dictionary (New ed. 2016).

74 *Metonymy*, Merriam-Webster's Dictionary (New ed. 2016).

75 Pierre Schlag, *Hiding the Ball,* 71 N.Y.U. L. Rev. 1681, 1708 (1996).

76 Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions,* 46 UCLA L. Rev. 75, 106–07 (1998) (quoting Cleavinger v. Saxner, 474 U.S. 193, 205 (1985)) ("An example of a live trope illustrating both metonymy and synecdoche appeared in a case concerning whether qualified immunity protects members of a prison discipline committee adjudicating inmate rule infractions: 'If qualified immunity is sufficient for the schoolroom, it should be more than sufficient for the jailhouse where the door is closed, not open, and where there is little, if any, protection by way of community observation.' The Court's reference to 'schoolroom' and 'jailhouse' at least minimizes the stakes in the decision and arguably even belittles the problem of abusive and unfair adjudication.").

> To say that [defendant corporation] Ocwen, plus its officers, executives, and employees, schemed with other corporations to defraud homeowners, without adding any detail about what particular Ocwen agents (or classes of agents) might have done, is just to repeat by synecdoche that Ocwen participated in the scheme.[77]

A more florid display of erudition is found in an opinion deciding a complex immigration issue.

> [T]he array of pertinent [reliance interests in the right to seek relief noted in] influential precedents are not exhaustive but merely illustration by synecdoche. Such listings simply describe several sufficient, as opposed to necessary, conditions for finding retroactivity.[78]

This opinion is an example of extreme, and perhaps unwise, literary ambition—in addition to the baffling reference to synecdoche, the court uses numerous obscure, mainly Latinate, terms, e.g., "fuliginous," "asseverate," "perscrutation," and "enceinture."[79]

To judge by this 2003 circuit court opinion, below, the Supreme Court's admonition concerning the use of synecdoche seems to have had little effect. The Court noted that

> [i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.[80]

Finally, in *A Matter of Interpretation: Federal Courts and the Law*,[81] Justice Scalia makes somewhat less than rigorous use of the term synecdoche. He notes cryptically that the terms "Press" and "Speech" in the First Amendment "stand as a *sort of* synecdoche" that covers handwritten letters.[82] Yet, as Andre LeDuc points out, Scalia never explains why "reading the term[s] like a synecdoche is consistent with the semantic claims of originalism—or why the reading treats the term[s] like a

77 Taylor v. Ocwen Loan Servicing, LLC, No. 416CV04167SLDJEH, 2017 WL 3443209, at *3 (C.D. Ill. Aug. 10, 2017).

78 Arevalo v. Ashcroft, 344 F.3d 1, 14 (1st Cir. 2003) (internal cites and punctuation omitted).

79 *Id.* at 11, 13, 14. In a further attempt to turn law into literature, the court notes, "It is trite, but true, that courts are bound to interpret statutes whenever possible in ways that avoid absurd results." *Id.* at 8. To call a legal rule "trite" would seem a meaningless assertion.

80 Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

81 Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Amy Gutmann ed., 1997).

82 *Id.* at 38 (emphasis added).

synecdoche rather than as a synecdoche."[83] Surely, one might as usefully say that the terms apple and peach are "a sort of synecdoche" for pear.

In brief, although the trope is sometimes effectively used as persuasion or interpretation, the term synecdoche tends too often to be tossed in as proof of erudition.

B. Metaphor

The use of metaphor in the law has been studied extensively and intensively,[84] given that, consciously or unconsciously, lawyers and judges use metaphor not only to clarify, but also to manipulate emotions, to induce agreement, and even to alter doctrine.

> [M]etaphoric language can be useful for describing or expressing an abstract legal concept. In fact, it is the ability of metaphor . . . to put an abstraction into concrete terms . . . that has led to the prevalence of metaphor in doctrinal law. However, a metaphor cannot possibly capture the true meaning of, and all the dimensions and nuances implicated by, an abstract legal concept. Indeed, it is this allure of metaphor combined with its potential pitfalls that led renowned jurist Benjamin Cardozo to his famous criticism of metaphors in doctrinal law: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [85]

Our purpose here is not to add to this theoretical discussion, but merely to emphasize, by way of two recent examples, the irresistibility and danger of metaphor and the caution with which literary devices should be used. One example arose in *Janus v. American Federation of State, County, & Municipal Employees, Council 31,*[86] where the Supreme Court held that the First Amendment was violated by the requirement that nonmembers of a public-sector union pay what is generally called an "agency fee," *i.e.,* a percentage of the full union dues. Writing for the majority, Justice Alito noted,

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83 André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics,* 31 BYU J. Pub. L. 111, 232 (2016).

84 When Christopher Rideout quotes Robert Frost as saying"[A]ll thinking is metaphorical," citing *Education by Poetry*, in Collected Poems, Prose, and Plays 717 (Lib. of America 1995), he is referring to current theories holding "[m]etaphor, far from being a matter of language and style, is instead a matter of thought. . . . '[T]hey are general mappings across cultural domains.'" J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ALWD 155, 164–65 (2010) (quoting George Lakoff, *The Contemporary Theory of Metaphor*, *in* Metaphor and Thought 202–03 (Andrew Ortony ed., 2d ed. 1993)).

85 Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 Mercer L. Rev. 919, 923 (2007).

86 Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

> Respondents . . . contend[ ] that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. . . . Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person *shanghaied* for an unwanted voyage.[87]

To "shanghai" means "to put aboard a ship by force, often with the help of liquor or a drug."[88] The Chinese city's name became attached to the process in the 1800s, seemingly because ships unwillingly manned by the kidnapped sailors were often bound for the East; the abductors themselves were not Asian.[89] The term came to be a metaphor for coerced participation. It would seem to be a dead or "sleeping"[90] metaphor—an Internet search for the term indicated many writers are unaware of the literal meaning and wondering whether accusation of shanghaiing is a racist slur.[91]

In the quoted passage, Justice Alito attributes the "shanghaied" metaphor to the petitioner, but, curiously, provides no citation. Moreover, a word-search in Westlaw for the verb "shanghai" and its derivative forms in the petitioner's filings was unsuccessful. Even assuming that the petitioner did use this term in a pleading or oral argument, however, Justice Alito chose to adopt it. Now, we do not mean to suggest that Justice Alito intended to make his point more persuasively by appealing to anti-Asian sentiments. Nor do we think that Justice Alito meant to compare the respondent public-sector union to allegedly exploitive Chinese interests. But such is the power of metaphor, that his use of the term may well have that effect; as Steven Winters warns "what is at issue is not the truth or falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it."[92] And in an era characterized by rough and often abusive public discourse, many would deem metaphors like "shanghaied" especially inappropriate.

87 *Id.* at 2466 (emphasis added).

88 *Shanghai*, Merriam-Webster's Dictionary (New ed. 2016).

89 One might nonetheless wonder why the term referred to the destination and not the process or perpetrators, and why, if indeed, it did not speak to anti-Asian bias, the term has long survived the procedure.

90 "[M]etaphoricity is gradable and . . . even the most seemingly dead metaphors can be awakened through the unexpected uses of individual speakers." Stephen Hequembourg, *Literally: How to Speak Like an Absolute Knave*, 133 PMLA 56, 57 (2018) (discussing theories of Cornelia Muller, Metaphors Dead and Alive, Sleeping and Waking: A Dynamic View (2008)).

91 *See, e.g.,* IGN, *Is saying "I was shanghaied" racially insensitive?*, Boards, http:// www.ign.com.boards/boards/threads/is-saying-i-was-shanghaied-racially-insensitive.250600553/ (last visited July 9, 2020).

92 Steven L. Winter, *Death Is the Mother of Metaphor,* 105 Harv. L. Rev. 745, 759 (1992) (reviewing Thomas C. Grey, The Wallace Stevens Case: Law and the Practice of Poetry (1991)) (citing George Lakoff & Mark Johnson, Metaphors We Live By 158 (1980)).

The "shanghaied" metaphor may well enhance the persuasiveness of Justice Alito's opinion through the "perceptions and inferences that follow from it," thus denigrating the municipal union and its cause. But worse still is a metaphor that also effectuates doctrinal change because, whether deliberately or unconsciously, it "does not accurately and effectively capture the . . . concept at issue."[93] This is what happened with the "muddy waters" metaphor that altered the application of a Texas statute[94] that was intended to allow easier access to post-conviction DNA testing. In a thoughtful and well-researched article, Professors Carrie Sperling and Kimberly Holst argue that the courts' use of the muddy waters metaphor "demonstrates the power of a metaphor to attach meaning to a legal standard and alter the application of that standard in a way that is counter to legislative intent."[95] Indeed, they hypothesize "that the implicit power of the metaphor plays an even greater impact on how judges make decisions than previously recognized."[96]

The Texas post-conviction DNA statute allowed testing when "there was 'a reasonable probability that . . . [a convicted person] would not have been prosecuted or convicted if DNA testing had provided exculpatory results.'"[97] But in the first case decided under the statute,[98] the Texas Court of Criminal Appeals construed the statute to require that the DNA tests would prove innocence, saying that otherwise, the test would simply "muddy the waters."[99] This metaphor was then used to deny relief in many cases requesting access to DNA testing. Even after "the legislature explicitly amended the statute to correct for [the] misapplied burden[,] [t]he metaphor would not release its grip . . . ,"[100] and Texas courts adhered to the muddy waters standard. Given the persistence of the metaphor, it is not farfetched to wonder whether the hue of the muddy waters was related to the skin-tone of the majority of petitioners.

The authors postulate that the muddy waters metaphor connotes "dirt and dirty metaphors connote guilt,"[101] thus manipulating the emotions of decisionmakers. But we wonder whether this is merely a case of a "metaphor gone wrong"; it may instead be an instance of "judges gone

93 Smith, *supra* note 85, at 923.

94 Tex. Code Crim. Proc. Ann. art 64.03 (West Supp. 2016).

95 Carrie Sperling & Kimberly Holst, *Do Muddy Waters Shift Burdens?*, 76 Md. L. Rev. 629, 642 (2017).

96 *Id.*

97 *Id.* at 644 (quoting H. Research Org., S.B. 3 Bill Analysis, H.Res. 77, Reg. Sess. 2–3 (Tex. 2001)).

98 Kutzner v. State, 75 S.W.3d 427 (Tex. Crim. App. 2002).

99 *Id.* at 439.

100 Sperling & Holst, *supra* note 95, at 654.

101 *Id.* at 657.

bad," judges who deliberately use a metaphor with little correspondence to the plain language of the statute and legislative intent in order to mask biases. As Steven Winters warns, "It is this pragmatic attention to the relations created by our metaphors, and not some mysterious faculty like 'judgment,' that allows us to avoid the use of metaphor to mask oppression."[102]

> Whether in law, poetry, or anywhere else, the expression of a metaphor must be done appropriately. The appropriate expression does not mean merely following stylistic rules, but rather expressing the metaphor in a way that conveys its correspondences, or mappings, coherently. If metaphors, conceptually, are constrained by their own systematicity, then the expression of those metaphors must in turn reveal, not muddle, that systematicity.[103]

A court masked biases, possibly racist biases, with an inappropriate metaphor upon which other judges of the same persuasion then seized. The muddy waters cases are, therefore, a cautionary tale showing that metaphors may not only manipulate emotion, but may also conceal improper motives and further wrongful agendas.

IV. Conclusion

This article started as one inquiry and ended as the beginning of another. It began a few years ago when we had a chance encounter with hendiadys, in a book by Shakespeare scholar James Shapiro,[104] in which the author briefly discussed the use of the figure in *Hamlet* and cited the leading authority, George Wright's 1981 article *Hendiadys and Hamlet*.[105] Given that we both have backgrounds in literary studies, we read Wright with interest and admiration. We were intrigued by hendiadys and wondered about its use (or absence) in legal texts. Was it used? If so, where, and how? Was there scholarly comment on its use? How should one track this elusive figure?[106] Since literary figures and tropes reveal themselves to the reader only through close reading of individual texts or when they are called by their name, we chose the latter route, though much research remains to be done on, for example, the many other

102 Winter, *supra* note 92, at 759.

103 Rideout, *supra* note 84, at 190.

104 James Shapiro, A Year in the Life of William Shakespeare: 1599 (2005).

105 Wright, *supra* note 1.

106 We quickly ruled out searching for "and" in online databases.

binomial expressions in the Constitution and whether they are or are not hendiadic.[107]

Beginning our research, we found sparse mention of hendiadys—until Professor Bray's article was published, eliciting considerable comment and other explorations of hendiadys in law. We soon became convinced that not only was it unlikely that many, if any, binomial expressions in the law are hendiadys, but even if some are, that its use as an interpretive strategy is inappropriate. Hendiadys can only serve legal interpretation by betraying its own essence, which is multiplicity and complexity.

Other tropes and figures like synecdoche and metaphor create similar interpretive conundrums, even though these figures are not intrinsically antithetical to clear expression or understanding of the law. Their misuse, however, benefits neither law nor literature. Our takeaway is therefore simple: some literary devices, like hendiadys, have no proper place in the language of the law or in its interpretation, and others should be used judiciously.

107 We suspect that, like "cruel and unusual" and "necessary and proper," none of the others are hendiadys. *See* Tiersma, supra note 25, at 46 ("[T]he Framers of the Constitution seem to have agreed that it should be in the 'plain common language of mankind' . . . .") (citing Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 344–45 (1996)).

ARTICLE

Get with the Pronoun

Heidi K. Brown*

The singular *they*: this four-letter word packs enough power to foster clarity, accuracy, inclusion, and respect in legal writing. English grammar traditionalists have argued that the use of *they* to refer to a singular antecedent is grammatically incorrect. Legal writing professors and law office supervisors have, for decades, corrected novice legal writers' use of the word *they* to refer to "the court" or "the company" or "the government." Those nouns are *it* in pronoun form, not *they*. Of course, that particular grammar correction for non-person nouns is still proper (and not disrespectful to anyone, or politically incorrect). The conversation got interesting when proponents of inclusive writing, and inclusive *legal* writing, began urging adoption of the singular *they* as an appropriate vehicle to refer to a person whose gender is either unknown or for whom the binary gender construct does not work. Grammarians persisted, "But the use of the singular *they* muddles sentences! It confuses readers! It erodes clarity!" Does it? Really?

This article proposes that good legal writers actually can *enhance* and *foster* clarity, accuracy, inclusion, and respect in pleadings, briefs, and judicial decisions through purposeful and intentional usage of the singular *they* (and other pronouns). Legal writers should use the singular *they* to refer to a person whose gender is unknown, who is non-binary, or whose gender should be anonymized for purposes of a legal matter, and then incorporate a concise and pointed explanation of the pronoun's usage—within the text itself or a well-placed footnote—to educate the unfamiliar (or possibly resistant) reader.

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Section I of this article notes changes underway in the United States toward recognizing individuals' pronoun usage[1] outside the historical *he/she* binary, and acknowledging the singular *they*. Many colleges, universities, and employers, in addition to service providers like Facebook, United Airlines, Lyft, and Netflix, already engage with non-binary gender identifiers. Likewise, law students, lawyers, clients, litigants, witnesses, and decisionmakers are using personal pronouns other than *he* or *she.* Legal writers and legal readers need to embrace and honor this new grammatical terrain, lest we let discomfort with one four-letter pronoun get in the way of doing the right thing for others.

Section II touches on how language impacts human relationships and can—and must—evolve as our society naturally forays into new frontiers. Section III surveys how and when well-respected American (non-legal) writing style guides embraced the singular *they*. Section IV describes how legal writing experts have transitioned from advising lawyers to write "conservatively" with regard to gender-neutral writing for fear of confusing readers, to a new approach of using straightforward footnotes or textual sentences to pointedly explain why the writer is using a particular pronoun. Section V provides a glimpse into the successes and challenges of inclusive writing movements in other countries and legal systems, highlighting language activists' arguments that gender-inclusive language helps remedy the grammatical "erasure" of marginalized citizens. Section VI offers examples of how American lawyers and judges have effectively used litigants' and witnesses' personal gender pronouns, including the singular *they*, in pleadings, briefs, and judicial decisions.

This article concludes with a call to action for legal writers to use the singular *they* in circumstances involving persons of unknown gender, who identify as non-binary, or whose identity should remain confidential, as a proactive tool to enhance clarity, accuracy, inclusion, and respect in legal documents. Lawyers and academics cannot cling to outdated grammar rules—simply based on tradition—and ignore necessary societal shifts, or we risk disrespecting and alienating clients, litigants, finders-of-fact, and decisionmakers. Instead, we can use individuals' personal pronouns with intention, and educate ourselves and our legal community in the process.

1 As many of us initially began engaging with gender-neutral pronouns, we might have heard or used the phrase "*Preferred* Gender Pronouns," or "PGPs." Advocates clarify that it is better to refer to an individual's pronouns as "*Personal* Gender Pronouns" instead of "*Preferred* Gender Pronouns." The former is "the most inclusive phrasing as [it] doesn't insinuate respecting someone's pronouns is optional." Sassafras Lowrey, *A Guide to Non-Binary Pronouns and Why They Matter*, Huffington Post, Nov. 8, 2017, https://www.huffpost.com/entry/non-binary-pronouns-why-they-matter_b_5a03107be4b0230facb8419a.

I. Pronoun Proliferation in the United States

While law often (understandably) takes time to catch up to societal change, as legal writers, we should actively ramp up our awareness about the growing use and acceptance of non-binary language across many facets of our American society. As Professor Laura Graham noted in her article, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, "In 2017, law schools welcomed the first members of Generation Z to their halls."[2] Generation Z students (born between 1995 and 2010)[3] join the ranks of Millennials (born between 1980 and 1994) as our next generation of attorneys, judges, and corporate counsel clients; they are using and recognizing personal pronouns other than *he* or *she*. A 2016 J. Walter Thompson Intelligence survey reported that "56 percent of U.S. Gen Z'ers (13 to 20 years old) said they know someone who uses gender-neutral pronouns such as *they*, *them*, or *ze*."[4] On many American college and university campuses, "[s]haring one's pronouns and asking for others' pronouns when making introductions is a growing trend."[5] For example, at the University of Vermont, "students can choose from 'he,' 'she, 'they,' and 'ze,' as well as 'name only'—meaning they don't want to be referred to by any third-person pronoun, only their name."[6]

Influencers and players in our day-to-day cultural experiences are recognizing evolving gender norms and directly addressing individuals' usage of gender-neutral pronouns and honorifics. In 2014, Facebook offered users the choice of *they/their* pronouns, in addition to *he* and *she*.[7] In May 2019, the ride-share company, Lyft, added gender-neutral pronouns to rider profiles in its app, offering passengers a choice of "they/them/theirs, she/her/hers, he/him/his, my pronoun isn't listed, prefer not to say."[8] The same year, a trade group, Airlines for America, announced that "[a]ir travelers who want to [do so] will soon be able to choose a gender option

2 Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. Ark. Little Rock L. Rev. 29 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271137 (abstract).

3 *Id.*

4 Sarah McKibben, *Creating a Gender-Inclusive Classroom*, 60 Educ. Update, no. 4, Apr. 2018. For a helpful guide to new pronouns such as "xe/ze/zim/zir/hir," see *Resources on Personal Pronouns: How*, Mypronouns.org, https://www.mypronouns.org/how (last visited June 12, 2020).

5 Avinash Chak, *Beyond "He" and "She": The Rise of Non-Binary Pronouns*, BBC News Mag., Dec. 7, 2015, https://www.bbc.com/news/magazine-34901704.

6 *Id.*

7 Josh Constine & Jordan Crook, *Facebook Opens up LGBTQ-Friendly Gender Identity and Pronoun Options*, TechCrunch, Feb. 13, 2014, https://techcrunch.com/2014/02/13/facebook-gender-identity/.

8 Megan Rose Dickey, *Lyft is Adding Gender-Neutral Pronouns to Its App*, TechCrunch, May 29, 2019, https://techcrunch.com/2019/05/29/lyft-is-adding-gender-neutral-pronouns-to-its-app/.

other than 'male' or 'female' when buying their tickets."[9] The choices will be "male," "female," "undisclosed," or "unspecified."[10] Further, "customers who do not identify with a gender will have the option of selecting 'Mx.' as a title."[11] United Airlines led the way as the first airline in the United States to afford passengers non-binary gender options when booking flights.[12]

Some companies are including pronoun recognition as part of employees' training for interaction with job applicants, clients, and customers. In 2019, financial services company TIAA issued guidelines "suggesting client-facing employees share their pronouns in introductions."[13] In the hiring process, Netflix recruiters share their pronouns in initial interviews and ask job applicants about their pronouns.[14]

Whether or not some legal writers feel ready to embrace new pronoun trends, these language shifts are happening all around us. The individuals we write about in our legal documents are living in and navigating a society in which gender-neutral pronouns are becoming the norm. We must catch up.

II. Language Can, and Should, "Reorient" and Evolve

Purdue University's Online Writing Lab poignantly sums up the grammar debate regarding the singular *they*:

> Why should we use this kind of language? Isn't this incorrect grammar? In short, no. Grammar shifts and changes over time; for instance, the clunky *he or she* that a singular *they* replaces is actually a fairly recent introduction into the language. Singular *they* has been used for a long time and is used in most casual situations; you probably do it yourself

9 Zach Wichter, *U.S. Airlines to Offer New Gender Options for Non-Binary Passengers*, N.Y. Times, Feb. 15, 2019, https://nyti.ms/2EcG7RL.

10 *Id.*

11 *Id.* A website called www.lexico.com (a collaboration between Dictionary.com and Oxford University Press) mentions the honorific *Mx*. In its entry on the word "they," the website first explains that "they" can be "used to refer to a person of unspecified gender," and then notes that "[l]ike the gender-neutral honorific Mx., the singular they is preferred by some individuals who identify as neither male nor female." *Meaning of They in English*, Lexico.com, https://www.lexico.com/definition/they (last visited Apr. 12, 2020). Additionally, New York City's Commission on Human Rights, which provides Legal Enforcement Guidance on Gender Identity/Gender Expression on its website, notes in a footnote that "[t]he gender-neutral title Mx. is pronounced 'məks' (similar to 'mex') or 'mɪks' (similar to 'mix')." N.Y.C. Comm'n on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3; N.Y.C. Admin. Code § 8-102, 4 n.15 (Feb. 15, 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf.

12 Samantha Schmidt, *United Becomes First U.S. Airline to Offer Non-Binary Gender Booking Options—Including "Mx.,"* Wash. Post, Mar. 22, 2019, https://www.washingtonpost.com/dc-md-va/2019/03/22/united-becomes-first-us-airline-offer-non-binary-gender-booking-options-including-mx/.

13 Jena McGregor, *How Employers are Preparing for a Gender Non-Binary World*, Wash. Post, July 7, 2019, https://www.washingtonpost.com/business/2019/07/02/how-employers-are-preparing-gender-non-binary-world/.

14 *Id.*

> without realizing it. We are simply witnessing a reorientation of the rule, mostly with the intention of including more people in language.[15]

Language embodies human contact. It can forge connection, and it can inflict pain. Regardless of one's personal feelings about grammar rules, it is important to understand the detrimental impact of "misgendering" an individual when we speak and write. As the Human Rights Campaign Foundation explains, "The experience of being misgendered can be hurtful, angering, and even distracting." Thus, "[a] culture that readily asks [about] or provides pronouns is one committed to reducing the risk of disrespect or embarrassment for both parties"[16] in a conversation.

Can one four-letter pronoun effect positive change in a profession like law, which is so steeped in history and rooted in tradition? As linguist Noam Chomsky said, "Language etches the grooves through which your thoughts must flow."[17] Indeed, language is the vehicle through which we convert ideas to words, share them with others, and spark responses and reactions. In an "awareness-raising session" of the United Nations Economic and Social Commission for Western Asia, participants asserted that "[l]anguage not only reflects the way writers think; it also shapes the thinking of listeners or readers and influences their behaviour."[18] Sam Dowd, a British didactics expert, echoed the principle that "language is the primary filter through which we perceive the world."[19] Thus, "it's obvious that it affects how we relate to and make judgments about one another."[20] He emphasizes, "Until now, history has been written and told by men, to the detriment of others. Part of any attempt to create a society in which *all* people—regardless of gender, sexuality, or race—have equal opportunities and freedoms is to use language that no longer excludes

15 Purdue Online Writing Lab, *Gendered Pronouns & Singular "They,"* Purdue Univ., https://owl.purdue.edu/owl/general_writing/grammar/pronouns/gendered_pronouns_and_singular_they.html (last visited Apr. 3, 2020); *see also* Lesbian, Gay, Bisexual, Transgender, Queer Plus LGBTQ+ Resource Center, *Gender Pronouns*, Univ. of Wis.–Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns/ (last visited Apr. 3, 2020) ("And whatever the grammarians might argue, people have been using the singular 'they' for about the last 600 years.").

16 *Talking About Pronouns in the Workplace*, Human Rights Campaign Found., https://www.hrc.org/resources/talking-about-pronouns-in-the-workplace (scroll down, then select download "Talking about Pronouns in the Workplace") (last visited Apr. 3, 2020); *see also Resources on Personal Pronouns: What are Personal Pronouns and Why Do They Matter?*, Mypronouns.org, https://www.mypronouns.org/what-and-why (last visited Apr. 3, 2020) ("[P]ronouns matter"; "Using someone's correct personal pronouns is a way to respect them and create an inclusive environment, just as using a person's name can be a way to respect them.").

17 Shona Whyte, *Thinking in Two Languages*, On Teaching Languages with Technology, https://shonawhyte.wordpress.com/2016/10/07/thinking-in-two-languages/ (last visited Apr. 26, 2020) (noting that this quote is attributed to Noam Chomsky but that the source of the quote is unknown).

18 United Nations, Gender-Sensitive Language Guidelines 1 (2014), https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf.

19 Adryan Corcione, *How to Use Gender-Neutral Words*, Teen Vogue, Aug. 27, 2018, https://www.teenvogue.com/story/how-to-use-gender-neutral-words.

20 *Id.*

certain groups or creates unconscious bias."[21] Likewise, Dr. Charlotte Ross cautions that

> we might hide behind the rules and norms of grammar, making sure our language is "correct" according to current dictionaries, and shrugging off the fact that language is cultural, and is often highly patriarchal, sexist, and binary in its conception of identities. What are the consequences of tolerating or even defending these linguistic norms? Well, these norms sanction some behaviours and stigmatise others; they lend authority to certain ideas and marginalize others; they validate some identities and silence or do violence to others.[22]

Language and the law are inextricably intertwined. Our statutes, case law, and contractual promises are memorialized in words. We persuade judges and other decisionmakers through sentences and paragraphs. We communicate with clients and opposing counsel through nouns, verbs, pronouns, adverbs . . . and the occasional, regrettable, exclamation point. Attorney Stan Sarkisov and Carleigh Kude (an access and inclusion specialist in higher education) emphasize that "[l]anguage and laws reflect the values of society."[23] The reflex use of a two-letter word like *he*—to refer to all genders—can reinforce historical power hierarchies. Sarkisov and Kude remind us that, "[s]ince the birth of our nation, less privileged Americans—specifically those who are excluded by the use of a default male singular third person pronoun—have fought for their promised enfranchisement."[24]

Instead of clinging to outdated terminology or rules because we do not like the way a new (to us)[25] grammatical structure sounds in a sentence, this is a prime opportunity to stop and take stock of the language we use daily as legal writers. As Sarkisov and Kude urge, if we do not "paus[e] to confront bias in our writing, there is ample opportunity for first impressions to double down on themselves: stereotyping gives way to confirmation biases; confirmation biases give way to subjective validation; subject[ive] validation manifests as prejudice, discrimination, and so on."[26] The National Council of Teachers of English reiterates how language—

21 *Id.*

22 Charlotte Ross, *Qu@*ring the Italian Language*, Queer Italia Network (Jan. 12, 2017), https://queeritalia.com/2017/01/12/queeringitalian/.

23 Stan Sarkisov & Carleigh Kude, *Pronoun Power—The Standard for Gender Neutrality*, S.F. Att'y, Winter 2017, at 40.

24 *Id.*

25 As mentioned in note 15 (and discussed in more detail later in section III), the singular *they* has been used for centuries.

26 *Id.*

without reflection and consideration of necessary evolution and change—re-entrenches gender bias:

> Language, which plays a central role in human cognition and behavior, is one of the most common mechanisms by which gender is constructed and reinforced. The words that people use to describe others or objects are often unintentionally but unquestionably based in implicit cultural biases, including biases that privilege the gender binary. We can see such bias reinforced in professional language use: in curriculum and pedagogy; in papers and publications; in handouts and other materials used in presentations; and in speaking in and beyond our classrooms.[27]

Our language must, and can, change. There is ample precedent for such evolution.

The National Council of Teachers of English emphasizes that "[a]s both a product and an engine of human culture, language is inherently dynamic and ever-evolving."[28] In fact, at "the intersection of language, gender, and equity, the English language has been in a period of active shift for several decades."[29] Author, professor, and transgender activist, Jennifer Finney Boylan, reinforces the reality that

> English has a long history of adapting to cultural change. That's something we should celebrate, not lament. None of this happens swiftly, though. The honorific "Ms.," first proposed in an issue of The Sunday Republican of Springfield, Mass., in 1901, was finally adopted by *The New York Times* in 1986.[30]

Professor Finney also points out that "although the first use of 'Mx.' as an honorific for people wishing not to be identified by gender dates to 1977, Merriam Webster added it to its lexicon only last September."[31]

While language activists in other countries and legal jurisdictions often face formidable obstacles in the form of powerful institutional guardians of language tradition, such as the Académie Française or the Royal Spanish Academy,[32] American legal writers do not need to wait for a

27 Nat'l Council of Teachers of English, Statement on Gender and Language (Oct. 25, 2018), https://ncte.org/statement/genderfairuseoflang/.

28 *Id.*; *see also* Betty Birner, *Is English Changing?*, Linguistic Soc'y of Am., https://www.linguisticsociety.org/content/english-changing (last visited Apr. 4, 2020) ("Language is always changing, evolving, and adapting to the needs of its users.").

29 Statement on Gender and Language, *supra* note 27.

30 Jennifer Finney Boylan, *That's What Ze Said*, N.Y. Times, Jan. 9, 2018, https://www.nytimes.com/2018/01/09/opinion/ze-xem-gender-pronouns.html.

31 *Id.*

32 *See, e.g.*, Levi C.R. Hord, *Bucking The Linguistic Binary: Gender Neutral Language in English, Swedish, French, and German*, 3 Western Papers in Linguistics, no. 1, 2016, art. 4 at n.6 ("Swedish, French, and German have language

formal institutional sanction of change or to convince a "higher authority" of the propriety of this evolution. We hold enough power in our own pens and laptops to transform legal language. Levi C.R. Hord writes,

> Rather than being decided by an authority, most languages are used according to shared public consensus, and new terms are not officially instated but are introduced into speech communities organically with the potential to become widespread. The power that the people have over the language becomes important as it links the acceptance of stigmatized language (including gender neutral language) to social rather than institutional change, making social attitudes significant not only as markers of progress but as targets for potential transformation. While many prescriptivists argue against gender neutral language as incorrect or ungrammatical, the consensus on whether or not its use is acceptable will come from the people who either choose to use it or not, and the prescriptivist viewpoint will become moot.[33]

Instead of waiting for official sanction, legal writers have the power right now to choose to use the singular *they*, to acknowledge societal change and cultivate inclusion.

III. Prominent Non-Legal Writing Style Guides Have Embraced the Singular They

Well-known writing style manuals already have embraced the singular *they*. This section of this article tracks the chronological progression of this acceptance over the past five years.

In 2015, the *Washington Post* approved the use of the pronoun in singular form, expressly indicating its utility in referring "to people who identify as neither male nor female."[34] In writing about the change, the late copy editor Bill Walsh explained that "[t]he only thing standing in the way of *they* has been the appearance of incorrectness—the lack of acceptance among educated readers."[35] He shared, "What finally pushed me from acceptance to action on gender-neutral pronouns was the increasing visibility of gender-neutral people. The *Post* has run at least one profile of a person who identifies as neither male nor female and specifically requests

authorities that dictate official rules and changes (the Swedish Academy, the Académie Française, and the Rat für deutsche Rechtschreibung). These entities influence the use of gender neutral language through the occasional official decree.").

33 *Id.* at 8.

34 Benjamin Mullin, *The* Washington Post *Will Allow Singular "They,"* Poynter, Dec. 1, 2015, https://www.poynter.org/reporting-editing/2015/the-washington-post-will-allow-singular-they/.

35 Bill Walsh, *The* Post *Drops the "Mike"—and the Hyphen in "E-mail,"* Wash. Post, Dec. 4, 2015, https:/www.washingtonpost.com/opinions/the-post-drops-the-mike—and-the-hyphen-in-e-mail/2015/12/04/ccd6e33a-98fa-11e5-8917-653b65c809eb_story.html.

they and the like instead of *he* or *she*."[36] Walsh asserted, "simply allowing *they* for a gender-nonconforming person is a no-brainer."[37]

The same year, the American Dialect Society[38] selected the gender-neutral singular *they* as Word of the Year. The Society recognized *they* "for its emerging use as a pronoun to refer to a known person, often as a conscious choice by a person rejecting the traditional gender binary of *he* and *she*."[39] For those of us who may have erroneously thought that the singular *they* is a new language development, the Society shared that "[t]he use of singular *they* builds on centuries of usage, appearing in the work of writers such as Chaucer, Shakespeare, and Jane Austen."[40] The online dictionary, www.dictionary.com, also highlights how "Shakespeare, Swift, Shelley, Scott, and Dickens, as well as many other English and American writers, have used *they* and its related case forms to refer to singular antecedents."[41]

In 2017, the *Chicago Manual of Style* announced that writers may "use *they* to refer to a specific, known person who does not identify with a gender-specific pronoun such as *he* or *she*."[42] At the time, the *Manual* reported that "[t]his usage is still not widespread either in speech or in writing, but Chicago accepts it even in formal writing."[43] Also in 2017, the Associated Press authorized journalists to use the singular *they*, but indicated a preference for grammatical workarounds:

> *They/them/their* is acceptable in limited cases as a singular and/or gender-neutral pronoun, when alternative wording is overly awkward or clumsy. However, rewording usually is possible and always is preferable. Clarity is a top priority; gender-neutral use of a singular *they* is unfamiliar to many readers. We do not use other gender-neutral pronouns such as *xe* or *ze*.[44]

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36 *Id.*

37 *Id.*

38 "Members in the 127-year-old organization include linguists, lexicographers, etymologists, grammarians, historians, researchers, writers, editors, students, and independent scholars." *2015 Word of the Year Is Singular "They,"* Am. Dialect Soc'y (Jan. 8, 2016), https://www.americandialect.org/2015-word-of-the-year-is-singular-they.

39 *Id.*

40 *Id.*

41 *They*, Dictionary.com, https://www.dictionary.com/browse/they (last visited Apr. 4, 2020) (emphasis added). Interestingly, the online version of the Merriam-Webster Dictionary notes that the word "'thon' was a singular, gender-neutral pronoun in our unabridged dictionary. Until it wasn't." *We Added a Gender-Neutral Pronoun in 1934. Why Have so Few People Heard of It?*, Merriam-Webster, https://www.merriam-webster.com/words-at-play/third-person-gender-neutral-pronoun-thon (last visited Apr. 4, 2020).

42 Chicago Manual, *Chicago Style for the Singular* They, CMOS Shop Talk (Apr. 3, 2017), http://cmosshoptalk.com/2017/04/03/chicago-style-for-the-singular-they/.

43 *Id.*

44 Associated Press, The Associated Press Stylebook 274 (2017).

The 2017 *AP Stylebook* suggested the (disconcerting) option of writing around the pronoun: "In stories about people who identify as neither male nor female or ask not to be referred to as *he/she/him/her*: Use the person's name in place of a pronoun, or otherwise reword the sentence, whenever possible."[45] Paula Froke, lead editor for the *AP Stylebook* stated, "Clarity is the top priority. Our concern was the readers out there. Many don't understand that *they* can be used for a singular person."[46]

As *Wall Street Journal* columnist and linguist Ben Zimmer and *The Roanoke Times Reporter* Tiffany Stevens (who is non-binary and uses the singular *they* pronoun) pointed out, the AP's stated preference for using a person's last name or rewording sentences over using the singular *they* results in "un-pronouning" a person.[47] This "pronoun avoidance" could be viewed as another form of "erasure."[48] Zimmer calls this "a bit of a copout."[49] Instead, Zimmer emphasizes that, to enhance clarity for readers, writers can expressly communicate the reason for using the pronoun; this will "help everyone get used to the idea that 'they' could refer to a singular person."[50]

The 2017 *AP Stylebook* indeed offered an option that did not involve "un-pronouning" someone: "If *they/them/their* use is essential, explain in the text that the person prefers a gender-neutral pronoun. Be sure that the phrasing does not imply more than one person."[51] This phrasing remains the same in the 2019 version of the *AP Stylebook*.[52]

In 2018, the Modern Language Association (MLA) Style Center included the following information on its website:

> Writers who wish to use a non-gender-specific pronoun to refer to themselves may prefer *they* and *their* (or a neologism like *hir*). Likewise, writers should follow the personal pronoun choices of individuals they write about, if their preferences are known, and editors should respect those preferences. *They* may be used in a singular sense according to a person's stated preference for it.[53]

45 *Id.*

46 Gerri Berendzen, *AP Style for First Time Allows Use of They as Singular Pronoun*, Aces: The Soc'y for Editing, Mar. 24, 2017, https://aceseditors.org/news/2017/ap-style-for-first-time-allows-use-of-they-as-singular-pronoun/ (emphasis added).

47 Kristen Hare, *AP Style Change: Singular They Is Acceptable "in Limited Cases,"* Poynter, Mar. 24, 2017, https://www.poynter.org/reporting-editing/2017/ap-style-change-singular-they-is-acceptable-in-limited-cases/.

48 *Id.*

49 *Id.*

50 *Id.*

51 Associated Press, The Associated Press Stylebook 274 (2017).

52 Associated Press, The Associated Press Stylebook 281 (2019).

53 MLA Style Center, *What Is the MLA's Approach To the Singular* They*?*, Modern Language Ass'n, Oct. 3, 2018.

Notably, in 2019, the *New York Times* ran an article by journalist Sophie Haigney about a New-York based photographer named Elle Pérez.[54] Using both the singular *they* and the honorific *Mx.*, Haigney wrote, "Past work by Mx. Pérez, who uses the gender-neutral pronouns 'they' and 'them,' has explored the punk community in the Bronx, underground night life culture, gender identity and Latinx communities. (Latinx is a gender neutral alternative to Latino or Latina.)."[55]

In late 2019, the seventh edition of the *Publication Manual of the American Psychological Association* also endorsed the use of the singular *they*.[56]

IV. Legal Writing Experts Are Shifting How They Advise Lawyers About Using Gender-Neutral Language

Given the lively debate in legal writing circles right now over gender-neutral pronouns, it might surprise some of us to learn that at least two legal writers advocated for the use of the singular *they* over two decades ago. In 1995, Professor Robert D. Eagleson wrote an article entitled *A Singular Use of They*, published in the *Scribes Journal of Legal Writing*.[57] Providing historical context, Eagleson highlighted how "the use of *they* to refer to a singular noun is not an innovation of recent decades or even of this century"; excerpts in *The Oxford English Dictionary* evidenced the pronoun's use at least as far back as the fourteenth century.[58] He further contended, "In adopting *they* with singular reference, we are simply following a long-established convention of the English language."[59] A few years later, in 1998, Debora Schweikart took a similar stance and argued "that the legal profession should take a leading role in the development of fair speech by adopting accurate gender neutral pronouns for the singular third person."[60] She suggested the singular *they*.[61]

54 Sophie Haigney, *Forced to Wait for a Ride? Might as Well Enjoy the Art*, N.Y. Times, Mar. 29, 2019, at C20.

55 *Id.* Further, on July 10, 2019, *New York Times* opinion writer Farhad Manjoo argued that "it's time for *they*." Farhad Manjoo, *It's Time for "They,"* N.Y. Times, July 10, 2019, at A27.

56 Chelsea Lee, *Welcome, Singular "They,"* APA Style (Oct. 31, 2019), https://apastyle.apa.org/blog/singular-they.

57 Robert D. Eagleson, *A Singular Use of They*, 5 Scribes J. Legal Writing 87 (1994–1995).

58 *Id.* at 89.

59 *Id.*

60 Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 Women's Rts. L. Rep. 1, 1 (1998).

61 *Id.* at 8.

Notwithstanding these forward-thinking recommendations over two decades ago, it has taken our profession a while to consider how the singular *they* could work seamlessly in actual day-to-day practice. Initially in this context, some scholars and experts counseled legal writers to write "conservatively" for fear of confusing readers. Recently, however, legal writing experts have suggested using straightforward textual sentences or footnotes to directly explain to readers why the writer intentionally employed a particular pronoun. These are easy solutions that can enhance awareness of societal change, accuracy in the way we refer to litigants, and respect for and inclusion of others.

Let's gain context by reviewing some of the guidance our legal writing community has exchanged over the past twenty years about gender-neutral writing. These examples are not intended as *critique* from a position of hindsight, but instead as *perspective* on the evolution of this conversation and efforts at awareness-raising among legal writers over the past two decades.

In 2002, a judge wrote, "No singular can be *they*," in an article about gender-neutral writing.[62] Five years later, the judge advised colleagues in a *New York State Bar Journal* article about ethical judicial opinion writing, stating that "[s]ome states—New York included—require that opinions be gender neutral."[63] The 2007 article did not address gender-neutral pronouns.

In 2009, in writing about federal appellate judges' use of gender-neutral language in opinions, a law professor described the principle of "reader expectation theory."[64] This theory posits "that writers communicate more effectively if they use linguistic structures that readers expect. Linguistic quirks cause readers to stumble, breaking their concentration."[65] While the professor advocated that legal writers should use gender-neutral language, she also emphasized that "the legal writer's purpose is usually not to shock but to explain or persuade. A dramatic departure from expectations may divert legal readers from the writer's intended message."[66] If we strictly apply this approach today, though, we prioritize concerns about potential reader distraction ahead of a legal writer's potential role in helping effect societal change (while, of course, vigorously representing the client's interests). So long as the legal writer and the client talk through the potential risks and then agree on a writing

62 Gerald Lebovits, *He Said—She Said: Gender-Neutral Writing*, N.Y. St. B. Ass'n J., Feb. 2002, at 55.

63 Gerald Lebovits, *Ethical Judicial Writing—Part III*, N.Y. St. B. Ass'n J., Feb. 2007, at 64.

64 Judith Fischer, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. Rev. 473, 489 (2009).

65 *Id.* (internal citations omitted).

66 *Id.* at 490.

strategy, a good piece of legal writing can respectfully yet firmly educate a reader who might be unfamiliar with a particular grammatical structure. We do this all the time with odd legal phrases or technical terminology; can't we also do it with a four-letter pronoun? A clear and concise explanation of its use at the outset, and perhaps a reminder later in the piece if necessary, can connect the reader more closely to the narrative, and ease potential qualms. The use of gender-neutral pronouns need not be "a dramatic departure"[67] from a reader's expectations if handled gracefully by the legal writer. Indeed, as the professor noted in a subsequent article a few years later, "Gender-*biased* language can distract the reader."[68] We will see examples of this in section VI.E. below.

In 2010, another law professor wrote about the Supreme Court's use of gender-neutral language.[69] She relayed how "[m]ost modern legal writing texts and style manuals recommend that writers use gender-neutral language."[70] However, with regard to the singular *they*, she described the consensus at the time as follows:

> Several alternatives are not recommended or accepted in the world of formal legal writing, including the use of the word *they* as a singular pronoun and "slash constructions" (s/he, he/she). Although the use of *they* as a universal singular pronoun has deep historical roots, such use is not currently considered grammatical because it poses a problem of subject-verb agreement. While the singular *they* might slip by in speech, in formal writing it is more likely to be noticed and frowned upon. Ultimately, it may become an accepted gender-neutral pronoun for use with both singular and plural antecedents, but law may be the last to adopt such a practice.[71]

In 2013, another professor wrote an article for the *Idaho Advocate* counseling legal writers against using the singular *they*.[72] Similar to the foregoing authors, she advised, "While this is perfectly acceptable in casual speech, it is not yet acceptable in formal writing. I suspect this is changing but for now do not use *they* as a singular pronoun in your writing."[73] In a footnote, however, the professor flagged the *New Oxford American*

67 *Id.*

68 Judith D. Fischer, *The Supreme Court and Gender-Neutral Language: Splitting La Difference*, 33 Women's Rts. L. Rep. 218, 223 (2012) (emphasis added).

69 Leslie Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 17 Duke J. Gender L. & Pol'y 81 (2010).

70 *Id.* at 82.

71 *Id.* at 87.

72 Tenielle Fordyce-Ruff, *Problems with Pronouns Part III: Gender-Linked Pronouns*, The Advoc., June/July 2013, at 48.

73 *Id.*

Dictionary's position that "using *they* as a singular pronoun is becoming more acceptable" and may be preferable "to *he* in some instances."[74]

A year later, another professor highlighted the growing awareness and acceptance of gender-neutral pronouns. He emphasized that, "[l]ike all living languages, the English language is an evolving work in progress. One aspect of the evolutionary process is that new words are coined and added to an existing vocabulary so as to meet emerging linguistic needs."[75] Citing Sweden's adoption of a new gender-neutral pronoun (discussed later in section V. of this article), he argued that "[t]he simplest way to avoid application of the masculine rule and related objectionable linguistic usages in drafting legislation and other legal rules is to adopt several new referent-inclusive pronouns."[76] He suggested new pronouns like *ee*, *eet*, and *herim*.[77]

Still, as of five years ago, other legal writing scholars remained hesitant to encourage lawyers to use gender-neutral pronouns, reiterating the perceived dangers of "reader distraction." In 2015, a professor cautioned that "[l]anguage that may distract, annoy, or possibly inflame the reader is language that any practitioner representing a client, and writing with a specific objective, should avoid at all times."[78] She emphasized that, of course, "[g]ender-biased language can cast [a] shadow over the writer's purpose."[79] Nonetheless, with regard to gender-neutral pronouns, she warned, "Progressive though they may be, these nonspecific pronouns are still avant-garde to most people and are likely to distract and startle. They also may be perceived as malapropos gender activism and could alienate readers."[80]

The same year, the *Idaho Advocate* author mentioned above wrote a follow-up piece, reporting that "[t]he language of the law is moving toward gender-and bias-free word choices, but not as fast as other disciplines."[81] She mentioned in a footnote that "[u]sing *they* as a singular pronoun is becoming commonplace and accepted. Many legal readers, however, are still jarred by its usage."[82]

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74 *Id*. at 49 n.3 (emphasis added).

75 C. Marshall Thatcher, *What is "Eet"? A Proposal to Add a Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*, 59 S.D. L. Rev. 79, 79 (2014).

76 *Id*. at 87.

77 *Id*. at 83–84.

78 Eunice Park, *How to Use Gender-Neutral Language in Legal Writing*, Cal. Law., Aug. 2015, http://legacy.callawyer.com/2015/08/how-to-use-gender-neutral-language-in-legal-writing/.

79 *Id.*

80 *Id.*

81 Tenielle Fordyce-Ruff, *Fairness, Clarity, Precision, and Reaction: Gender-Free and Bias-Free Word Choice*, The Advoc., Aug. 2015, at 52.

82 *Id*. at 52 n.2 (citing Bryan Garner, Garner on Language and Writing 244 (2009)).

In a similar vein, in 2016, another professor wrote an article about the singular *they* for the *Kansas Bar Association Journal*.[83] She emphasized that attorneys should "be conservative when we write because we usually write on another person's behalf, for an audience that may not be receptive to freewheeling language choices. That context imposes a duty of care that probably keeps the practicing bar away from the cutting edge of a grammar shift."[84] She counseled legal writers that "[w]hen we write for our clients it's not a great idea to be on the grammar advance guard."[85] Looking ahead though, she predicted, "Perhaps one day, singular *they* will seem as natural and correct as the universal *he* once did."[86] At the time, like others before her, she refrained from nudging legal writers to forge that path.

Later in 2016, an article in the *Vermont Bar Journal* called on legal writers to embrace change and address the "hole in our language."[87] The author couched gender-neutral pronouns as one solution to a language gap, stating, "Many members of the transgender and genderqueer communities do not feel comfortable with gendered pronouns like he or she. We need a gender-neutral pronoun to reflect this new reality."[88] The author also illuminated the bigger societal picture: "Gender-neutral pronouns benefit the trans and gender-queer communities, but they also have a broader salutary effect. They blur or erase gender lines and therefore lead to greater equality."[89] Thus, he urged, "Using gender-neutral pronouns disrupts and threatens male privilege by redefining gender roles through language."[90]

Shortly thereafter, in January 2017, a professor published an article about the singular *they* and the lesser known *ze* pronoun.[91] She conveyed that "[a] new change is upon us to include persons who consider themselves gender neutral. Using 'ze' or the singular they as pronouns is gaining popularity and acceptance."[92] Like others before her, she advised legal writers "to write conservatively, that is, to follow the traditional rules of grammar. A brief-writer does not want his or her style to interfere with

83 Joyce Rosenberg, *A Singular Understanding of "They,"* J. Kan. B. Ass'n, Apr. 2016, at 20.

84 *Id.*

85 *Id.*

86 *Id.* at 21.

87 Greg Johnson, *Welcome to Our Gender-Neutral Future*, Vt. B.J., Fall 2016, at 36.

88 *Id.*

89 *Id.* at 37.

90 *Id.*

91 Kathleen Dillon Narko, *They and Ze: The Power of Pronouns*, CBA Rec., Jan. 2017, at 48.

92 *Id.*

a judge's reading of the brief."[93] Looking ahead, however, she indicated, "My advice may be different in the not-too-distant future. A generational change is afoot."[94]

The same year, Sarkisov and Kude wrote an article for the San Francisco Bar Association, acknowledging that "modern legal writers might experience discomfort, or uncertainty, in practicing gender neutral writing. *They* as third person singular might seem too informal or initially awkward."[95] However, Sarkisov and Kude urged legal writers not to let awkwardness stand in the way of necessary change. They reassured writers that "hesitation will inevitably ease with continued usage and increasing exposure to others' usage."[96] They offered nine grammatical options for cultivating gender neutrality, but ultimately suggested Option 10: "[B]ecause language is living and changing, and the choices we make to be unbiased in our words diminish the biases passed onto future generations reading those words—[begin] to use *they*."[97] Sarkisov and Kude encouraged, "It is through writing that change is effected, and effective change is reflected through writing. At the least, legal writing should be more progressive than the DMV."[98]

Even more recently, in 2018, a professor wrote an *Arizona Attorney* article asserting, "*They* is now a singular gender-neutral pronoun. Maybe we should accept it and move on with our lives."[99] She reminded readers that, "[i]n fact, for centuries people have used *they* and *them* to describe an individual whose identity, and thus gender, is unknown or irrelevant. Chaucer did it in *The Canterbury Tales*. Emily Dickinson did it in personal correspondence. Shakespeare did it in his plays and poetry."[100] The professor acknowledged that legal professionals "are notoriously late adopters, especially when it comes to linguistic change."[101] This is because

93 *Id*. at 51.

94 *Id*. at 52.

95 Sarkisov & Kude, *supra* note 23, at 42.

96 *Id*.at 42–43.

97 *Id*. at 43.

98 *Id*. Regarding the Department of Motor Vehicles, on May 29, 2019, the *New York Times* reported that "nine state motor vehicles bureaus have recently added the 'X' [non-binary gender] option to driver's licenses without involving the legislature. Several other jurisdictions, including New York City, Oregon, New Jersey and New Mexico, have also begun to allow people to change the gender on their birth certificate to 'X' [instead of male or female]." Amy Harmon, *Which Box Do You Check? Some States Are Offering a Nonbinary Option*, N.Y. Times, May 29, 2019, https://nyti.ms/2Wc7F49l; *see also* Sarkisov & Kude, *supra* note 23, at 42 ("In October 2017, Governor Jerry Brown signed SB179 into law, offering a gender-neutral option on state documents for those who do not identify as male/female."); Brief of Amici Curiae States of California, Colorado, Maine, Minnesota, Nevada, New Jersey, Oregon, Vermont and Washington in Support of Appellee, Zzyym v. Pompeo, 2019 WL 2171322, at *3 nn.1–4 (10th Cir. May 15, 2019) (No. 18-1453).

99 Susie Salmon, *Them!*, Ariz. Att'y, Oct. 2018, at 10.

100 *Id.*

101 *Id.*

"we don't want our audience to think that our use of the singular *they* indicates a carelessness about noun/pronoun agreement or ignorance of grammar rules in general. But much like the common law, the English language evolves."[102] She offered legal writers a simple solution: "[O]f course, if an individual communicates a desire to be addressed and described using a particular set of pronouns, respect that wish. And if you're concerned about confusion, you can always drop a footnote explaining the reasons behind your pronoun usage to your audience."[103]

An attorney gave similar advice in a 2018 article in the *Minnesota Lawyer*.[104] She articulated three potential uses for the pronoun *they*: "(1) the familiar gender-neutral plural ('the students should bring their backpacks'); (2) the reaffirmed gender neutral singular ('each student should bring their backpack'); and (3) the shiny new non-binary singular ('Davon will bring their backpack.')."[105] She posed the question, "What's a writer to do? How about what a good writer always does: accurately reflect the facts while respecting both our readers and the people we write about."[106] Like other authors mentioned above, the attorney advised legal writers to be change-makers for inclusion and transparency:

> Recognize that you are on the frontiers of inclusion, and help your reader join you there. When introducing someone who uses a pronoun other than "he" or "she," try dropping in an early footnote or a parenthetical note that "X uses the pronoun they."[107]

In 2019, another attorney writing about her prior experience as a judicial clerk for an Oregon Supreme Court Justice modeled how to use the singular *they* with assertion, transparency, and clarity.[108] After her first use of the pronoun in her essay, she inserted a footnote stating, "I have adopted the singular 'they' for this essay because it is both more inclusive and more flexible."[109] She also mentioned, "I understand that [the Justice for whom I clerked] has come to accept the singular 'they.'"[110] The same year, two professors wrote an article about the singular *they* for the

102 *Id.*

103 *Id.*

104 Karin Ciano, *Legal Writing Notebook: What's Up with the Singular "They" These Days?*, Minn. Law., May 7, 2018.

105 *Id.*

106 *Id.*

107 *Id.*

108 Nora Coon, *The Landau Look: A Clerk's-Eye View*, 97 Or. L. Rev. 569 (2019).

109 *Id.* at 569 n.2.

110 *Id.*

Michigan Bar Journal.[111] They indicated that "[t]he flexibility gained is in avoiding the clumsy *he* or *she*, capturing collective nouns with increased comfort, and respecting those who prefer a gender-neutral pronoun."[112] Ultimately, they advised, "Attorneys, as wordsmiths, should embrace these changes."[113]

Finally, in a recent post on the Appellate Advocacy Blog, a professor relayed how a mindful use of the singular *they* is a "grammatical, rhetorical, and ethical choice" in legal writing.[114] She asserted that when we use the gender-inclusive pronoun, we are "sending a message about [our] attitude toward [our] professional role as an officer of the court who is responsible for the fair administration of the judicial system, a system that must treat all participants without bias or discrimination."[115]

The words of the foregoing professors, attorneys, and judges over the past twenty years illustrate the care that legal writers take in making sure our written work touches our audiences. The evolution of the conversation also shows that we, as a legal writing community, must constantly grow—to make sure our work includes more voices and narrates their stories. We cannot remain stuck in dated grammar rules or engage in a form of self-censorship in an effort to avoid distracting, annoying, inflaming, or alienating legal readers and meanwhile marginalize members of our society. Instead, we can give our legal readers more credit than that. With transparent, helpful, and concise explanations, our readers (like us) can adjust. We can thoughtfully explain to readers *why* we have made particular pronoun choices in our legal writing—just as we often need to clarify our use of peculiar legal phrases or puzzling technical terms—and then move on to our substantive narrative and content.

V. Putting Our Singular They in Broader Context

Legal writers and readers who might initially be resistant to, or unfamiliar with, the singular *they*, or feel that the legal profession is not quite ready for this grammatical shift, might benefit from greater context. This section describes the efforts afoot in some American jurisdictions to incorporate gender-neutral language into legislation and government

111 Brad Charles & Thomas Myers, *Evolving They*, Mich. B. J., June 2019, at 38.

112 *Id.*

113 *Id.*

114 Kirsten K. Davis, *He, She, or They: Thinking Rhetorically About Gender and Personal Pronouns*, Appellate Advocacy Blog (Sept. 5, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/09/he-she-or-they-thinking-rhetorically-about-gender-and-personal-pronouns.html (citing Tom Cobb, *Embracing the Singular "They,"* NW Law., May 2019, at 12).

115 *Id.*

documents. This section of the article further situates our discussion of gender-neutral pronouns in a global framework, by chronicling the successes and challenges of inclusive writing movements in other countries and legal systems. Language activists advocate that gender-inclusive language helps remedy the grammatical erasure of marginalized citizens. Overall, linguistic changes indeed take time, even more so in languages like French, Spanish, and Italian in which—unlike in English—nouns and adjectives historically have assumed either masculine or feminine genders. Nonetheless, as the following examples illustrate, change is possible, and it is happening all around us.

A. Gender-Neutral Language Initiatives in American Legal Jurisdictions

Many jurisdictions in the United States have launched initiatives to incorporate and use gender-neutral language in legislation. Some states even have proposed measures to amend their constitutions to incorporate gender-neutral language.[116]

According to the National Conference of State Legislatures, as of 2013, "[a]bout half of the states have moved toward using gender-neutral language in their official documents."[117] However, simply doing a "find-and-replace," scanning the state codes for the word *he* and adding *she* obviously is not going to be enough.[118] This is especially true now that many states are recognizing a "third gender option" on ID cards and birth certificates.[119]

Some California lawmakers have expressly acknowledged the need to consider how pronoun usage in legislation affects nonbinary and transgender citizens. In 2018, California's Assembly Concurrent Resolution No. 260 proposed a measure to "encourage the Legislature to engage in a coordinated effort to revise existing statutes and introduce new legislation

116 *See Utah Gender-Neutral Constitutional Language Amendment*, Ballotpedia, https://ballotpedia.org/Utah_Gender-Neutral_Constitutional_Language_Amendment_(2020) (last visited Apr. 5, 2020) (mentioning a proposed measure in Utah; successful measures in New York, Maine, Maryland, and California; unsuccessful measures in Nebraska, New Hampshire, Wisconsin); *see also* Associated Press, *Some State Constitutions Are Going Gender-Neutral*, N.Y. Times, May 22, 2003, at A18 (mentioning measures in Rhode Island and Michigan).

117 Katy Steinmetz, *Down the Manhole: State Officials Grapple with Gender-Neutral Language*, Time, Feb. 5, 2013, https://swampland.time.com/2013/02/05/down-the-manhole-state-officials-grapple-with-gender-neutral-language. For example, Colorado's Executive Committee of Legislative Council "directed that gender-neutral language be used for all legislative measures." *Excerpt on Gender-Neutral Drafting from Colorado Legislative Drafting Manual*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/Portals/1/Documents/lsss/ExcerptGender-NeutralDraftingCO.pdf (last visited Apr. 5, 2020). Additionally, since 2013, Washington, D.C. "has made great strides in ensuring the use of gender neutral language in laws, with changes to more than 3500 section[s] of the state code." Avani Bansal & Vandita Morarka, *Gender, Language and the Law*, Live Law, Sept. 7, 2017, https://www.livelaw.in/gender-language-law/.

118 Steinmetz, *supra* note 117.

119 *See supra* note 98.

with inclusive language by using gender-neutral pronouns or reusing nouns to avoid the use of gendered pronouns."[120] In the recitals to the resolution, the drafters explained that "[t]he use of the pronouns 'he' or 'she' for individuals is not inclusive of all transgender people, nonbinary people who may not ascribe to a particular or fixed gender, or people who otherwise use different pronouns."[121] The measure also mentioned that "[c]ertain writing style guides, including the Chicago Manual of Style and the Associated Press stylebook, have recently accepted the use of 'they' as a singular pronoun in certain cases."[122] The California resolution passed.[123]

At least two jurisdictions have enacted laws imposing penalties for an entity's intentional failure to honor an individual's identified pronouns. For example, the New York City Commission on Human Rights provides Legal Enforcement Guidance on Gender Identity/Gender Expression. It explains individual pronoun usage as follows: "Most people and many transgender people use female or male pronouns and titles. Some transgender, non-binary, and gender non-conforming people use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir."[124] The Commission's website—which describes various aspects of the New York City Human Rights Law—indicates that the law "requires employers and covered entities to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.) with which a person self-identifies, regardless of the person's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person's identification."[125] The website notes that "[t]he Commission can impose civil penalties up to $125,000 for violations, and up to $250,000 for violations that are the result of willful, wanton, or malicious conduct."[126] Similarly, a California statute that went into effect on January 1, 2018, states that "it shall be unlawful for a long-term care facility or facility staff to . . . willfully and

120 Assemb. Con. Res. 260, 2017–2018 Reg. Sess. (Cal. 2018).

121 *Id.*

122 *Id.*

123 *Id.*

124 *See* N.Y.C. Comm'n on Human Rights, *supra* note 11, at 4 n.15.

125 *Id.* Covered entities include employers and providers of public accommodations and housing. *Id.*

126 *Id.* In 2017, Canada's Senate passed Bill C-16 which "prohibits discrimination against transgender Canadians and affords them protection against hate crimes." Phil Heidenreich, *Senate Passes Bill C-16 Which Defends Transgender Rights*, Global News, June 16, 2017, https://globalnews.ca/news/3532824/senate-passes-bill-c-16-which-defends-transgender-rights/. A media battle ensued over whether this bill criminalized a refusal to use an individual's personal pronouns, with opponents to the bill arguing that it violates the right to freedom of expression. As Professor Brenda Cossman explains in her article, *Gender Identity, Gender Pronouns, and Freedom of Expression: Bill C-16 and the Traction of Specious Legal Claims*, 68 U. Toronto L.J. 37 (2018), "there is nothing in Bill C-16 that would risk criminalizing the misuse of gender pronouns." *Id.* at 46. Further, "to the extent that Bill C-16 might protect trans and gender non-binary individuals from harassment through the misuse of pronouns, it would not be a violation of freedom of expression." *Id.*

repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns."[127]

Thus, in these contexts in New York and California at least, grammar rules are not a valid justification for declining to employ the singular they to refer to an individual who uses that pronoun.

B. Gender-Fair Language Movements in International Jurisdictions

The call for gender-inclusive language is gaining traction in many parts of the world. Language advocates in numerous other countries have launched movements toward "inclusive writing" or "gender-fair writing"—with the initial goal of reducing or eliminating the masculine bias. Modernizing well-entrenched language traditions, especially in European languages in which nouns are either masculine or feminine (unlike English), is obviously not an easy endeavor. Advocates have proposed various ways of changing languages to achieve the goal of including women, noting,

> Gender-fair language (GFL) aims at reducing gender stereotyping and discrimination. Two principle strategies have been employed to make languages gender-fair and to treat women and men symmetrically: neutralization and feminization. Neutralization is achieved, for example, by replacing male-masculine forms (policeman) with gender-unmarked forms (police officer), whereas feminization relies on the use of feminine forms to make female referents visible.[128]

One example of feminization is converting "professore" in Italian to "professoressa," to refer to a female professor. Feminization of words might not always be the ideal solution. Language experts report, for instance, that "[t]he Italian feminine suffix -essa, for example, has a slightly derogatory connotation."[129]

A vivid example of a language's ability to shift toward gender inclusion is Sweden's formal adoption of a new gender-neutral pronoun—*hen.* This word, referred to as a "neologism" (a "newly coined word or expression"),[130] "is used to refer to a person without revealing their gender—either because it is unknown, because the person is trans-

127 Cal. Health & Safety Code § 1439.51(a)(5) (2018).

128 Sabine Sczesny, Magda Formanowicz & Franziska Moser, *Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?*, 7 Frontiers in Psychology, art. 25 (Feb. 2016) (abstract).

129 *Id.* at 3.

130 *Id.*

gender, or the speaker or writer deems the gender to be superfluous information."[131] Swedish language experts remind us that "[t]he word 'hen' was coined in the 1960s when the ubiquitous use of 'han' (he) became politically incorrect."[132] Linguists sought a way around "the clumsy 'han/hon' (s/he) construction."[133] *Hen* "resurfaced around 2000, when the country's small transgender community latched onto it, and its use has taken off in the past few years. It can now be found in official texts, court rulings, media texts and books."[134] The word "appeared in 2012 in a children's book where it served as an alternative to the gender-marked pronouns 'she' (*hon*) and 'he' (*han*)."[135]

Sweden's *hen* serves as a good model for the concept that language can adapt to, and effect, societal change. In fact, the country's language academy, established in 1785, was set up "with the aim to adapt the Swedish languages to changing cultural and societal influences."[136] To test the impact of the new pronoun *hen*, researchers conducted a study in which they asked 2,000 native Swedes to associate a stick figure with a pronoun; the participants chose *hen* more than the traditional *hon* or *han*.[137] Reportedly, "[t]his study suggests that new words can lead to new ideas in society."[138] In 2018, the World Economic Forum ranked Sweden as one of the top three gender-equal countries in the world.[139] Interestingly, Sweden's neighbor—Norway—rejected a proposal in parliament to adopt its own "third gender" personal pronoun.[140]

131 AFP in Stockholm, *Sweden Adds Gender-Neutral Pronoun To Dictionary*, The Guardian, Mar. 24, 2015, https://www.theguardian.com/world/2015/mar/24/sweden-adds-gender-neutral-pronoun-to-dictionary.

132 *Id.*

133 *Id.*

134 *Id.*

135 Sczesny, *supra* note 128, at 3; *see also* Adam Rogers, *Actually, Gender-Neutral Pronouns Can Change a Culture*, Wired, Aug. 15, 2019, https://www.wired.com/story/actually-gender-neutral-pronouns-can-change-a-culture/amp ("In 2012 Jesper Lundquist wrote a children's book, *Kivi and the Monster Dog*, that referred to the main character with, as others had proposed, the neologized pronoun *hen*.").

136 Rick Noack, *Sweden Is About to Add a Gender-Neutral Pronoun To Its Official Dictionary*, Wash. Post, Apr. 1, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/04/01/sweden-is-about-to-add-a-gender-neutral-pronoun-to-its-official-dictionary/.

137 Ivan de Luce, *Sweden Recently Introduced a Gender-Neutral Pronoun. Psychologists Say It's Already Changing the Way People Think*, Bus. Insider, Aug. 19, 2019, https://www.businessinsider.com/sweden-has-non-gendered-pronoun-changing-the-way-people-think-2019-8?utm_source=hearst&utm_medium=referral&utm_content=allverticals.

138 *Id.*

139 World Economic Forum, The Global Gender Gap Report 2018 (Dec. 17, 2018), http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.

140 AFP, *Norway Parliament Turns down Third Gender "Hen,"* The Local No, Feb. 28, 2017, https://www.thelocal.no/20170228/norway-parliament-says-no-to-third-hen-gender. Norway is ranked #2 (just ahead of Sweden) in the World Economic Forum's Global Gender Gap Report. *See The Global Gender Gap Report 2018*, *supra* note 139. Figure 1 of this report shows that the "top seven countries in the rankings have closed at least 80% of the gap. Among them, the top four are Nordic countries (Iceland, Norway, Sweden and Finland)." *Id.* at 7–8.

Numerous international agencies, governments, and academic institutions have issued guidelines to assist citizens and members of academic communities in raising awareness about, and adopting, gender-inclusive language. Many of these pamphlets and guidebooks explain how *gendered* language reinforces male privilege, and why gender-inclusive language benefits society. For example, UNESCO (the United Nations Educational, Scientific, and Cultural Organization) issued Guidelines for Gender-Neutral Language in 1999. UNESCO created the guidelines "to deal with a growing concern that language does in fact influence thought and that the continuous usage of sexist language would, in effect, create representations that imply that women are inferior to men." [141] UNESCO aspired "'to transform behavior and attitudes that legitimize and perpetuate the moral and social exclusion of women' under the premise that current language usage was 'exclusionist to women and girls.'"[142] Later, in May 2008, the European Parliament promulgated a guideline on gender-neutral language "for all of the community's working languages."[143] The document asserts "that language has an influencing effect on behavior and perceptions."[144]

The Australian Government offers a Guide to Accessibility and Inclusivity that encourages the use of "inclusive language and terms."[145] It advises writers to recraft sentences "to avoid using gender-specific singular pronouns (he/she, her/his, her/him)."[146] Tasmania's Department of Education also issued Guidelines for Inclusive Language, noting that "[h]istorically in the English-speaking world, language usage has privileged men and often rendered women invisible or inferior."[147] The Guidelines instruct, "In language terms, the most inclusive strategy is to avoid references to a person's gender except where it is pertinent to the discussion. This often involves seeking gender neutrality when using terms and pronouns."[148] The Victorian Government in Australia explains in its

141 Franziska Moser, Sayaka Sato, Tania Chiarini, Karolina Dmitrow-Devold & Elisabeth Kuhn, *Comparative Analysis of Existing Guidelines for Gender-Fair Language Within the ITN LCG Network*, Language Cognition Gender, Marie Curie Initial Training Network, Mar. 2011, at 9 (internal citations omitted).

142 *Id.*

143 *Id.* at 10.

144 *Id.*

145 *Accessibility and Inclusivity*, Austl. Gov't, http://guides.service.gov.au/content-guide/accessibility-inclusivity/ (last visited Apr. 12, 2020).

146 *Id.*

147 Tasmanian Gov't Department of Education, Inclusive Language Guidelines 6 (Dec. 23, 2019), https://documentcentre.education.tas.gov.au/Documents/Guidelines-for-Inclusive-Language.pdf.

148 *Id.* Similarly, the University of Calgary in Canada issued an Inclusive Language Guide, emphasizing that "[i]nclusive communication avoids use of words or expressions that exclude specific groups of people or are no longer acceptable." The Guide espouses a forward-thinking viewpoint: "The language associated with gender, disabilities, age, class, size, Indigenous Peoples, racial, ethnic and religious identity can be sensitive and is always changing as societal views change and groups choose to redefine their own identities." The Guide defines "inclusion" as "[t]he process of creating a culture and

Inclusive Language Guide, "Language has the power to empower individuals and strengthen relationships."[149] The Guide states that "[i]nclusive language ensures everyone is treated with respect as such language is free from words or tones that reflect prejudice, discrimination or stereotypes."[150] Regarding pronouns, the Guide indicates that "[s]ome people prefer to be described with their first name only or a non-binary pronoun such as 'they' rather than a gendered pronoun. Others prefer no pronoun at all. Also be aware that some gender neutral pronouns exist, such as 'zie' and 'hir.'"[151] Likewise, the Canadian Translation Bureau "published a linguistic recommendation on gender inclusivity in correspondence."[152] It explains how "[s]omeone who doesn't identify with the masculine or feminine gender is referred to as having a non-binary gender identity."[153]

In 2014, the German federal justice ministry required all state bodies to use "'gender-neutral' formulations in their paperwork."[154] Thereafter, in 2017, Germany's highest court "found that having only two genders for official purposes was unconstitutional."[155] The court endorsed "creating a third gender category for people born with ambiguous sexual traits and those who do not identify as either male or female, or even dispensing with gender altogether in public documents."[156] The ruling required German authorities "to change thousands of laws and draw up new rules for issuing passports and birth certificates."[157]

Australia's capital city of Canberra now issues birth certificates that include a nonbinary gender designation.[158] Likewise, the province of Ontario, Canada began allowing citizens to provide alternative gender and sex information on government identification applications and forms. Instead of the traditional male/female binary option, individuals can

environment that recognizes, appreciates, and effectively utilizes the talents, skills, and perspectives of every individual." Univ. of Calgary, Inclusive Language Guide (June 2017), https://observatori382866246.files.wordpress.com/2019/02/inclusive-language-guide-june-13-2017.pdf.

149 Victorian Gov't, LGBTIQ Inclusive Language Guide (Aug. 11, 2016) (copy on file with author).

150 *Id.*

151 *Id.*

152 Josephine Versace, *Making Letters and Emails Gender-Inclusive*, Language Portal of Canada (Feb. 5, 2018), https://www.noslangues-ourlanguages.gc.ca/en/blogue-blog/inclusifs-gender-inclusive-eng.

153 *Id.*

154 Philip Oltermann, *Germans Try to Get Their Tongues around Gender-Neutral Language*, The Guardian, Mar. 24, 2014, https://www.theguardian.com/world/2014/mar/24/germans-get-tongues-around-gender-neutral-language.

155 Madhvi Raman, *Will a New Law Forever Change the German Language?*, Smithsonian Mag., Feb. 28, 2018, https://www.smithsonianmag.com/arts-culture/will-new-law-forever-change-german-language-180968289/.

156 *Id.*

157 *Id.*

158 Ariel Jao, *Gender "X": Ontario Issues Its First "Nonbinary" Birth Certificate*, NBC News, May 9, 2018, https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676.

choose "*x*" "which includes Trans, Non-Binary, Two-Spirit, and Binary people who don't want to disclose their gender identity."[159] In May 2018, Ontario issued its first "nonbinary" birth certificate.[160] The Canadian provinces of Northwest Territories, Newfoundland, and Labrador also adopted nonbinary birth certificate policies.[161] In a unanimous vote in 2019, the Icelandic Parliament passed a new gender identity law, permitting individuals who identify as non-binary to "change their legal gender at the national registry using the new third gender option of '*x*.'"[162]

Some governments are even reevaluating gendered language in their national anthems. In 2012, Austria changed its national anthem, replacing the lyrics "home to great sons" with "home to great daughters and sons," and "fraternal choirs" with "jubilant choirs."[163] In January 2018, Canada revised its national anthem to be gender-inclusive. The original language stated, "O Canada! Our home and native land! True patriot love in all thy sons command."[164] The new language deletes the words "thy sons" and replaces the phrasing with "in all of us command."[165] Obviously, this change did not happen overnight: "The vote was the culmination of the work of numerous women who had been calling for the change for almost 40 years."[166] Advocates in Germany have proposed changing the language in the national anthem from "fatherland" to "homeland" and altering the word "brotherly" to "courageously." This proposal has not yet been successful.[167]

As the foregoing examples illustrate, movements toward inclusive language are having global reach.

159 *Gender and Sex Information on Government IDs and Forms*, Gov't of Ontario, https://www.ontario.ca/page/consultation-gender-and-sex-information-government-ids-and-forms (last updated Feb. 7, 2020).

160 Jao, *supra* note 158.

161 *Id.*

162 Vic Parsons, *Iceland Adds Third Gender Option and Strengthens Trans Rights in Unanimous Vote*, Pink News, June 25, 2019, https://www.pinknews.co.uk/2019/06/25/iceland-third-gender-trans-rights/.

163 Leonid Bershidsky, *Why Germany Won't Have a Gender-Neutral Anthem*, Bloomberg, Mar. 7, 2018, 11:00 PM PST, https://www.bloomberg.com/opinion/articles/2018-03-07/gender-neutral-national-anthems-are-the-future-but-timing-is-everything (explaining that Austria kept the word "Fatherland" in its anthem).

164 *The Women Who Fought to Make Canada's National Anthem Gender-Neutral*, BBC, Feb. 9, 2018, www.bbc.com/news/stories-42977303.

165 *Id.*

166 *Id.*

167 In March 2018, "German Chancellor Angela Merkel . . . rejected a 'gender sensitive' move by a government commissioner on equality who called for the removal of the word 'Fatherland' from the country's national anthem." Benjamin Fearnow, *Merkel Dismisses German Official's "Gender -Neutral" National Anthem Proposal*, Newsweek, Mar. 5, 2018, 2:19 PM EST, https://www.newsweek.com/german-national-anthem-kristin-rose-mohring-feminist-sexist-fatherland-831152; *see also* AFP, *Row over German Anthem Erupts Amid Nationalism Debate*, France 24, May 10, 2019, https://www.france24.com/en/20190510-row-over-german-anthem-erupts-amid-nationalism-debate.

C. La Résistance

Despite the many advancements mentioned above, strong resistance to gender-neutral language and the "inclusive writing" movement persists. For example, prominent linguists and language institutions in France and Spain have outright opposed the inclusive language movement.

French nouns (and their corresponding pronouns and adjectives) are either masculine or feminine. French "has no neutral grammatical gender."[168] Further, there is a deep-rooted grammatical hierarchy, or patriarchy: "French students are taught that 'the masculine dominates over the feminine.'"[169] Applying this rule, if a writer or speaker were describing—in French—a gathering of 500 lawyers, 499 female and one male, the writer or speaker would use the *masculine* form of the word for "lawyers": *les avocats* (instead of *les avocates et l'avocat*). Critics of this historical and traditional grammar rule argue that "[c]ertain linguistic constructions . . . efface women from being seen in various personal and professional capacities."[170]

Proponents of the inclusive language movement in France have advocated for *neutralization* and *feminization*. One creative option is a proposed "grammatical tool that consists of adding a 'median-period' at the end of masculine nouns, followed by the feminine ending, thus indicating both gendered versions of every noun (like *musicien.ne.s*, which would read as 'male musicians and female musicians')."[171] The median periods also are referred to as "middots" or "interpuncts." In response to the movement, Microsoft Word released an inclusive French writing option in 2016, which helps writers construct the median periods or "middots."[172] The following year, in 2017, a French publishing company called Hatier released an "inclusive" textbook for third grade children "based on the 2015 recommendations of the High Council for Gender

168 Annabelle Timsit, *The Push to Make French Gender-Neutral: Can Changing the Structure of a Language Improve Women's Status in Society?*, The Atlantic, Nov. 24, 2017, https://www.theatlantic.com/international/archive/2017/11/inclusive-writing-france-feminism/545048/.

169 *Id.*

170 James McAuley, *Gatekeepers Say Gender-Neutral Pronouns Pose "Deadly Danger" for the French Language*, Wash. Post, Oct. 27, 2017, 10:24 EDT, https://www.washingtonpost.com/news/worldviews/wp/2017/10/27/is-making-french-less-sexist-a-threat-to-the-language-the-academie-francaise-says-oui/; *see also* Mary Aviles, *In Spanish, Inclusive Language Can Be at Odds with Grammar Rules*, Global Voices, Dec. 30, 2015, 17:04 GMT, https://globalvoices.org/2015/12/30/in-spanish-inclusive-language-can-be-at-odds-with-grammar-rules/ (Martyn Davies trans.) ("Feminist linguists maintain that this forced inclusion of the feminine within the masculine is a form of exclusion from the language. Being contained and invisible within masculine nouns forces women to ask themselves the same question thousands of times throughout their lives: 'Are they speaking about me?,' whilst men never experience this." (quoting Sandra Russo)).

171 Timsit, *supra* note 168.

172 *Id.*

Equality, which had outlined 10 ways to make the French language more gender-neutral."[173] This caused an "uproar."[174]

The foregoing suggestions and developments sparked spirited debate—some might even say, alarm—in France.[175] Perhaps the most staunch critic has been L'Académie Française itself, the established "council for matters pertaining to the French language."[176] The Academy has declared the French language to be "in mortal danger" as a result of this movement.[177] French Prime Minister Edouard Philippe wrote "to ministers describing the masculine form as a neutral term applicable to women, and demanding that ministries avoid inclusive writing, to boost 'intelligibility and clarity.'"[178] In 2017, he banned "gender equal words from government texts," reiterating that "state administrations must comply with grammatical and syntactic rules, especially for reasons of intelligibility and clarity."[179] Still, inclusive language advocates in France have achieved some forward momentum. In early 2019, the Académie Française approved "feminization" of job titles.[180]

A similar quarrel is underway in Spain. The Spanish language enforces the same masculine-dominant grammar rule as the French: "All nouns in Spanish are either masculine or feminine, and according to the language's rule, the masculine form trumps the feminine when describing a group of people containing members of both genders."[181] Like French advocates' inventive middots, creative Spanish speakers

173 *Id.*

174 *Id.*

175 Agence France-Presse, *No More Middots: French PM Clamps down on Gender-Neutral Language*, The Guardian, Nov. 21, 2017, 11:32 EST, https://www.theguardian.com/world/2017/nov/21/no-more-middots-french-pm-clamps-down-on-gender-neutral-language ("Moves to end the linguistic dominance of the masculine over the feminine have sparked impassioned debate in France.").

176 Timsit, *supra* note 168.

177 *Id.*; *see also* Ben McPortland, *French PM Bans Ministers from Using Female-Friendly Writing*, The Local Fr, Nov. 21, 2017, https://www.thelocal.fr/20171121/french-pm-bans-gender-equal-writing-from-official-texts ("[T]he Académie said [inclusive writing] puts the French language 'in mortal danger for which our nation will be accountable to future generations.'"); McAuley, *supra* note 170 (observing that the Académie Française has "issued a fiery condemnation of what in France is known as 'inclusive writing'").

178 Alasdair Sandford, *France Steps Back from Gender-Neutral Language*, Euronews, Nov. 21, 2017, https://www.euronews.com/2017/11/21/french-prime-minister-says-non-to-gender-neutral-language (discussing 2015 guidelines by the Haut Conseil à l'égalité entre les femmes et les hommes).

179 McPortland, *supra* note 177.

180 *Official Guardians of French Language Approve "Feminisation" of Work Titles*, France 24, Feb. 28, 2019, https://www.france24.com/en/20190228-french-language-academie-francaise-feminisation-professions; Jon Henley, *Académie Française Allows Feminisation of Job Titles*, The Guardian, Mar. 1, 2019, 13:43 EST, https://www.theguardian.com/world/2019/mar/01/academie-francaise-allows-feminisation-of-job-titles.

181 *See* Aviles, *supra* note 170.

> are moving away from this rule and toward what they consider to be more inclusive language. Instead of saying "todos" (the masculine plural form of "everyone"), they'll use "todos y todas" or even "tod@s" with the *at sign* symbolizing both the "a" and "o" ending in one character.[182]

Like L'Académie Française, Spain's highest language authority—The Royal Spanish Academy (Real Academia Española (RAE))—has resisted such changes.[183] Linguist Ignacio Bosque has stated, "'[T]he generic use of the masculine when both sexes are present is firmly established in the grammatical system' of Spanish, and it does not make sense 'to force linguistic structures.'"[184] (This begs the question: Isn't that what the traditionalists are doing? Forcing an *outdated* linguistic structure?) Others question the use of the @ sign as "not linguistic [or] pronounceable."[185]

In South America, specifically in Argentina, teenagers are championing a gender-inclusive language movement, substituting a gender-neutral "e" for the masculine "o" or the feminine "a" at the end of nouns.[186] For example, instead of "los soldados" (soldiers), one eighteen-year-old used the word "*les soldades*" at a student government rally, sparking controversy.[187]

Italy's *resistenza* to gender-neutral language seems less vocal but still present. An Italian astrophysics scholar, Dr. Marina Orio, reported that "[d]espite the fact that the Italian government has issued guidelines for the use of more gender-neutral language in public institutions like universities and research institutes, these guidelines are blatantly disregarded."[188]

Of course, it is important to recognize, as Levi C.R. Hord points out, that "grammatically gendered languages" like French, Spanish, and Italian might have a harder time than other languages transitioning to gender inclusive writing, "having less linguistic 'room' for subversion and innovation due to strict grammatical structures and agreement requirements."[189] Nonetheless, languages like Swedish and English—not subject to the same masculine/feminine grammar binary—could lead the way in carving out new vocabulary and grammatical constructs. Our four-letter English pronoun *they* could be a transformative example.

182 *Id.* (emphasis added).

183 *Id.*

184 *Id.*

185 *Id.*

186 Samantha Schmidt, *A Language for All*, Wash. Post, Dec. 5, 2019, https://www.washingtonpost.com/dc-md-va/2019/12/05/teens-argentina-are-leading-charge-gender-neutral-language/?arc404=true/.

187 *Id.*

188 Marina Orio, *Fighting for Gender-Fair Language at the National Institute of Astrophysics of Italy*, Gender/Sexuality/Italy, no. 4 (2017), http://www.gendersexualityitaly.com/26-fighting-for-gender-fair-language-at-the-national-institute-of-astrophysics-of-italy (abstract).

VI. Legal Writers Can Use the Singular They to Foster Clarity, Accuracy, Inclusion, and Respect

American legal writers who remain hesitant or resistant toward the singular they might benefit from seeing it in action, used effectively as a tool of clarity, accuracy, inclusion, and respect.

A. Parties Have Directly Addressed Personal Pronouns in Court Pleadings to Foster Clarity and Respect Parties' Pronoun Usage

In the past several years, some litigants and their counsel have directly identified individuals' personal pronouns in pleadings to clarify the use of the singular they within the document. For example, in 2015, in *Zzyym v. Kerry*, a party filed a complaint for declaratory, injunctive, and other relief in a federal district court in Colorado.[190] The complaint contended that the United States Department of State had deprived an intersex citizen of a passport because the applicant's gender identity was neither male nor female, yet the passport application required a gender designation. In a footnote situated in Paragraph 19 of the complaint, the litigant explained the intentional use of the singular *they* within the pleading: "As an intersex person who does not identify as either male or female, Dana uses the singular 'they,' 'them,' and 'their' third-person gender neutral pronouns."[191] Footnotes are a simple tool that legal writers can use to clarify the intentional use of the singular *they* in a document filed with the court.

Likewise, in a 2018 federal case related to arrests by the Louisiana State Police during a protest in Baton Rouge after Alton Sterling's shooting death, the plaintiffs filed a second amended complaint.[192] Numbered paragraphs of the complaint identified each plaintiff along with their associated pronouns. For example, one paragraph indicated that "Plaintiff Samantha Nichols goes by 'Sami' and uses the pronoun 'they.'"[193] The drafter then inserted a footnote, highlighting that *they* "is generally used as a pronoun for people who identify as neither male nor female," and citing an article from BBC News.[194] This pleading demonstrates how a legal writer can use a simple textual sentence (rather than a footnote) to inform the reader about the intentional use of the singular *they*.[195]

189 Hord, *supra* note 32, at 22.

190 Complaint, Zzyym v. Kerry, 2015 WL 6449495 (D. Colo. Oct. 25, 2015) (No. 1:15-CV-2362).

191 *Id.* ¶ 19 n.1.

192 Complaint, Imani v. City of Baton Rouge, 2018 WL 2948772 (M.D. La. Jan. 2, 2018) (No. 17-CV-00439).

193 *Id.* ¶ 23.

194 *Id.* at n.4.

195 *See also* Complaint ¶ 53, Sinnok v. State, 2018 WL 7458981 (Alaska Super. Ct. Aug. 24, 2018) (No. 3AN-17-09910) (indicating, in a numbered paragraph in the complaint, that "Plaintiff Margaret 'Sebastian' or 'Seb' Kurlaud is an eighteen-year-old permanent resident of Juneau, Alaska where they moved when they were three. Seb attends college in Massachusetts. Seb identifies as transgender, nonbinary, and prefers the pronoun 'they' and its derivations.").

Interestingly, the Louisiana State Police filed a motion to strike the plaintiffs' complaint on several grounds.[196] In the motion, the police-defendants asserted that the plaintiffs' inclusion of pronoun designations in the pleading was improper, as the Federal Rules require "that no such allegations be made, especially here, where the case has no sexual component whatsoever."[197] In an opposition brief, the plaintiffs countered that they had followed typical conventions for drafting pleadings, including describing each plaintiff.[198] They further explained that identifying individual pronouns in this instance was "both a courtesy to the [litigants] and necessary for clarity, because it indicates that elsewhere in the complaint the word 'they' may be used as a *singular* rather than plural pronoun."[199] This explanation is exactly the type of directive that addresses the pronoun issue head-on and educates a possibly unfamiliar reader about non-binary pronoun usage by members of our communities. The plaintiffs reiterated that "[t]here is a growing understanding in our legal system that a person should be referred to by the pronoun that they use," citing three published cases in which courts specifically acknowledged litigants' personal pronouns.[200] The plaintiffs also referenced two 2017 letters from the Clerk of the United States Supreme Court "rebuking litigants who refused to use the established pronoun of a party in a case caption."[201] Ultimately, the court denied the police-defendants' motion to strike the portions of the complaint that mentioned the pronouns.

These examples illustrate how a legal writer can clearly and concisely signpost intentional pronoun usage (and show courtesy to litigants) without "shocking" or "distracting" the reader.[202]

196 Defendants' Memorandum Supporting their Fed. R. Civ. P. 12(f) Motion to Strike, *Imani*, 2018 WL 2948634 (Jan. 22, 2018).

197 *Id.*

198 Plaintiffs' Opposition to Louisiana State Police Defendants' Motion to Strike Plaintiffs' Complaint, *Imani*, 2018 WL 2948640 (Feb. 5, 2018).

199 *Id.*

200 *Id.* (citing Cuoco v. Moritsugu, 222 F.3d 99, 103 n.1 (2d Cir. 2000) (involving a pre-trial detainee who the court described as "a preoperative male to female transsexual"; "We therefore refer to the plaintiff using female pronouns."); Nelson v. City of Madison Heights, 845 F.3d 695, 697 n.1 (6th Cir. 2017) ("While irrelevant to this case, Hilliard was a transgender woman whose legal name was Henry Lee Hilliard. All references to Hilliard will use female pronouns."); Farmer v. Perrill, 275 F.3d 958, 959 n.1 (10th Cir. 2001) (explaining that the case involved "Dee Farmer ('Farmer'), a transsexual prison inmate"; "Although a biological male, Farmer considers herself to be female and uses the feminine pronoun in referring to herself. In deference to her wishes, this opinion will do the same.")).

201 Plaintiffs' Opposition to Louisiana State Police Defendants' Motion to Strike Plaintiffs' Complaint, *Imani*, 2018 WL 2948640 n.9 (referring to a case, *Gloucester County School Board v. G.G.*, in which the Clerk admonished brief-writers for referring to the opposing party as "her" instead of "his" in the caption of the case).

202 Further, in a 2018 case involving election law, one party introduced both the honorific *Mx.* and the singular *they* to refer to one of several plaintiffs. First Amended Petition ¶ 21, Priorities USA v. State, 2018 WL 6030963 (Mo. Cir. Ct. Aug. 3, 2018) (No. 18AC-CC00226) (indicating, in a numbered paragraph, that "Plaintiff Ri Jayden Patrick is a 31-year-old resident of St. Louis, Missouri. Mx. Patrick is a transgender individual and prefers the pronouns 'they/them.'").

B. Legal Writers Also Have Provided Pronoun Clarity Through Well-Placed Footnotes in Briefs

In addition to pleadings, litigants have inserted simple and straightforward footnotes to provide clarity regarding the use of individuals' pronouns in the text of briefs. Notably, back in 1980, an appellant filing a reply brief with the United States Supreme Court identified the party's pronoun in a footnote, stating, "Plaintiff, although anatomically male, has stated in briefs that she prefers use of the feminine pronoun."[203]

In 2018, the law firm of Gibson, Dunn & Crutcher, LLP filed an *amicus curiae* brief on behalf of The Trevor Project in a case challenging the legality of Donald Trump's transgender military ban.[204] The brief focused on the harm inflicted by the ban upon the transgender population. As context and support for the rights and desires of members of the transgender community to serve in the military, the brief-writer wrote, "During a conversation between a transgender youth and a Trevor Project counselor, one individual explained that they had dreamed of joining the military since childhood, as they believed it was their only path to an affordable college education."[205] In the middle of the sentence, after the first appearance of the pronoun *they*, the brief-writer inserted a footnote, and explained, "Where appropriate, this brief uses 'they' and 'their' as singular, gender-neutral pronouns."[206]

In the *Zzyym v. Kerry* case mentioned above in section VI.A.'s discussion of pleadings, the plaintiff later filed a brief in support of the petition for declaratory, injunctive, and other relief, and in opposition to the State Department's motion for judgment.[207] The first page of the brief explained that "Zzyym was born intersex, with ambiguous genitalia, and their gender identity—the innate sense of being male, female, both, or neither—is neither male nor female."[208] The brief-writer placed a footnote directly after the first reference to the pronoun *their*. The footnote read, "As an intersex person who does not identify as either male or female,

203 Appellant's Reply Brief, Miller v. Zbaraz, 1980 WL 339698, at *4 n.1 (U.S. April 18, 1980) (No. 79-5); *see also Amici Curiae* Brief of ACLU Foundation, Rodgers v. State, 2017 WL 3421341, at *1 n.1 (Fla. July 31, 2017) (No. 17-1050) (noting, in a brief filed on behalf of a Florida prisoner diagnosed with gender dysphoria, that, "[f]or the majority of her life, Appellant Jeremiah Rodgers has been 'cruelly imprisoned within a body incompatible with her true gender'"; further explaining, in a footnote after the phrase "her life," that the brief uses "the gender pronouns of 'she/her' consistent with [the Appellant's] gender identity, which is female").

204 Brief of *Amicus Curiae* The Trevor Project in Support of Plaintiffs-Appellees and Affirmance, Doe v. Trump, 2018 WL 5619822 (D.C. Cir. Oct. 29, 2018) (No. 18-5257).

205 *Id.* at *19.

206 *Id.* at *19 n.33; *see also* Brief of *Amicus Curiae* The Trevor Project in Support of Appellees, Karnoski v. Trump, 2018 WL 3382851, at *18 n.30 (W.D. Wash. July 2, 2018) (No. 18-35347).

207 Plaintiff's Opening Brief in Support of Declaratory, Injunctive, and Other Relief and Opposition to Defendant's Motion for Judgment, Zzyym v. Kerry, 2016 WL 1660095 (D. Colo. April 22, 2016) (No. 1: IS-CV-02362).

208 *Id.* at *1.

Zzyym uses the singular 'they,' 'them,' and 'their' third-person gender-neutral pronouns."[209] For the reader's reference, the brief quoted a 2016 Economist article titled *Singular They*.[210]

One litigant took an extra procedural step to educate the court and opposing counsel about the use of the singular *they*, and to remind the parties to use it. In *Sai v. Pekoske*,[211] a *pro se* petitioner named "Sai" filed a "letter re courtesy pronoun usage." Sai relayed how, "[i]n its orders and opinions, this Court has referred to Petitioner with male references." Sai explained to the court and opposing counsel that

> Petitioner identifies as agender, not male, and has carefully avoided gendered language to refer to themselves. Petitioner respectfully requests, as a courtesy, that this court (and [the Transportation Safety Administration (TSA)]) use gender-neutral references to refer to Petitioner. Petitioner's preference is singular "they," but any gender-neutral language is fine (e.g. "Sai," "Petitioner," "zie," gender-avoidant grammatical structure, etc.).[212]

The litigant mentioned in a footnote how "[t]he use of singular 'they' dates to Shakespeare, and centuries earlier," citing *Hamlet*, *A Comedy of Errors*, the Rolls of Parliament, and the Wycliffe Bible.[213]

In a different case in which the same litigant, Sai, filed a motion to intervene, counsel for TSA filed a brief in opposition to the motion.[214] TSA's brief-writer inserted a footnote after the first mention of Sai's name in the court filing, stating

> "Sai" has been presented as the proposed intervenor's full legal name. Sai has indicated a preference for being referred to without any titular prefix (e.g. "Mr."), and has further indicated a slight preference for the use of gender neutral pronouns (e.g. "they" rather than "he").[215]

209 *Id.* at *1 n.2.

210 *Id.* (citing R.L.G., *Why 2015's Word of The Year Is Rather Singular*, The Economist, Jan. 15, 2016, http://www.economist.com/blogs/prospero/2016/01/johnson-singular-they); *see also* Brief of *Amicus Curiae* Intersex & Genderqueer Recognition Project in Support of Plaintiff-Appellee, Zzyym v. Pompeo, 2019 WL 2171323, at *6 n.10 (10th Cir. May 15, 2019) (No. 18:1453) (incorporating a footnote after the use of *their* in the brief's text, explaining, "[t]hough not all nonbinary people do, [the Intersex and Genderqueer Recognition Project's] constituent storytellers all use singular 'they/them/their' pronouns," further noting that "[s]ingular 'they' pronouns have been used since the 14th century," citing the Oxford English Dictionary).

211 Letter re courtesy pronoun usage, Sai v. Pekoske, No. 15-2356 (1st Cir. Sept. 30, 2017).

212 *Id.*

213 *Id.* at n.1.

214 Response in Opposition to Motion to Intervene, Cohen v. Transp. Sec. Admin., 2016 WL 8347304 (W.D. Tenn. Sept. 30, 2016) (No. 2:16-CV-2529).

215 *Id.* at n.1.

TSA indicated that counsel would honor the proposed intervenor's preference and use the singular *they*.[216]

The foregoing examples illustrate the simplicity of explaining the use of the singular *they* either in a footnote or directly in the text of a brief, to foster precision and courtesy.[217]

C. Judges Also Have Expressly Addressed Pronouns in Court Orders to Enhance Clarity and Respect Individuals' Pronoun Usage

Judges have directly discussed pronouns in their court orders, underscoring intent in word choice and respecting litigants' personal pronoun usage.[218] For example, in the aforementioned case involving Sai's motion to intervene, the court issued an order denying the motion.[219] In the first sentence, the order stated, "Before the court is individual third-party proposed intervenor Sai's motion to intervene . . . ."[220] The court inserted a footnote immediately after Sai's name, explaining that "[t]he proposed intervenor has indicated that 'Sai' is their full legal name. Because Sai has stated a slight preference for gender-neutral pronouns, the court will refer to the proposed intervenor as 'Sai,' 'the proposed intervenor' or 'they.'"[221]

In yet another case involving Sai, in an order granting in part and denying in part TSA's motion for summary judgment, the court stated that the suit involved "six [Freedom of Information Act] and Privacy Act requests for records that Plaintiff, whose full name is Sai, sent to the TSA in 2013."[222] In an accompanying footnote, the court noted that "Sai has

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216 *Id.*

217 Brief writers also have used footnotes to explain the honorific *Mx. See, e.g.*, Response Brief of Plaintiffs-Appellees, Free the Nipple—Fort Collins v. City of Fort Collins, 2017 WL 4054217 (10th Cir. Sept. 11, 2017) (No. 17-1103) (referring to one of the Plaintiffs-Appellees as "Mx. Hoagland," and then including a footnote directly after the sentence stating, "The honorific Mx. is a gender-neutral title utilized in connection with non-binary individuals."). In an *amicus curiae* brief filed in the United States Supreme Court by LGBTQ law students, recent law graduates, lawyers, judges, and law professors in an employment discrimination matter, an appendix listed the signatories; many used the honorific *Mx. See Amicus Curiae* Brief in Support of the Employee, Bostock v. Clayton County, 2019 WL 3060837 (U.S. July 3, 2019) (Nos. 17-1618, 17-1623, 18-107) (noting that "Mx. Brown identifies as transgender and queer," "Mx. Baines identifies as gay and queer," "Mx. Goldman identifies as queer," "Mx. Steiner identifies as non-binary and queer," "Mx. Baitch identifies as gay.").

218 Some judges even have placed signs in their courtrooms communicating their commitment to using gender-inclusive terms. *See* Sierra Trojan, *Winnebago Co. Courtroom Using Gender Inclusive Terms*, Fox 11 News, Aug. 21, 2019, https://fox11online.com/news/local/oshkosh-courtroom-using-gender-inclusive-terms (discussing a notice pinned to the wall of Wisconsin Circuit Court Judge Teresa Basiliere's courtroom stating, "It is common in a formal courtroom for the judge to use terms of Mr. and Ms. If a litigant or defendant has a preference for the court to use a gender-neutral term of Mx., please advise the judge or court staff.").

219 *Cohen*, 2016 WL 9450440.

220 *Id.* at *1.

221 *Id.* at *1 n.1.

222 Sai v. Transp. Sec. Admin., 315 F. Supp. 3d 218, 229 (D.D.C. 2018).

indicated a preference not to be referenced using gender pronouns, and, in this amended opinion, the Court has endeavored to respect that request."[223]

In *Tardif v. City of New York*,[224] a protester in the 2012 Occupy Wall Street movement filed a lawsuit against New York City and several police officers, asserting excessive force and deliberate indifference to serious medical needs during an arrest. The protester filed a multi-issue motion *in limine*, in which, among other things, she moved to require both parties to refer to her witness "formerly known as James Amico, as Mari Tade Storm Summers, and to use the pronouns 'she,' 'her,' and 'hers' when identifying or addressing Ms. Summers at trial."[225] The plaintiff requested the parties to use the same pronouns for another witness "formerly known as Tony Zilka, and now known as Mandy Quinn."[226] The defendants did not contest this portion of the motion *in limine*, so the court denied the request as moot. Still, the court took the time to acknowledge the pronoun request in its order. The court used *Ms.* to refer to both witnesses when addressing the defendants' "concern that the use of masculine pronouns or names may be necessary for clarity when referring to the 2012 events that are the subject of this suit, for example if Ms. Summers and Ms. Quinn are asked to identify themselves in video footage of the events."[227] The court emphasized, "As a general matter, the parties are required to use witness[es'] preferred pronouns and names."[228] Ultimately, the court urged the parties to "use great caution and limit any use of witnesses' 2012 names to those that are necessary to avoid confusion."[229]

223 *Id.* at 229 n.1.

224 344 F. Supp. 3d 579 (S.D.N.Y. 2018).

225 *Id.* at 606.

226 *Id.*

227 *Id.*

228 *Id.* at 606–07.

229 *Id.* at 607; *see also* Crowder v. Castillo, No. 1:16-CV-00851, 2016 WL 6599797, at *2 n.2 (E.D. Cal. Nov. 7, 2016) (noting on the second page of a magistrate judge's order screening an Eighth Amendment case to determine whether it stated a cognizable claim, that "Plaintiff is [a] transgender person," and then including a footnote stating, "Plaintiff does not state the gender he or she identifies with or a preferred pronoun to be identified with. Based on plaintiff's incarceration in a men's prison, the Court assumes that plaintiff is a transgender woman, i.e., a person whose female gender identity is different from the male gender assigned to her at birth, and the Court therefore uses female pronouns here."); Pryor v. S.F. City & County, No. C-12-02696, 2013 WL 12199455 (N.D. Cal. Sept. 19, 2013) (providing context for the court's use of the *she* pronoun, describing the defendant as an "African-American male-to-female transgender person," and referring to the defendant as *she* starting from the second sentence of the order); *In re* Boone, 924 N.W. 2d 44, 45 (Minn. Ct. App. 2019) (noting, in the first sentence of an opinion ruling on a petition for a name change, that "Appellant Bradley Stephen Boone appeals from the district court's denial of her name-change application," then including a footnote immediately after the word *her*, stating, "At oral argument, counsel for Boone indicated that Boone uses she/her pronouns. We will therefore refer to Boone using her preferred pronouns."); In the Matter of Outman, 19 N.Y.S.3d 678, 681 n.1 (N.Y. Sup. Ct. 2015) (referring to an inmate seeking review and vacatur of the denial of her grievance in which she requested special housing on account of her diagnosis of gender dysphoria, and indicating in a footnote that it would "honor petitioner's preference to be referred to by the female pronoun.").

Likewise, in a federal case in Florida addressing voting rights and early voting on school campuses,[230] the court issued an order granting students' and several voting rights organizations' motion for a preliminary injunction. In describing the burden certain citizens had to bear in order to vote, the court stated, "Mary 'Jaime' Roy does not own a car and is dependent on Gainesville's public transportation system. In one municipal election, they had to travel on two buses from their home to their voting location, which took between 40 and 60 minutes each way."[231] After the phrase "public transportation system," the court inserted a footnote explaining, "Plaintiff Roy identifies as gender-queer and prefers the use of the gender-neutral pronoun 'they.'"[232]

Further, in a federal case pending in New York, the court adjudicated the issue of "whether [a] plaintiff who identifies as gender queer and trans-masculine, may sue their former employer under a pseudonym."[233] In the first sentence of the court's order disallowing the use of the pseudonym, the court indicated that "Plaintiff Jaime Doe identifies as genderqueer and trans-masculine, with preferred pronouns of 'they,' 'their,' and 'theirs.'"[234]

The foregoing judges model the ease of directly and concisely explaining the intentional use of pronouns—either in a footnote or directly in the text of judicial opinions.[235]

D. Courts Have Used Pronouns with Intention When Seeking to Protect the Identity of a Party or Witness

In addition to using certain pronouns out of *respect* for litigants, courts have implemented particular pronouns in an intentional effort to protect the identity of a party or witness. For example, in a case filed in a California state court, an evidentiary question arose as to whether a school district could divulge the contents of two letters from a confidential personnel file relating to an investigation into a teacher's actions

230 League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205 (N.D. Fla. 2018).

231 *Id.* at 1211.

232 *Id.* at 1211 n.4.

233 Doe v. Fedcap Rehab. Servs., Inc., No. 17-CV-8220, 2018 WL 2021588 (S.D.N.Y. April 27, 2018).

234 *Id.* at *1.

235 *See also* People v. Binns, No. B282506, 2018 WL 3490852, at *1 n.1 (Cal. Ct. App. July 20, 2018) (including a footnote after the first reference to the defendant's name in an order affirming the jury's conviction of a defendant, stating "Binns is male and identifies as a woman. We refer to her by her preferred pronoun."); Miller v. State, No. 62-CR-11-3803, 2013 WL 6795618, at *1 n.1 (Minn. Dist. Ct. Jan. 29, 2013) (explaining, in an order ruling on a petition for post-conviction relief, that the victim "D.M.B. is a female transitioning to a male and identifies as a male," and further acknowledging in a footnote, "Because D.M.B. preferred to be addressed as a male, the Court will respect this preference and use male pronouns in its order."); Arledge v. Peoples Servs., Inc., No. 02-CVS-1569, 2002 WL 1591690, at *1 n.1 (N.C. Apr. 18, 2002) (explaining, in an employment case, that, based on the plaintiff's announcement of her transsexualism and change of name from "Bob" Arledge to "Barbara" Arledge, the court would use "feminine pronouns to refer to Plaintiff Barbara Arledge in this Order," and further clarifying that "[s]uch usage does not imply a finding of fact or conclusion of law concerning Plaintiff's sex or gender.").

as a girls' volleyball coach.[236] In an order finding that disclosure of the letters would violate the teacher's privacy interests, the court used the singular *they* when reciting facts about the coach: "Doe is a high school teacher in [Chino Valley Unified School District (CVUSD)] and a member of [Associated Chino Teachers]. During their two-decade career with CVUSD, they have never received any warnings or disciplines related to their assignment as a classroom teacher."[237] To explain the use of *they* throughout the order, the court dropped a footnote after *their* in the foregoing sentence, stating "In order to protect the identity of Doe, we will use the gender-neutral pronoun 'they.'"[238] Notably, the court mentioned that the proper conjugation of the verb *to be* when used with the singular *they* is *they are* (rather than *they is*).[239]

A court perhaps could have opted to use the singular gender-neutral *they* but instead chose *he* in a situation in which the pronoun choice of an individual involved in the case was unclear. The court did, however, acknowledge the principle of an individual's identification with particular pronouns. In this federal case involving drug and firearm charges, a defendant filed a motion to suppress evidence of marijuana and an illegal gun found in a search of a home.[240] A detective's affidavit, based on information provided by a confidential informant, supported the search warrant.[241] In a footnote, the court explained its choice of pronoun when referring to the informant: "To maintain the informant's confidentiality, the affidavit did not state one way or another whether [the individual's] preferred gender pronoun was 'he' or 'she.' For readability purposes we will refer to [the informant] as 'he.'"[242]

In recent news, the matter of the whistleblower complaint about White House dealings with Ukraine exemplifies another situation in which the singular *they* can help protect a person's identity in communications. In a question-and-answer session before the House Intelligence Committee, the acting director of national intelligence, Joseph

236 Associated Chino Teachers v. Chino Valley Unified Sch. Dist., 30 Cal. App. 5th 530 (2018).

237 *Id.* at 535.

238 *Id.* at 535 n.2.

239 *Id.*

240 United States v. Graf, 784 F.3d 1 (1st Cir. 2015).

241 *Id.* at 2.

242 *Id.* at 3 n.1. The court in Commonwealth v. Hoard, 82 Va. Cir. 335 (Va. Cir. Court 2011), mentioned the *he/she* binary as a possible language remedy (without venturing into singular *they* territory) when noting the outdated use of male referents in the Virginia Constitution. The court acknowledged a defendant's right in the text of the Virginia Constitution to "call for evidence in *his* favor." *Id.* at *3 (emphasis added). The court mentioned in a footnote that "[t]he Constitution uses the grammatically correct, but politically incorrect, pronoun, but the Court is disinclined to edit or amplify the language of that basic document with the otherwise obligatory 'he/she.'" *Id.* at *3 n.7.

Maguire, used the word *his* to refer to the whistleblower.[243] Committee chairperson Adam Schiff countered with the singular *they*. News outlets used *they* in headlines when referring to the individual.[244] In writing about the Committee session and the pronoun's role in protecting a person's anonymity, columnist Ben Zimmer explained, "If the singular *they* came to be more widely embraced as an acceptable grammatical choice, then there would be no need for any verbal gymnastics in cases like the whistleblower's, where a person's gender may be at least temporarily unclear."[245]

These scenarios demonstrate how the singular *they* can be useful to preserve an individual's privacy, safety, and reputation, even if the person in question uses male or female pronouns (rather than gender-neutral pronouns) in daily life.

E. Lawyers and Judges Can Look Disrespectful, Sloppy, or Foolish if They Choose to Ignore a Litigant's Personal Gender Pronouns

Two recent cases illustrate the upsetting reality that lawyers and judges who either ignore or outright refuse to use a litigant's personal gender pronouns reinforce systemic exclusion of marginalized members of our society.

A case in which a party ignored a litigant's personal gender pronouns made headlines in a news article entitled, *Supreme Court Notebook: Gender pronouns part of LGBT fight*.[246] In 2013, a litigant named Aimee Stephens was fired from her job as a funeral director and embalmer when she announced her transition from male to female. Her subsequent lawsuit progressed to the United States Supreme Court. The ruling of the United States Circuit Court of Appeals for the Sixth Circuit in favor of Stephens, holding that "workplace discrimination against transgender people is illegal under federal civil rights law," used *she/her* pronouns.[247] In its opinion, the Sixth Circuit indicated, "We refer to Stephens using female pronouns, in accordance with the preference she has expressed."[248] Numerous Supreme Court briefs filed in support of Stephens also used *she/her* pronouns "to refer to the transgender woman."[249]

243 Ben Zimmer, *How Maguire Accidentally Made the Case for Singular "They,"* The Atlantic, Sept. 27, 2019, https://www.theatlantic.com/entertainment/archive/2019/09/joseph-maguire-testimony-supports-use-singular-they/598969/.

244 *Id.*

245 *Id.*

246 Mark Sherman & Jessica Gresko, *Supreme Court Notebook: Gender Pronouns Part of LGBT Fight*, AP News, Aug. 20, 2019, https://www.apnews.com/cd658b2da9da44989ab585db559e4058.

247 *Id.*

248 EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 n.1 (6th Cir. 2018).

249 Sherman & Gresko, *supra* note 246.

In contrast, in over 110 pages pressing the Supreme Court to roll back the Sixth Circuit's decision, "the Trump administration and the Michigan funeral home where Stephens worked avoid gender pronouns, repeatedly using Stephens' name."[250] The Justice Department's Supreme Court brief used language like the following instead of using Stephens' pronouns:

> Respondent *Stephens* was employed by Harris Homes from 2007 to 2013—first as an apprentice, and later as a funeral director and embalmer. *Stephens* "was born biologically male," with the name William Anthony Beasley Stephens, and *Stephens* presented as a male when *Stephens* began working for Harris Homes and for more than five years thereafter. *Stephens* now identifies as a transgender woman and uses the name Aimee Stephens.[251]

Intentionally repeating a person's name in each sentence to avoid honoring a transgender individual's personal pronouns seems much more jarring than simply using *she* or *her*. As such, this raises concerns along the lines of those discussed by legal writing experts in section IV above about potentially distracting readers with "new" language choices.

In 2020, an opinion issued by the United States Circuit Court for the Fifth Circuit also failed to honor a litigant's personal pronouns. On January 15, 2020, Judge Stuart Kyle Duncan wrote an opinion in an appeal by a federal prisoner named Norman Varner.[252] The prisoner sought to change the name on her judgment of confinement to "Kathrine Nicole Jett."[253] The prisoner also requested to be referred to, by the appellate court, with female pronouns. Rejecting the litigant's pronoun request, Judge Duncan used *he/his/him* pronouns throughout the opinion. The judge stated, "no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity."[254] He mentioned that "courts that have followed this 'convention' . . . have done so purely as a courtesy to parties."[255]

Isn't *courtesy* a fundamental ideal we should reasonably expect from judges toward *all* litigants, especially in the midst of the civility crisis in

250 *Id.*

251 Brief for the Federal Respondent Supporting Reversal, R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC, 2019 WL 3942898, at *4 (U.S. Aug. 16, 2019) (No. 18-107) (emphasis added).

252 United States v. Varner, No. 19-40016 (5th Cir. Jan. 15, 2020). The Honorable Stuart Kyle Duncan, The Honorable Jerry E. Smith, and The Honorable James L. Dennis presided. As indicated below, Judge Dennis dissented.

253 *Id.*

254 *Id.* at 6.

255 *Id.* at 7.

which we currently live in our country? As Judge James L. Dennis wrote in his "respectful[ ] but emphatic[ ]"[256] dissenting opinion, "many courts and judges adhere to such requests out of respect for the litigant's dignity."[257] As the journalist Ruth Marcus put it, "Even in an uncivil, unyielding era, all of us—certainly federal judges endowed with enormous power and lifetime tenure—should be able to summon the grace to grant her simple request to be described that way."[258]

In a much less political and much less publicized case involving an insurance coverage dispute pending in a federal court in California, the insurance company filed a notice of motion and accompanying motion for summary judgment, referring to the opposing party in the brief by *he* pronouns and *Mr.*[259] The insurer's brief included a quote from the insured's website: "for the past few years they have been making a brand of stripped down machine techno."[260] The insurance company's brief-writer inserted a footnote after the quoted use of *they*, indicating that the insured "identifies as 'non-binary' and prefers the pronoun 'they/them.'"[261] This discrepancy begs the question: why not use the insured's pronouns in the rest of the brief?

As the foregoing examples show, some lawyers and judges remain intent on refusing to use the personal pronouns of particular individuals in our society. Let's urge these members of our profession to pause to consider, and educate themselves about, the destructive emotional impact these slights have on the already marginalized individuals involved. Hopefully, by looking to the examples in sections VI.A.-D. of lawyers and judges who exhibited civility and respect towards litigants—without their cases imploding in grammatical confusion—resisters might soon embrace dignified change.

VII. Conclusion

Overall, it's time for legal writers to get with the pronoun. First, let's enhance our awareness of the pronouns that individuals in our communities use—locally, nationally, and even globally. Let's then incorporate

256 *Id.* at 17 (Dennis, J., dissenting).

257 *Id.* at 15 (Dennis, J., dissenting).

258 Ruth Marcus, *We're at War over Gender Pronouns. Can't We All Just Show Some Respect?*, Wash. Post, Jan. 19, 2020, 7:59 EST, https://www.washingtonpost.com/opinions/a-judge-said-calling-a-transgender-woman-her-would-show-bias-oh-please/2020/01/19/7d3a9f3c-3965-11ea-bb7b-265f4554af6d_story.html.

259 American Bankers Insurance Company of Florida's Notice of Motion and Motion for Summary Judgment, American Bankers Ins. Co. of Fla. v. Butler, 2018 WL 6585599 (N.D. Cal. June 28, 2018) (No. 3:18-CV-019 73-WHA).

260 *Id.* at 4.

261 *Id.* at 4 n.1.

the pronouns used by our clients, witnesses, and other actors in our cases into our legal communications, pleadings, briefs, and judicial opinions. If this feels uncomfortable at first, let's pause and examine why. As journalist and author Monica Hesse wrote about readers bemoaning the singular *they*, "the grammar excuse seems to be a convenient fig leaf, and what it's covering is these letter writers' own prejudice."[262] She urged, "We're not really talking about grammar. We're talking about the willingness for all of us to feel a little uncomfortable on our universal, bumbling quest toward compassion and humanity."[263]

For writers worried about confusing or distracting the reader, we can explain the intentional use of particular pronouns or honorifics like *Mx.* in concise and straightforward textual sentences or footnotes after our first use of the word in a document. In lengthy legal documents, we might remind the reader about the intentional use of the pronoun midway through the text, if needed. If we are concerned about clarity in pronouns' references to antecedents, we can consider rephrasing sentences but in a way that does not "un-pronoun" a person in a disrespectful way.

Judges could consider following Judge Teresa Basiliere's example[264] and cultivate a courtroom culture which expressly honors gender-inclusive language. Steps could include (1) informing litigants and their attorneys about the procedure for notifying the court of a party's personal pronouns and choice of honorifics like Mr., Ms., or Mx.; (2) incorporating requirements in local court rules or Case Management Orders for parties to exchange and then use identified pronouns and honorifics in oral and written communications; and (3) holding lawyers accountable if they fail to honor identified pronouns and honorifics in oral and written communications. Judges can set an example by using parties' and witnesses' pronouns in the courtroom and in judicial opinions, like the examples in section VI.C. above.

Lawyers can foster conversations with clients about pronoun usage and discuss how to proactively enhance clarity, accuracy, inclusion, and courtesy in legal documents. Legal writing professors can train our new generation of legal writers in this regard through designing assignments in which law students must incorporate litigants' pronouns and honorifics into pleadings, memoranda, briefs, and other communications, in a clear and considerate way.

262 Monica Hesse, *A Grammar Nerd Gently Dismantles Those Arguments for Rejecting the New "They,"* Wash. Post, Sept. 20, 2019, 10:40 am EDT, https://www.washingtonpost.com/lifestyle/style/a-grammar-nerd-gently-dismantles-your-arguments-for-rejecting-the-new-they/2019/09/20/95f87260-da56-11e9-a688-303693fb4b0b_story.html.

263 *Id.*

264 *See* Trojan, *supra* note 218.

Instead of assuming our readers will be confused, distracted, or annoyed by a gender pronoun, the singular *they*, or a new word altogether, let's have more faith in our readers' ability to grasp and follow our content. Every day, lawyers and judges write about complex material that is unfamiliar to our audiences; we explain and define odd terms of art, strange vocabulary, and peculiar rules, and then we lead the reader through analyses that use those same concepts and principles. We can do the same with pronouns and honorifics.

In the end, that's the beauty of legal writing: so much power packed into each word we select to communicate our clients' narratives. Let's choose respectfully and wisely.

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ARTICLE

Using Judicial Motives to Persuade Judges

A Dramatistic Analysis of the Petitioners' Brief in *Lawrence v. Texas*

Stephen Boscolo*

I. Introduction

Lawrence v. Texas was one of the most important civil rights cases in history. The team petitioning on behalf of John Lawrence and Tyron Garner faced entrenched discrimination against the LGBTQ community and contrary Supreme Court precedent in the form of *Bowers v. Hardwick*. Despite these challenges, Petitioners' team prevailed, overturning a Texas law forbidding sexual intercourse between two people of the same sex.

This article examines the Petitioners' winning Brief through the lens of Kenneth Burke's Dramatism. Dramatism is a technique for rhetorical criticism that attempts to uncover the motives, or underlying rationalizations and worldview, contained in a speaker's message regarding an action.[1] We are more easily persuaded by people who have similar "properties" to us: those with similar tone, attitudes, and ideas.[2] Studies have suggested that persuasion is more effective when the speaker's attitude is presented as congruent to the recipient's attitude.[3] Once the motives of a speaker are uncovered, a listener is able to better evaluate a speaker's

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1 Michael A. Overington, *Kenneth Burke and the Method of Dramatism*, Theory and Soc'y, Spring 1977, at 131, 133–34.

2 *See* Dennis G. Day, *Persuasion and the Concept of Identification*, 46 Q. J. Speech 270, 271 (1960).

3 Gregory R. Maio & Geoffrey Haddick, *Attitude Change, in* Social Psychology, Handbook of Basic Principles 565, 577 (Arie W. Kruglanski & E. Tory Higginsed eds., 2d ed. 2007).

message.[4] Dramatism suggests that if a speaker is able to convey that the motives contained in their[5] message are similar to the listener's motives, then the listener will "identify" with the speaker and be persuaded.[6] Although the idea of similar underlying motives being more persuasive was not unique to Burke, he was the first one to suggest that persuasion is solely a product of motive identification.[7]

Section II of this article discusses the history of the Texas statute at issue in *Lawrence v. Texas*, as well as the facts and history surrounding the case of *Lawrence v. Texas*. Section III then analyzes the Petitioners' Brief in detail. Section IV discusses the theory of Dramatism as developed by Kenneth Burke and explains how it can be used both as a method of rhetorical analysis and as a persuasive technique.[8] Section V analyzes the Petitioners' Brief through the lens of Dramatism as outlined by Kenneth Burke and expanded on by Professor Clarke Rountree. That section concludes that the Petitioners' Brief was able to create identification with the justices by conveying motives that Rountree suggests all judges share. The section further argues that this identification may have persuaded the justices to adopt Petitioners' argument. This article concludes by suggesting advocates may benefit by keeping these principles in mind while crafting persuasive briefs.

II. The Case of *Lawrence v. Texas*

A. The History of the Texas Sodomy Statute

Texas enacted Penal Code Section 21.06, the Homosexual Conduct Law, in 1973. Prior to 1973, all acts of extramarital sexual intercourse, as well as oral and anal sex, were criminalized. These restrictions applied to all couples, regardless of their sex.[9] In 1973, all laws criminalizing private sexual conduct were decriminalized.[10] Subsequently, however, 21.06 was passed, which recriminalized only sexual acts between two individuals

4 *See* Ryan Erik McGeough & Andrew King, *Dramatism and Kenneth Burke's Pentadic Criticism*, *in* Rhetorical Criticism: Perspectives in Action 147, 149 (Jim A. Kuypers ed., 2d ed. 2016) (discussing how dramatism was developed to help listeners "cut through" a speaker's rhetoric).

5 I use "their" or "they" in this paper as a gender-neutral singular pronoun.

6 Day, *supra* note 2, at 273.

7 *Id.*

8 In recent years, rhetorical criticism of effective, high-profile briefs to develop advocacy skills has become more common. *See* Linda Berger & Kathryn Stanchi, Legal Persuasion: A Rhetorical Approach to the Science (2018); Ross Guberman, Point Made: How To Write Like The Nation's Top Advocates (2d ed. 2014); Noah A. Messing, The Art of Advocacy: Briefs, Motions, and Writing Strategies of America's Best Lawyers (2013).

9 Brief of Petitioners at 5, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

10 *Id.*

of the same sex.[11] The law made it a crime to engage in "deviant sexual intercourse" with another individual of the same sex.[12] Deviant sexual intercourse was defined in Section 21.01 as including any contact with the genitals of one person and the mouth or anus of another person.[13] Prior to *Lawrence,* there were no public court records involving the enforcement of this law against consenting adults in a private space.[14]

A similar sodomy law enacted in Georgia had previously been challenged in the case of *Bowers v. Hardwick* in 1986. In that case, the Supreme Court upheld the sodomy law, ruling it was constitutional under the Fourteenth Amendment. In doing so, the Court characterized the right asserted by the petitioner extremely narrowly, holding there was no "right to homosexuals to engage in acts of consensual sodomy."[15] The *Bowers* court, despite having the opportunity, declined to find a fundamental right involved in private sexual intimacy between two men.[16] This was the case Petitioners would have to overcome in *Lawrence*.

B. The Facts, Issues, and Procedural History of *Lawrence*

On the night of September 17, 1998, officers responding to a false report of a domestic disturbance entered John Lawrence's home. Robert Eubanks, a former paramour of Tyron Garner, had called the police, claiming there was an armed assailant in the building.[17] Eubanks later admitted he had fabricated the story of the assailant and the gun.[18] In the home, the police disturbed Lawrence, who was allegedly engaged in sexual intercourse with Garner. In fact, whether or not Lawrence and Garner actually had sex (or even were touching at the time) is disputed.[19] Nevertheless, Lawrence and Garner were arrested for violating the Homosexual Conduct Law.[20]

With the aid of lawyers from Lambda Legal ("Lambda"), a civil rights organization that focused on LGBTQ rights,[21] and the firm of Jenner &

11 *Id.*

12 *Id.*

13 *Id.* at 2.

14 Dale Carpenter, Flagrant Conduct: The Story of Lawrence v. Texas; How a Bedroom Arrest Decriminalized Gay Americans 13 (2012).

15 Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

16 *Id.* at 192–95.

17 Carpenter, *supra* note 14, at 61–66.

18 *Id.* at 77.

19 In his book, Carpenter suggests that the police's account is ludicrous at best, and it is likely the officers arrested Lawrence and Garner for false reasons, perhaps because of the erotica in the apartment. *Id.* at 71–74, 76.

20 Brief of Petitioners, *supra* note 9, at 2.

21 Carpenter, *supra* note 14, at 124.

Block,[22] Lawrence and Garner challenged the constitutionality of the Homosexual Conduct Law. Initially, Lawrence and Garner suggested in Texas courts that the sodomy law was an impermissible form of sexual orientation discrimination, sex discrimination, and a violation of the constitutional right to privacy.[23] In 2002, the Texas Court of Criminal Appeals declined to declare the Homosexual Conduct Law invalid.[24] As a result, Lawrence and Garner appealed the decision to the United States Supreme Court.[25] Once the appeal was accepted,[26] a team of lawyers, most prominently Ruth Harlow of Lambda and Paul Smith and Bill Hohengarten of Jenner & Block, crafted the Petitioners' Brief, refining the earlier arguments into their final form.[27]

III. Deconstructing the Petitioners' Brief

The Petitioners' Brief has been heavily referenced as a superlative example of legal writing and has been analyzed in other materials prior to this piece.[28] The Brief itself was authored by a team of lawyers with a long history in civil rights work, litigation before the Supreme Court, or both. Harlow, a Yale graduate, had spent virtually her whole career fighting for LGBTQ rights for both Lambda and the ACLU.[29] She was extremely familiar with the bigotry the LGBTQ community could face in the legal system, having once encountered a prosecutor who argued putting a gay man in prison was like putting a child in a candy store.[30] Hohengarten, a former clerk to Justice David Souter, was an experienced Supreme Court litigator.[31] Additionally, he had briefly worked with Harlow in 1992 on the ACLU gay rights project.[32] Finally, Smith, who argued the case for Petitioners, had some of the most extensive litigation experience in the Supreme Court in history, arguing eight cases and filing over 100 cert

22 *Id.* at 182.

23 *Id.* at 155–58.

24 *Id.* at 178.

25 Petition for a Writ of Certiorari, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

26 Lawrence v. State, 41 S.W.3d 349 (Tex. Ct. App. 2001), *cert. granted,* Lawrence v. Texas, 537 U.S. 1044 (2002).

27 Carpenter, *supra* note 14, at 185.

28 For example, Linda Edwards included a discussion of the Brief in a work discussing exceptional examples of legal writing. *See generally* Linda Holdeman Edwards, Readings in Persuasion: Briefs That Changed the World Part 2 (6th ed. 2012).

29 Carpenter, *supra* note 14, at 127–29.

30 *Id.* at 128.

31 *Id.* at 182.

32 *Id.*

petitions or oppositions.[33] While not as seasoned as Harlow in litigating LGBTQ rights, Smith had some experience, writing an amicus brief for the American Psychology Association in the Supreme Court case of *Romer v. Evans* and briefs in cases challenging state sodomy laws.[34]

Aware of the challenges facing them, Petitioners carefully framed the Brief with an eye on both public opinion and the *Bowers* decision. While sexual orientation discrimination was still a contentious issue at the time, privacy rights and general principles of equality were much less controversial.[35] Because of this, Petitioners chose to base the legal arguments on the two principles of privacy rights under the Due Process Clause and Equal Protection Clause, both guaranteed by the Fourteenth Amendment of the Constitution.[36] Working off of these twin arguments, the team writing the Brief argued that *Bowers* should be overruled and the Texas sodomy law declared unconstitutional.

Roughly the first half of the Brief's argument was based on the right to privacy under the Due Process Clause of the Fourteenth Amendment. Petitioners argued, based on prior cases such as *Griswold v. Connecticut*[37] and *Planned Parenthood v. Casey*,[38] that the government was invading the privacy interests of LGBTQ individuals in their most intimate setting.[39] These privacy rights involved intimacy, family, relationships, and personal dignity.[40] Notably, the Brief minimized any reference to homosexual conduct or the specific acts outlawed in the statute. Dale Carpenter, a legal commenter and author, suggested the Brief's writers wanted the Court to see *Lawrence* as a case about families and relationships, not about sex.[41] Petitioners emphasized that any infringement of these privacy rights suggested a violation of the Due Process Clause.[42] Additionally, Petitioners discussed the increasing acceptance of LGBTQ people as being normal, healthy, and able to live fulfilling lives, rebutting the long-held belief that homosexuality involves mental health issues or moral degeneracy.[43] Finally, the Brief emphasized that the State had no countervailing interest in justifying a privacy invasion besides morality.[44] Petitioners argued that, while powerful countervailing interests by the state can justify some burden on liberty interests,[45] Texas's justification essentially amounted to a statement of disapproval of the conduct Lawrence and Garner committed.[46]

33 *Id.* at 211–12.

34 *Id.* at 212.

35 *Id.* at 185–87.

36 *Id.* at 184–85.

37 Griswold v. Connecticut, 381 U.S. 479 (1965).

38 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

39 *See* Brief of Petitioners, *supra* note 9, at 10–11.

40 Carpenter, *supra* note 14, at 187.

41 *Id.*

42 *See* Brief of Petitioners, *supra* note 9, at 9.

43 *Id.* at 16.

44 *Id.* at 26.

45 *See id.* at 25.

46 *See id.* at 28.

In cases involving similar protected liberty interests such as *Casey* or *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*,[47] the state was only able to justify the infringement on privacy rights by showing the state's compelling interest in preserving human life. Petitioners argued that unlike the State in those cases, Texas showed no compelling state interest even remotely able to justify the intrusion in this case.[48]

The second half of the Brief was based on an Equal Protection Clause argument. This section argued that the statute discriminatorily treated gay people differently than heterosexuals, in violation of the Fourteenth Amendment.[49] Petitioners alleged that criminalization of sodomy between two adults of the same sex while permitting it between couples of different sexes constituted disparate treatment.[50] Disparate treatment by the government could be justified if Texas was able to show a rational basis for the treatment.[51] However, Petitioners argued Texas was unable to meet even this deferential standard. Rather, the state of Texas had no rational basis for treating homosexual conduct differently from heterosexual conduct. The only justification offered by the state was morality, which Petitioners claimed was an invalid justification for disparate treatment.[52] If the legislature's view of what was considered moral was sufficient to justify disparate treatment, any discriminatory law, no matter how vile, could be justified.[53]

The Petitioners further argued that, even if morality was accepted as a rational basis for imposing the law, the disparate treatment of gay people in the Texas statute was in truth motivated by "archaic and unfounded negative attitudes towards a group," not morality.[54] Petitioners emphasized that negative attitudes towards one group could not provide legal justification for disparate treatment, even if those attitudes were rooted in moral justifications.[55]

The Equal Protection Clause section of the Brief also contextualized the law by suggesting it was part of a long history of discrimination against the LGBTQ community. Petitioners recounted how LGBTQ individuals were historically characterized as suffering from mental illness or sexual deviance.[56] They described the Texas homosexual conduct law as "a remnant of a historical pattern of repressive law enforcement measures" that had supported widespread discrimination against LGBTQ Americans.[57] Finally, Petitioners gave examples of state-sponsored

47 Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280 (1990).

48 Brief of Petitioners, *supra* note 9, at 26.

49 *Id.* at 32.

50 *Id.*

51 *Id.*

52 *Id.* at 36–38.

53 *Id.*

54 *Id.* at 38.

55 *Id.*

56 *Id.* at 46.

57 *Id.*

discriminatory conduct, including involuntary commitment of gay Americans, conversion therapy, authorizations of arrests for "'appearing' to be gay or lesbian" and prevention of gay Americans from having the same rights as heterosexuals.[58] Although acknowledging that great strides had been made in the field of equality, Petitioners argued that discrimination still continued, and the Constitution "neither knows nor tolerates classes among citizens."[59] Petitioners argued that because of this, the state could not claim that "freedom from state intrusion into the private sexual intimacy of two consenting adults is an important aspect of liberty for most of its citizens, but then deny that liberty to a minority."[60]

Even when viewed from a purely legal perspective, the Brief is a superlative example of persuasive writing. However, when viewed through the lens of Dramatism, it is evident that motives underlying the brief were ideal for persuading the Court.

IV. Dramatism as a Method for Rhetorical Criticism and Persuasion

Kenneth Burke was one of the most influential rhetorical critics of the twentieth century when it came to understanding the rhetoric of others.[61] Burke was born in 1897, and spent most of his life writing, working, and teaching in New York and Vermont.[62] Although never holding a formal position in scholarship such as a professorship, Burke was well known for the books he wrote discussing motives: the attitudes, values, and beliefs which underlie human action.[63] These books, *A Grammar of Motives* and *A Rhetoric of Motives*, discussed both Burke's overarching theory of dramatism and a toolset to identify motives he called the "pentad."[64] Having lived through two World Wars, Burke was concerned that people had difficulty cutting through rhetorical techniques to discover the true worldviews of speakers.[65] In order to analyze how speakers and writers characterize human action, and to analyze the flood of persuasive messages that we deal with every day, Burke developed dramatism, which included the pentad, a rhetorical framework

58 *Id.*

59 *Id.* at 48 (quoting Romer v. Evans, 517 U.S. 620, 623 (1996)).

60 *Id.* at 50.

61 McGeough & King, *supra* note 4, at 147.

62 John Mcgowan, *Burke, Kenneth*, *in* The Encyclopedia of Literary and Cultural Theory (Michael Ryan ed., 2011).

63 *Id.*

64 *Id.*

65 McGeough & King, *supra* note 4, at 151.

to analyze discourse and better understand how speakers view the world.[66]

Burke's method of rhetorical criticism can be used not only to reveal the writer's underlying worldview, but as a means of persuading listeners. Listeners tend to be more amenable to new ideas if they are framed as coming from similar motives as those of the listeners.[67] If writers are able to frame their motives in a way that increases the likelihood of audience identification, persuasion is substantially more likely to occur.[68]

A. The Pentad as a Tool for Revealing Writer's Motives

The goal of Burkean analysis is to reveal how the strategic choices of speakers in describing an action can reveal the speaker's underlying worldview regarding the action.[69] Of special interest to Burke was the process of understanding what occurs when a speaker describes "what people are doing and why they are doing it."[70] In understanding why people's actions are characterized in a certain way, one can understand the motives of the speaker.[71] Burke believed these "motives" could be discovered through textual analysis of thought or language.[72] For example, in a speech discussing a decision to forbid illegal immigration into the United States, Burkean analysis could reveal that the speaker's motive for their decision was a belief that immigrants are fundamentally dangerous or less important than citizens. Once this motive is understood, a listener could better understand the implications of the offered message.[73]

In 1945, Burke published many of his ideas regarding motives and the pentad in a book he called *A Grammar of Motives*.[74] Burke's theory of Dramatism is designed to identify the grammar through which humans express their experience of the world.[75] Pentadic analysis allows us to take this grammar and uncover the worldview of a speaker in the characterization of an action.[76] The choice to frame, emphasize, or deemphasize the

66 *Id.* at 149.

67 Day, *supra* note 2, at 273.

68 *Id.*

69 McGeough & King, *supra* note 4, at 161–62.

70 Kenneth Burke, A Grammar of Motives, xv (Univ. of Cal. Press ed. 1969).

71 *See* McGeough & King, *supra* note 4, at 151.

72 *Id.* at 150.

73 *Id.* at 149.

74 *Id.*

75 Jeffrey W. Murray, *Kenneth Burke: A Dialogue of Motives*, 35 Phil. & Rhetoric 22, 33 (2002).

76 *See* McGeough & King, *supra* note 4, at 161–62 ("Making the perspectives [of the speaker] visible through application of the pentad to the text allows us to . . . evaluate a text.")

pentadic elements of an event in certain ways can reveal the underlying motive of the speaker.[77] It is through pentadic analysis that motives can be identified.[78]

In any statement that describes a situation surrounding human action, there must be a characterization of five elements.[79] What happened, or the act. Where, when, or under what circumstances the act was done, or the scene. Who did the act, and with what characteristics, or the agent. How and in what way the act was done, or the agency. And why the act was done, or the purpose.[80] In defining the pentad, Burke explained that the elements he chose revealed the strategic spots in a message where ambiguities arose and could be manipulated.[81] Burke did not create the pentad, but repurposed it from earlier descriptions of narrative form identified by Greek philosophers.[82] He believed that these elements of form existed logically prior to his identification, as an intrinsic part of the human experience and any description of action slots naturally into these preconceived elements.[83] This is because we, as humans, experience and interpret life as narrative form.[84]

In making a choice to emphasize or deemphasize these elements, a speaker creates different characterizations of what is occurring.[85] In doing so, the speaker can reveal the motives underlying their actions. For example, emphasizing the purpose of an action over the act could suggest a motive of "the end justifies the means." Comparatively, emphasizing the scene over the agent suggests a motive of a "product of their environment."[86] Further, in discussing motives, the ratios of the pentad, or which elements are emphasized, are just as important as the elements themselves. Which element the speaker emphasizes can convey different underlying meanings in their messages. The act especially is important, as it is often the dominant element in persuasive pieces.[87]

77 *See id.* at 161.

78 *See id.* at 151.

79 J. Clarke Rountree, *Coming to Terms with Kenneth Burke's Pentad*, Am. Comm. J., May 1988, at 1; Burke, A Grammar of Motives, *supra* note 70, at xv.

80 Burke, A Grammar of Motives, *supra* note 70, at xv.

81 *Id.* at xviii.

82 McGeough & King, *supra* not 4, at 150.

83 *Id.* at 150–51.

84 *Id.*

85 Burke, A Grammar of Motives, *supra* note 70, at xx.

86 *See* McGeough & King, *supra* note 4, at 157.

87 *Id.* at 148.

In choosing to describe and emphasize certain elements, speakers are conveying motives that suggest a definition of reality.[88] In doing so, they are also deflecting competing realities; framing a scenario in one way can implicitly exclude other frames.[89] Characterizing a baseball player as successful by emphasizing his or her physical traits suggests the speaker views the player's success is a product of the agent—the player's own innate characteristics. This is turn implies external factors are not responsible for the player's success. Conversely, describing a player as successful because of the training he undergoes implies the agency or scene predominated over the agent.

Characterizations can be used to not only deflect competing realities, but also to imply a reality that casts an opposing side in a negative light or to constrict the other side's ability to reframe the situation. This is called a terministic screen.[90] For example, opponents of abortion favor themselves as pro-life, suggesting that their opposition is against life.[91] Reality is not only defined by the speaker, it is screened away from other realities through the terminologies used.[92]

B. Dramatism as a Tool for Persuasion

Continuing with the concepts he discussed with his work in *A Grammar of Motives*, Burke published his next book, *A Rhetoric of Motives*, in 1950. While *Grammar* described motives as a tool for identifying a speaker's underlying worldview, *Rhetoric* suggested motives and Dramatism could be used as a tool for persuasion. Building on his description of motives identified in *Grammar*, Burke described in *Rhetoric* the mechanisms by which these motives become shared and persuasion occurs.[93] *Rhetoric* suggests that a speaker persuades an audience by identification, or by characterizing the speaker's motive as "consubstantial" with that of the audience.[94] By consubstantiality, Burke did not mean merely agreeing with a speaker, but rather the audience and speaker's motives and worldview are substantially the same regarding a given situation.[95]

88 Burke, A Grammar of Motives, *supra* note 70, at 59 (suggesting that humans seek vocabularies that select certain realities).

89 *Id.*

90 *See* Richard Bello, *A Burkeian Analysis of the "Political Correctness" Confrontation in Higher Education*, S. Comm. J., Spring 1976, at 243, 244.

91 *See* McGeough & King, *supra* note 4, at 148.

92 Bello, *supra* note 90, at 244.

93 Murray, *supra* note 75, at 33.

94 Kenneth Burke, A Rhetoric of Motives, 46 (1950).

95 *Id.* at 21.

Burke theorized that if a person was able to convey that their motives are substantially the same as the audience, identification and subsequently persuasion would occur.[96] As Burke explained, "you persuade a man only insofar as you . . . identify[] your ways with him."[97]

C. Using Dramatism to Reveal Judicial Motives

Clarke Rountree has built on Burke's theory of identification in the context of legal writing by incorporating a theory of judicial motives into Dramatism. Professor Rountree has suggested that in writing an opinion, a judge must persuade readers that their rationale "embod[ies] proper judicial motives."[98] There are three of these judicial motives that a court should ideally convey in its decisions.[99] First, a judge must show that "prior cases, long-accepted legal principles, legislative statutes, administrative regulations, state and federal constitutions, and their authors (whose intentions are invoked) require the decision."[100] Second, a judge must show that "the decision yields the greatest justice in the instant case."[101] And third, a judge must show "that the decision creates the fairest and most efficacious results in the long run, providing clear direction and a just outcome for all foreseeable cases like it."[102] A legitimate judicial opinion should ideally reflect these proper judicial motives, rather than a judge's personal motive.[103] Failing to demonstrate these judicial ideals runs the risk of the opinion being viewed as illegitimate.[104] This theory recognizes that judges do not always issue opinions that perfectly convey all three motives. For example, Rountree suggests that the case of *Bush v. Gore* failed to successfully convey *any* of these motives, especially future equity, as the justices limited the holding to the present case.[105] Instead, according to Rountree, judges seek to convey they are conforming with as many of the motives as possible.

Typically, identification is seen as occurring when a speaker's motives become consubstantial with the audience's motives.[106] Burke's view of identification, as applied to the context of legal persuasion, suggests that to persuade a judge to rule a certain way, an advocate would have to create

96 *See* Day, *supra* note 2, at 273.

97 Burke, A Rhetoric of Motives, *supra* note 94, at 55.

98 Clarke Rountree, Judging the Supreme Court: Constructions of Motives in Bush v. Gore 5 (2007) (ebook).

99 *Id.* at 16.

100 *Id.*

101 *Id.*

102 *Id.*

103 *See id.* at 1–2, 5.

104 *See id.* at xiv.

105 *See id.* at 49, 392 (suggesting this failure was a factor in making the justification for the outcome in *Bush v. Gore* highly unpersuasive).

106 *See* Burke, A Rhetoric of Motives, *supra* note 94, at 46.

consubstantiality with a judge's personal motives.[107] Subsequently, the judge would then turn the advocate's position into a valid legal opinion.

However, this type of identification may not convince a judge to rule in an advocate's favor. Judges are expected to, at least in appearance, base their rulings on legal principles, not their personal feelings about the case.[108] Their personal motives should not be reflected in an opinion, and judges cannot simply casually disregard the legal principles they are expected to base their ruling on.[109] At a minimum, an opinion must at least convey that the motives contained in a decision are based on accepted judicial principles.[110] Given Rountree's suggestion that judges are constrained to demonstrate the three judicial motives as a consequence of their position,[111] any judicial opinion can be viewed as inherently seeking to convey these motives. Of course, opinions sometimes fail to convey all three of the motives. In failing to convey even one, the opinion is risked as being viewed as illegitimate or unpersuasive; therefore, judges seek to convey all three motives whenever possible.[112]

Therefore, if a speaker is able to convey that their position is consubstantial with and supported by these judicial motives, a judge should identify with the speaker's argument. This judicial motive identification may be even more appealing to a judge than personal identification, as the judge can subsequently use the representation of these motives to support their opinion without having to reframe them.

V. Alignment of Petitioners' Motives with Judicial Motives

The ultimate goal of the writers of the Petitioners' Brief in *Lawrence v. Texas* was to persuade the justices of the Supreme Court to agree with their argument. In order to do that, the writers needed the justices to identify with them, for as Burke explained, identification is the key to persuasion. Therefore, the approach of a successful appellate advocate can be seen as attempting to convey motives that are substantially equivalent to these judicial ideals (which can be seen by analysis with the pentad). Once identification is achieved from this, persuasion can occur.

107 *See id.* at 55.

108 Rountree, *supra* note 98, at 1–2, 5.

109 J. Clarke Rountree, *Instantiating "The Law" and its Dissents in* Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse*, Q. J. Speech, Feb. 2001, at 1, 3.

110 *See* Rountree, *supra* note 98, at 1–2, 5.

111 *See id.* at 4–5.

112 *See id.* at 16.

A. Analyzing the Pentad in the Petitioners' Brief

In order to discuss how the motives of the Brief were conveyed to the Court, the pentad and pentadic ratios can be used to identify and analyze the underlying motives in the Brief. The framing of the factual circumstances surrounding this case, and the effectiveness thereof, can be clearly shown by identifying the pentadic ratios present in the Brief.[113]

1. Act

The act in this case was Texas's enactment of the Homosexual Conduct Law, and more broadly, the imposition of regulations on the intimate relations of gay couples. Petitioners did not merely focus on the law itself, but also on the law's effect on the people it regulates. For example, Petitioners wrote that the law "singl[es] out a certain class of citizens for disfavored legal status,"[114] and described it as imposing "one particular view of how to conduct one's most private relationships."[115] Focusing on the wider effect of the law, rather than just the law itself, allowed the writers to emphasize the magnitude of the act. Framing the act as a movement affecting an entire class of citizens' status suggests a far more insidious act than preventing individuals from engaging in sodomy.

Additionally, the history of the law was prominently remarked on in the Brief. At the start of the Brief, Petitioners drew attention to the enactment of the law: how private sexual behavior was decriminalized, then recriminalized only for gay couples.[116] The history of the bill further contextualized this law as a smaller part of a greater whole. Rather than just a singular, insular bill, the law was framed as just a further example of a pattern of continuous discriminatory acts against gay couples in Texas.[117]

2. Agent

Petitioners characterized the agent in *Lawrence* as the "overly controlling and intrusive government."[118] Petitioners emphasized the government's characteristics as intrusive[119] and advocating an antiquated

113 I spoke to Paul Smith, one of the Brief's writers. He explained that while the writers did generally have the considerations Rountree identified as judicial motives in mind, the close conformation between the Brief and the judicial motives appears to have been a happy accident. Telephone Interview with Paul Smith, Attorney for John Geddes Lawrence Jr. and Tyron Garner (Feb. 14, 2020).

114 Brief of Petitioners, *supra* note 9, at 31 (quoting Romer v. Evans, 517 U.S. 620, 623 (1996)).

115 *Id.* at 28.

116 *Id.* at 5.

117 *Id.* at 46–47.

118 *Id.* at 15.

119 *Id.*

view about sexual morality.[120] For example, the government was framed as harboring animus against LQBTQ individuals based on the same type of puritan moral interests that led women to be burned at the stake,[121] and thus possessing a desire to intrude in those intimate interactions that was "unwarranted"[122] and based only on "dislike of a smaller group who are different."[123]

The choice to focus on the government as the agent, rather than Lawrence and Garner, allowed Petitioners to emphasize that the rights the Homosexual Conduct Law violated were not exclusive to LGBTQ Americans. Rather, the Court risked giving the government the right to violate the rights of all Americans.[124] Petitioners framed the government as an actor in need of restraint, describing democracy as requiring limits to be placed on the degree the government can intrude into life.[125] This characterization helped foreshadow and support the due process argument that would occur later in the Brief; because the government was the actor infringing on rights, its conduct could be constitutionally proscribed.[126]

3. Scene

The scene was characterized as the environment of discrimination the LGBTQ community has faced in America. The Brief spent a large part of its second half describing the landscape in which the law has been passed, recounting how gay people have been viewed as "sick," suffered from endemic "anti-gay prejudice," and subjected to "a historical pattern of repressive law enforcement measures that have reinforced an outcast status for gay citizens."[127] Furthermore, the description of the enactment of the bill reinforced the underlying scene as a hostile environment that discriminated against gay couples.[128]

Contextualizing the scene as part of a greater pattern of discrimination against gay people added credibility and served to support the argument that the law's purpose was discriminatory. This use of scene to support the characterization of the purpose is an example of gram-

120 *Id.* at 28.

121 *Id.* at 37.

122 *Id.* at 12.

123 *Id.* at 38.

124 See Carpenter, *supra* note 14, at 195–96 (recounting how Petitioners chose to base their arguments on the government's intrusion into a private home rather than sexual-orientation discrimination to appeal to the justices).

125 Brief of Petitioners, *supra* note 9, at 16.

126 *Id.* at 13 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992)).

127 *Id.* at 46–47.

128 *Id.* at 5.

matical anchoring. If an audience already accepts a pentadic relationship, or the characterization of an element of the pentad is not in dispute, the speaker can build on that representation to characterize other elements in the pentad.[129] The Court had found in the past that the purpose of certain laws was to limit the rights of gay people.[130] By suggesting through the scene that the Homosexual Conduct Act was an outgrowth of these past discriminatory acts,[131] Petitioners were able to add legitimacy to the argument that the law was passed for discriminatory purposes.

4. Purpose

Petitioners characterized the purpose of the law as discrimination and repression against gay people in the guise of morality. The Brief suggested this in two ways. First, the Brief argued that the true purpose of the law was to label a certain group as being less worthy of protection than others because of unfounded animosity towards gay people, merely "[u]sing a moral lens to describe negative attitudes about a group."[132] This characterization is supported by the fact that the law only applied to gay people, despite heterosexual people being able to perform the same act. Rather than any valid reason for the law, the state of Texas was described as having a "bald preference for those with the most common sexual orientation and dislike of a smaller group who are different."[133]

Second, the Brief adds further legitimacy to this characterization by portraying the law as yet another in a long line of laws meant only to discriminate against gay Americans.[134] As previously stated in the analysis of the act and scene, this bill was just another in the long line of measures meant by the state to restrict the rights of gay Americans. In the face of this history, it was further reinforced that the true purpose of the law was, as Petitioners stated, rooted in "dislike of a smaller group."[135] Petitioners emphasized that, in a vacuum, perhaps claims of other purposes may have been more credible, but when faced with the history, the true purpose of the law was characterized as evident.[136]

129 Rountree, *Coming to Terms*, *supra* note 79, at 1.

130 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).

131 Brief of Petitioners, *supra* note 9, at 45–48.

132 *Id.* at 37.

133 *Id.* at 38.

134 *Id.* While this framing may seem like it overlaps with the scene element, Burke remarked that the elements of the pentad are not indivisible, and in fact frequently overlap in some manner. *See* Burke, A Grammar of Motives, *supra* note 70, at xviii–xx.

135 Brief of Petitioners, *supra* note 9, at 38.

136 *Id.*

Finally, Petitioners suggested that even if the state's characterization of the purpose of the law—public morality—was accepted, that purpose had little ability to justify anything, as it was an invalid basis for a law.[137] This characterization additionally served as a terministic screen to deflect the audience away from the competing pentadic form: that this act and the necessary evil of the invasion of privacy was *justified* by the state's ability to proscribe morality and protect its citizens.[138]

5. Agency

Finally, the agency was characterized as the extreme lengths to which the government went in order to control the intimate relationships of its citizens, by reaching into the bedroom and private lives of gay Americans. The intrusive character of the law was emphasized throughout the Brief, as the enforcement of the law was described as "intrud[ing] into the privacy of innumerable homes by regulating the actual physical details of how consenting adults must conduct their most intimate relationships."[139]

Furthermore, this mechanism was framed as constitutionally suspect. Pointing to various cases involving bodily autonomy, Petitioners suggested that any time a government actor reached into the private sphere of the home through the "license" of the law, it is a privacy intrusion of the most stark sense.[140] The gravity of this intrusion is portrayed as one of the most serious things the government can do, thereby giving legitimacy to Petitioners' claims.[141]

B. The Pentadic Ratios and Screens of the Brief

Strategic representation of motives typically involves two main processes. First, there is characterization of pentadic elements and their hierarchal ratios: what Rountree calls their terministic relationships.[142] Certain elements are portrayed as dominant, and have more focus directed toward them. Second, terministic screens are used to deflect competing pentadic characterizations, as one speaker attempts to restrict alternate characterizations of the pentadic elements.[143] The dominant elements in the Brief were agency and act in the first half, while purpose was emphasized in the second half.

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137 *Id.* at 36–37.

138 *See* Romer v. Evans, 517 U.S. 620, 637–38 (1996) (Scalia, J., dissenting).

139 Brief of Petitioners, *supra* note 9, at 28.

140 *Id.* at 14–15.

141 *Id.* at 14.

142 Rountree, *Coming to Terms*, *supra* note 79, at 1.

143 Bello, *supra* note 90, at 244.

1. Pentadic Ratios in the Due Process Clause Argument

The first half of the Brief, which based its argument on due process, characterized agency and act as dominant over purpose. The result of this framing was to characterize the act and the agency as unjustified by whatever purpose Texas claimed the law had. In the Due Process Clause half of the Brief, Petitioners argued that past precedent and the Constitution created a protected area of private intimacy that the government cannot intrude in, barring a compelling purpose.[144] However, Texas did not have such a purpose.[145] In other words, the agency and act were emphasized as being dominant over purpose here.

The very first line in the argument section of the Brief quotes the case of *Planned Parenthood v. Casey*, declaring, "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[146] From the beginning of the Brief, Petitioners established that there are methods of legal enforcement that the government cannot perform, no matter what. The Brief, through this declaration, set an ironclad rule from the start that, even if the act itself was legitimate, or undertaken for legitimate reasons, past precedent established that there are means through which a government cannot under any circumstances act. This framing of the agency-purpose ratio suggested that, just as was the case in *Casey,*[147] the means of the law could not be justified by its ends.

As the Brief continued, Petitioners further expounded upon the act of the law itself to show the incredibly detrimental effect it had on gay people. Petitioners emphasized the repugnancy of the law's effects, declaring that "[b]eing forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation."[148] This legitimacy of this characterization of the act was enhanced by references to the Court's past decision in *Griswold,* which forbade enforcement of a prohibition that, through "regulation of the private details of sexual relations between two adults sharing an intimate relationship . . . intruded directly into a married couple's private sexual intimacy."[149] More than being just intrusive, this act in *Griswold* was characterized by the Court as "the grossest form[] of intrusion in the homes of individuals and couples."[150]

144 Other academics analyzing this Brief have emphasized that Petitioners chose to frame the issue as the right to intimacy, not to sexual intercourse. Edwards, *supra* note 28, at 408. This can be viewed as further subordination of the act.

145 Brief of Petitioners, *supra* note 9, at 26.

146 *Id.* at 10 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

147 *See Casey*, 505 U.S. at 878–79.

148 Brief of Petitioners, *supra* note 9, at 11.

149 *Id.* at 12.

150 *Id.* at 15.

This characterization additionally served to deflect a competing characterization, that the burden of the act may be relatively low compared to the important purpose. Both the act (prevention of sexual intimacy of adults and altering the status of an entire group of people) and the agency (legally enforced regulation of sexual acts) were presented as reprehensible on their own. Together, the law and its enforcement were described as "utterly destroy[ing] that freedom [of sexual intimacy]."[151]

Petitioners characterized the purported purpose of the law as unable to justify the high burdens that the law puts on its citizens. The framing of purpose in this manner was supported by past precedent requiring a compelling state interest for similarly burdensome laws.[152] Petitioners rejected any idea that the purpose could justify the act or agency, stating that there "is no countervailing State interest remotely comparable to those weighed by this Court in other recent cases involving fundamental liberties."[153] In fact, according to Petitioners, the state "ha[d] conceded that Section 21.06 furthers no compelling state interest."[154] The only justification the state offered was the encouragement of public morality, which Petitioners labeled "illegitimate."[155] Additionally, the Brief warned that accepting the purpose as justifying the agency and the acts could lead to inequitable holdings in the future. If the purpose of public morality was held sufficient to justify these acts, "the power of government to reject liberty interests would be unlimited."[156]

Petitioners also used terministic screens in their characterization of the law in this section of the Brief. Framing morality as the only presented justification, while at the same time claiming the state had conceded there is no compelling state interest, deflected the audience's attention away from any idea that the state can use morality as a compelling state interest. Whatever minor purpose the law may have had, Petitioners used this screen to suggest it could not justify the repugnancy of the act and agency.[157]

The due process argument was first in the Brief for a reason: it was seen by Petitioners as a superior way to tell the story and frame their arguments.[158] Petitioners chose to ground their argument in the funda-

151 *Id.* at 13.

152 *Id.* at 26 (citing *Casey*, 505 U.S. at 871–79 and Troxel v. Granville, 530 U.S. 57, 73 (2000)).

153 *Id.*

154 *Id.*

155 *Id.* at 26 ("This Court, however, has never allowed fundamental freedoms to be circumscribed simply to enforce majority preferences or moral views concerning deeply personal matters.")

156 *Id.* at 28.

157 See Edwards, *supra* note 28, at 408 (discussing how Petitioners deemphasized the purpose of the law).

158 Carpenter, *supra* note 14, at 194–95.

mental rights of private intimacy, arguing to the Court that an act which violated this due process right required a high countervailing purpose to justify. According to Petitioners, because the purpose was shown to be subordinated to the act and agency here, the law could not be justified and was unconstitutional.[159]

2. Pentadic Ratios in the Equal Protection Clause Argument

The second half of the Brief, which based its argument on the Equal Protection Clause, focused mainly on purpose. That section sought to delegitimize any use of the purpose to justify the law, framing the purpose as entirely based on discrimination. In doing so, Petitioners attempted to frame the purpose as unable to justify any act or law, which served to both subordinate the purpose to the other parts of the pentad and deflect competing characterizations. Rather than focusing on the domination of act and agency over purpose, this section solely focused on the purpose of the law. Here, Petitioners attempted to subordinate purpose to the extent that this element became completely delegitimized in its ability to positively characterize the law. If accepted, this characterization would impose serious grammatical constraints on the government, as it would screen away any use of purpose to justify the law.

Petitioners portrayed the purpose of the law as solely discriminatory, arguing it should be overturned based on both past precedent and the fairness of the law as applied in the instant case. The Brief quoted *Romer v. Evans*[160] at the start to suggest that gay people are often singled out for disfavored status and discriminated against.[161] And, according to Petitioners, "the State offers only a tautological, illegitimate, and irrational purported justification for such discrimination."[162] Consequently, Petitioners argued that the law was only meant to "continue an ignominious history of discrimination based on sexual orientation."[163]

Any arguments that the law was enacted for a valid purpose were quickly brushed aside by the Brief. Petitioners emphasized that, despite the claim of morality, the law did not incorporate considerations based on age, intent, maturity, location, commercial nature, or any other factor that could have a relation to morality.[164] Instead, the law only considered whether or not the people conducting the prohibited act were of the same sex. Viewed in this context, the purpose of the law could only be to

159 Brief of Petitioners, *supra* note 9, at 25–26.

160 Romer v. Evans, 517 U.S. 620, 633 (1996).

161 Brief of Petitioners, *supra* note 9, at 32.

162 *Id.* at 33.

163 *Id.* at 34.

164 *Id.* at 39.

prevent gay people from engaging in the same activity that heterosexuals could freely perform. Petitioners' framing of the law invited the characterization that the law was specifically designed to treat citizens differently on the sole basis of their sexual orientation and suggested the true purpose underlying the Homosexual Conduct Law was naked discrimination.[165]

Additionally, the scene and act lent significant weight to Petitioners' delegitimization of the purpose element in this section of the Brief. Petitioners characterized the law as an extension of the history of discrimination against gay people, which added legitimacy to the claimed purpose.[166] Because private sexual conduct had been decriminalized and then recriminalized only for gay couples,[167] it was evident that there was some unique discrimination solely directed at those people who were attracted to the same sex. Furthermore, like in the due process argument, Petitioners argued that accepting the purpose of this law as legitimate ran the risk of creating precedent that would lead to unjust results. According to Petitioners, if morality was sufficient purpose to overturn an equal protection challenge, the state could treat different groups differently whenever it pleased.[168]

C. Creating Consubstantiality between the Petitioners and the Judicial Motives

To achieve identification and ultimately persuasion, Petitioners had to appeal to the judicial ideals of 1) compliance with law, statutes, constitutions, and legal principles; 2) justice in the present case; and 3) clearest standard and most equitable outcome in future cases.[169] Through their Brief, Petitioners were able to form consubstantiality with these three judicial motives.

1. Creating Consubstantiality in the Due Process Clause Argument

The due process section of the Brief, which was ultimately the constitutional principle the Court based its ruling on, managed to create consubstantiality with all three judicial motives in demanding that the law be declared unconstitutional and overturned. Petitioners did this through emphasizing the elements of agency and act.

First, the argument in this section suggested that well-established past case law and the Constitution drastically limited the ability of the

165 *Id.* at 38.

166 *See id.* at 46–47.

167 *Id.* at 5.

168 *See id.* at 36-37.

169 Rountree, *supra* note 98, at 16.

government to commit certain acts (invading sexual intimacy) in certain ways (legal regulations).[170] Characterizing the act and agency of the law as overly intrusive and unfair suggested that the law was forbidden by past constitutional precedent establishing a right to privacy. Petitioners supported this characterization by arguing, "There should be no doubt, then, that the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults."[171]

Petitioners' characterization of past cases further supported the notion that both the act and the agency of the Texas law had been established in the past to be unconstitutionally intrusive. For example, Petitioners argued that the law was proscribed because it was well established that the Court had both recognized the liberty interests inherent to sexual intimacy[172] and declared personal privacy as a realm into which the government could not enter.[173] Because of the intrusive nature of the act and agency of the government here, Petitioners suggested the law was forbidden by prior cases. If this characterization was accepted by the Court, they would have to rule in favor of Lawrence and Garner to conform to past precedent. Conversely, failing to rule in favor of Lawrence and Garner could potentially undermine well-established cases and principles.

Additionally, in this section, Petitioners screened the Court away from a competing characterization: that past precedent suggested that the act and the agency could be justified. Petitioners spent significant time refuting any notion that past cases such as *Bowers* could support the Homosexual Conduct Law, stating that "there are no considerations like those identified in *Casey* or other *stare decisis* cases that might favor continued adherence to *Bowers*."[174] *Bowers*, a past case that could interfere with Petitioners' characterization of their motives, was screened away, presented as an aberration that demanded to be overruled.[175] If the judges were to issue a decision that squarely complied with the rationales of past cases, as well as conveyed the other two judicial motives, Petitioners suggested that overruling *Bowers* was the only option.

170 Brief of Petitioners, *supra* note 9, at 11.

171 *Id.*

172 *Id.* at 11–12.

173 *Id.* at 10.

174 *Id.* at 30.

175 *See id.* at 31 ("*Bowers* stands today as 'a doctrinal anachronism discounted by society.'") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992)).

Second, Petitioners also implied that the principles of justice and equity in the present case demanded that the law be overruled. The act and agency of the law were framed as not only proscribed by past precedent, but also fundamentally unjust. Petitioners emphasized that a law depriving gay people of sexual intimacy "would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals."[176] The government's ability to regulate sexual intimacy was described as extremely limited, as "sexual intimacy marks an intensely personal and vital part of [the liberty of free people]."[177] Because of the fundamental unfairness of restricting persons such as Lawrence and Garner in a significant part of their personhood through intrusive means, the only just result would be to overturn the law.[178]

Finally, Petitioners suggested through their emphasis on the predominance of act and agency that the unconstitutionality of the law was supported by future considerations. If the Court denied that this law was a violation of liberty, it "would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples."[179] Future laws would be able to justify incredible intrusion into the private lives of American citizens based on nothing more than "a mere declaration that the State disapproves of . . . the conduct at issue."[180] If the law was not overturned, similar claimed governmental purposes could justify extremely unfair laws, and people would be prevented from engaging in other intimate actions simply because the government disapproved of such actions.[181] Because such a principle would be incompatible with the judicial motive of future equity, a valid decision would have to overturn the law. Through these methods, the arguments by Petitioners in favor of overturning the law created consubstantiality with a judicial motive, and consequently the justices.

2. Creating Consubstantiality in the Equal Protection Clause Argument

The Equal Protection Clause section of the Brief is more difficult to analyze, as the Court did not reach a decision on the merits of the equal protection argument.[182] Accordingly, it is difficult to see the extent to which the Court accepted the arguments in this section. However, analysis of this section serves two purposes. First, this analysis can help further develop how Petitioners created consubstantiality with the Court. Second, if this section was able to less effectively convey the judicial motives, then

176 *Id.* at 11.

177 *Id.*

178 *See id.* at 13.

179 *Id.* at 15.

180 *Id.* at 28.

181 *See id.*

182 Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).

that may be at least part of the reason it was not adopted by the Court. If that is the case, then the argument that identification with judicial ideals is a feasible way to persuade a judge gains weight.

Like in the due process section, Petitioners suggested the law was incompatible with past precedent and the Constitution. Petitioners attempted to achieve this through characterizing the state's purpose as discriminatory, arguing, that"[t]his Court has many times repeated the core principle of rejecting bias, however characterized, in law,"[183] as well as, "[t]he Constitution and this Court's precedent forbid" a preference for one group motived by bias.[184] These references to precedent implied that the purpose of the law was completely inconsistent with established legal principles. Through characterizing the law's purpose as discrimination and thus invalid, Petitioners suggested that past precedent demanded the law be overturned.[185]

Additionally, Petitioners attempted to convey that the law was unjust in the present case. Because of the law's discriminatory purpose, Petitioners argued it was unfair and should be overturned.[186] The law was designed to essentially "send a message in the criminal law that one group is condemned by the majority."[187] Instead of any health, safety, or welfare concerns, the writers of the Brief framed the law as motivated by a "history of irrational anti-gay discrimination," that had nothing to do with any actual wrongdoing by gay people.[188] Petitioners argued that a criminal law based on this purpose was fundamentally unfair, and should be declared unconstitutional and overturned.

Finally, Petitioners also attempted to frame acceptance of their argument as necessary to ensure workable future standards. By framing the purpose as purely discriminatory, the Brief suggested that the law should be overturned due to the risk of polluting future precedent. If the law was allowed to stand, discriminatory laws would be given "*carte blanche* to presumed majority sentiment," and future laws that discriminated against a group could be allowed to stand simply because the legislature claimed they were moralistic.[189] The threat of these future laws motivated by discriminatory purpose further deflected the justices from accepting any elevation of the purpose over the agency and act. By claiming only their position would provide a fair and just result for similar cases in the future to be reflected in the opinion, Petitioners suggested

183 Brief of Petitioners, *supra* note 9, at 37.

184 *Id.* at 38.

185 *See id.* at 37–38.

186 *See id.* at 40.

187 *Id.*

188 *Id.* at 45.

189 *See id.* at 36.

the motive underlying their argument was consubstantial with a judicial motive.

However, the equal protection portion of the Brief contained grammatical strains that may have limited its persuasive effect.[190] A grammatical strain occurs when parts of the presented pentad are incompatible with each other, or when facts cannot fit into a frame despite the author's attempts.[191] The due process part of the Brief spent significant time discussing the importance of privacy rights for gay Americans. The equal protection section acknowledged this, arguing that the importance of the privacy rights reinforces their equal protection argument.[192] Yet the equal protection argument was not completely in line with this principle. Petitioners' equal protection claim was based on the law only forbidding gay people from committing sodomy, not heterosexuals. Implicit in this argument, however, is the idea that in future cases, a permissible law could forbid sodomy in both gay and heterosexual couples. Although this hypothetical law would be permissible under the second argument, it would be extremely inequitable, and conflict with the principles established in the due process argument. This conflict created a serious grammatical strain, that may have made it difficult for the equal protection section of the Brief to become consubstantial with the motives of the Court.

D. The Net Result: The Opinion of the Court in *Lawrence v. Texas*

The opinion shows the Court incorporated into its ultimate decision the Petitioners' arguments that were consubstantial with the judicial motives. For example, Justice Kennedy, in the majority opinion, described how past precedent such as *Casey* and the constitutional right to privacy supported overturning the law.[193] Kennedy also spent significant space in the opinion remarking on the unfairness of the law as applied to Lawrence and Garner: "The present case does not involve minors. . . . It does not involve public conduct or prostitution. . . . The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[194] Perhaps most notably, however, Kennedy explained in the opinion why the ruling is based on the Due Process Clause rather than the equal protection argument:

190 *See* Rountree, *supra* note 98, at 5–6 (discussing how grammatical strains weaken arguments).

191 *See id.*

192 Brief of Petitioners, *supra* note 9, at 48.

193 *See* Lawrence v. Texas, 539 U.S. 558, 573–74 (2003).

194 *Id.* at 578.

> [Lawrence argues that] *Romer* provides the basis for declaring the Texas statute invalid under the Due Process Clause. That is a tenable argument, but . . . [w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.[195]

This statement by Kennedy suggests that the due process and equal protection arguments differed in their ability to appeal to the third judicial motive. It also suggests that a main reason the due process argument was accepted was because it would provide the most equitable result in the future and conformed more closely to the judicial ideals. In other words, the implication was that the equal protection argument was less appealing because it was less able to effectively identify with the judicial ideals.

In *Lawrence*, when faced with two arguments, the Supreme Court adopted the argument that more closely identified with the judicial motives. Furthermore, the Court implied that the equal protection argument's grammatical strain with the third judicial motive was a reason why the equal protection argument was not adopted. The arguments that were adopted by the Court seemed to be the ones that were able to most closely convey identity with the judicial motives. This outcome suggests that advocates would be wise to keep the judicial motives in mind when attempting to persuade judges.

VI. Conclusion

Dramatism is a method of rhetorical criticism most commonly used for analyzing messages received by an audience. However, as the Petitioners' Brief demonstrates, it is possible to use dramatism to effectively persuade an audience through identification. In this case, we can see that through strategic representation of the pentad, Petitioners' motives aligned with the three judicial motives identified by Clarke Rountree. The success of Petitioners' argument suggests that creating consubstantiality with Rountree's judicial motives may be an effective way to identify with and persuade judges. Therefore, a Dramatistic approach to persuading judges in persuasive writing can be seen. If one can frame an argument to suggest the motives underlying it are identical with the judicial motives, a judge should be convinced by the argument. By cloaking arguments in the same cloth with which a judge must make an opinion, one can thus create an argument a judge is more easily able to accept.

195 *Id.* at 574–75.

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The Language of *Love v. Beshear*

Telling a Client's Story While Creating a Civil Rights Case Narrative

Dr. JoAnne Sweeny* & Dan Canon**

I. Introduction

We tend to think of a good lawyer as being a vigorous, focused advocate, one who thinks first and foremost of the interests, needs, and desires of their clients. But what if the client's case will affect an entire group of people; a group who may also seek to have its collective rights vindicated? This is the dilemma of the civil rights attorney—how does an effective advocate balance the specific needs of the client with the broader, long-term needs of the group the client represents? And who should have a say in what story is told on behalf of the client? In civil rights cases, it is not just the client, but activists, organizations, academics, and the media who have a stake in the outcome. How much of a say should they have in the creation of a litigation story that will most directly impact a single client? How are those stories crafted? With careless, blunt-force litigation, or with purposefulness? And does it matter who gets to tell the story?

This article addresses those questions by examining the recent marriage equality litigation that culminated in the Supreme Court decision *Obergefell v. Hodges*. Focusing on the Kentucky case, *Love v. Beshear*, this article shows how civil rights attorneys may be constrained by their dual roles—advisors to their clients and advocates for civil rights—and how they decide what story to tell to remain true to their clients' needs

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while keeping engaged with the larger civil rights issues inherent in these impact litigation cases. Moreover, once the litigation has begun, the other players—organizations, media, even the judges themselves—can change the story, highlighting what they see fit. The ultimate story of who a lawyer's clients are ultimately may not be up to the lawyer or the client. If that is the case, what is the lawyer's role in crafting a narrative? Part II of this article discusses the importance of narrative, creating a client's story, in litigation. Part III discusses additional difficulties and interests that must be considered when creating a narrative in civil rights litigation and shows how that story can change over time as other players become involved. Part IV delves into the cases *Love v. Beshear* and *Obergefell v. Hodges* as examples of how different actors can shape a client's narrative.

II. Importance of Narrative in Litigation

A lawyer's primary job is to persuade, and legal narrative is an effective way to do so.[1] Lawyers often use storytelling or a legal narrative to persuade judges and juries that their client should win their dispute because legal narratives present "a series of facts or events in an interesting and compelling fashion."[2] Legal narrative or storytelling has become a burgeoning area of legal scholarship. According to scholar Helena Whalen-Bridge, "A legal narrative is a story that focuses on the effect of a particular law on the lives of its characters,"[3] and a "story" is "an account of a character running into conflict, and the conflict's being resolved."[4] Storytelling is powerful because it is such a large part of how we understand the world.[5] In fact, a story can "ring true" and be persuasive even if it presents a version of events that differs with other people's perceptions of the same events.[6]

Part of a story or narrative's power is its ability to evoke an emotional response in its audience.[7] Narratives "evoke the reader's sympathy by depicting how events bear on the life of a character," and so narratives necessarily focus on individuals.[8] According to one scholar, "The most

1 Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229, 233 (2010).

2 *Id.* at 231.

3 Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 Or. L. Rev. 943, 943 (1994).

4 Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers On How To Use Fiction Writing Techniques To Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 466 (2001).

5 *Id.* at 958.

6 Whalen-Bridge, *supra* note 1, at 234.

7 Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. Legal Writing 127, 144 (2008).

8 Apt, *supra* note 3, at 961.

potent legal narratives are often personal testimonies."[9] To that end, one way a story can be persuasive is if it is recognizable to its audience so they can envision those events happening to them.[10] These stories invoke empathy by emphasizing the similarities between the narrative's characters and its audience.[11] For that reason, legal narratives are often used to advance social justice causes on behalf of marginalized groups.[12] The stories of the victims of discrimination can be told in academic writing, in writing to and by the courts, and in statements to media outlets in order to help the audience see the world from the victim's point of view.

In litigation, one way to tell a legal story is through the theory of the case, which "includes four elements: the facts presented, the legal framework, the client's perspective, and coherence with the audience's moral intuitions or lived experiences."[13] To that end, a case theory should "explain the party's version of the facts," be supported by the law, and respond well to the opponent's likely theory.[14] Part of the theory of the case is the "theme" of the case, which is "where the client's voice and point of view are present. The theme causes the visceral reaction that allows the reader to be immersed in the story, not just the law at issue."[15] A theme is therefore an important part of the theory of the case because it helps the theory of the case connect "to the client's experience of the world . . . in the way that can best achieve the client's goals."[16] By doing so, the theory of the case "combines the perspectives of the lawyer and the client with an eye toward the ultimate audience—the trier of fact."[17] A theory of the case that focuses too much on legal framework or strategy may lose the ability to connect with its subject—the client—and may therefore lose its ability to tell a meaningful story. By doing so, lawyers lose the ability to influence judges when the judges engage in "narrative reasoning," which is reasoning that "evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode."[18]

9 *Id.* at 957.

10 *Id.* at 970–71 (citing Kathryn Abrams, *Hearing the Call of Stories*, 79 Calif. L. Rev. 971, 1051 (1991).

11 Foley & Robbins, *supra* note 4, at 468 ("The more the reader understands and likes a character, the more the reader will root for him.").

12 Apt, *supra* note 3, at 943.

13 Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 Clinical L. Rev. 188, 189 (2008–2009).

14 Foley & Robbins, *supra* note 4, at 492–93.

15 Mary Ann Becker, *What is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 Gonz. L. Rev. 575, 576 (2011).

16 Binny Miller, *Give them Back their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 487 (1994).

17 *Id.*

18 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. F. 7, 11 (1996).

Some scholars have criticized the gap between the story the lawyer tells and the story the client would have told.[19] They have argued that the stories that lawyers tell to fit a legal framework often remove their client's perspectives from the story, effectively silencing the client.[20] "The phrase 'lost narrative' refers to such a situation, where events have occurred that some would like to discuss but which cannot, for some reason, be addressed."[21] However, other scholars have argued that a purely client-centered story would also not be as effective because it would not fit into a legal framework that could help the client get what she wants.[22]

This conflict between a client's personal story and their "legal" story gets even more complicated in civil rights litigation. In civil rights litigation, it is not only the client's story that needs to be told because larger issues are at play. More specifically, civil rights lawyers must balance the needs of their individual clients and the larger issues their clients embody when deciding what story should be told because the effects of one case could set a precedent that will affect larger communities. In addition, lawyers who represent individual plaintiffs in civil rights litigation are often pressured by several groups to tell a particular story, including activists, the media, academics, civil rights organizations and, indeed, the clients themselves.

In such cases, the trier of fact may *not* be the ultimate audience, as one activist scholar wrote:

> A group engaged in challenging entrenched power . . . has to contend with far more powerful opponents in incredibly lopsided political contests. Such a group, therefore, has not only to foster a strong internal identity; it also has to win allies beyond the bounds of that identity, if it is to build the collective power it needs to move any serious political goals forward.[23]

In other words, when advancing the rights of a marginalized group or seeking the creation of a new right, public opinion matters. Often these

19 Miller, *supra* note 16, at 515.

20 *Id.* at 486. This criticism of "lawyer-led" civil rights advocacy has come to the fore in recent scholarship. Arkles et al., describe

> troubling dynamics [in representing marginalized clients] where lawyers take center stage, where the voices of people with the most privilege in our communities are centralized, where knowledge stays within the legal profession rather than being shared outside of it, where an intersectional analysis is lacking, and where decisions about priorities are made in isolation from many key movement leaders and the people who are most impacted by the issues.

Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 Seattle J. Soc. Just. 579, 584 (2010).

21 Whalen-Bridge, *supra* note 1, at 229.

22 Miller, *supra* note 16, at 516–17. Also, sometimes, the client's unvarnished story is "neither noble nor empowering." *Id.* at 526.

23 Jonathan Smucker, Hegemony How-To: A Roadmap for Radicals (2017).

cases are part of a larger movement with multiple points of attack that need to be, if not fully coordinated, at least cognizant of the larger forces in play. That being the case, the stories told in civil rights litigation are meant for public consumption and therefore are often tailored to what will play best in the public eye. Consequently, although ostensibly wanting the same thing, the creation of a favorable judicial rule (or even an entirely new civil right), each group has their own larger interests to advance and will therefore want the client's story to be told a certain way.

Accordingly, detachment from the client may be intentional to serve a larger goal. For example, Dale Carpenter's book, *Flagrant Conduct*, discusses how the plaintiff's story was essentially ignored during the proceedings in *Lawrence v. Texas*,[24] including the likelihood that the sodomy for which he was arrested never occurred.[25] Instead, lawyers and activists wanted to focus on the constitutionality of the law itself and not get stuck on factual matters.[26] This was not necessarily a bad thing; Lawrence agreed to this strategy and was interested in advancing the larger civil rights issue.[27] In contrast, the plaintiff "Jane Roe" in *Roe v. Wade* felt ignored by her attorneys in their pursuit of larger constitutional issues and, perhaps due in small part to her perceived mistreatment, ultimately became an advocate against abortion.[28]

A different strategy has been used in other civil rights cases, where the plaintiffs challenging the law on constitutional grounds were made a large part of the story of the case, bringing the facts of the clients' lives and relationships into the forefront. The plaintiffs in *Loving v. Virginia*, although they shied away from media attention, were still a large part of the case theory, which focused on their affection for each other and the fact that they appeared to be the same as any other couple.[29]

Another example, and the focus of this article, are the plaintiffs in the case *Love v. Beshear*, one of the cases that was combined into the Supreme Court case *Obergefell v. Hodges*,[30] the case that granted marriage equality.

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24 539 U.S. 558 (2003).

25 Dale Carpenter, Flagrant Conduct 105 (2012).

26 *Id.* at 127.

27 *Id.* at 134.

28 *See* Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 Hastings L.J. 779 (1996) (presenting an in-depth analysis of the conflicts between Roe and her lawyer, who was extremely focused on litigating the larger constitutional issue, arguably to the detriment of her client, who simply wanted an abortion).

29 *See, e.g.,* Brief of Plaintiffs-Appellants at 61, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (internal citations omitted) ("The ability to identify a racial classification when the statute 'treats the interracial couple made up of a white person and a Negro differently than it does any other couple,' is no different from the ability to identify a sex-based classification when a statute is applied to treat a couple made up of a man and a man differently from a couple made up of a woman and a man.").

30 135 S. Ct. 2584 (2015).

Although largely lauded for its results, some scholars have criticized *Obergefell* for focusing too much on marriage as opposed to other kinds of relationships.[31] Such criticisms appear to argue that the attorneys in the *Obergefell* cases focused too much on their clients without considering the larger civil rights issues.[32]

Cynthia Godsoe has also criticized the case for "normalizing" the issue of gay rights by choosing only "perfect" plaintiffs who most resemble heterosexual couples at the expense of the wider gay experience.[33] As she sees it, "[H]eteronormative and traditional characteristics [are] present in the carefully curated set of *Obergefell* plaintiffs" because "respecting individual choice in those we love[] will require challenging mainstream norms themselves rather than simply imitating existing models."[34] Godsoe's critique offers another potential conflict between the needs of the client and the larger civil rights issue: anticipating the individual needs of those in the larger marginalized group who are not the client.[35]

These criticisms show the difficult balancing act civil rights lawyers must accomplish in order to stay true to their clients' needs and address the larger civil rights issues their clients represent. As shown below, the lawyers in *Love v. Beshear* were faced with the monumental task of deciding what story to tell not only about their clients, but about same-sex relationships overall, to very different kinds of audiences. However, and perhaps more importantly, choosing clients was only the beginning of the crafting of the clients' stories in *Love v. Beshear*. Ultimately, it was not the lawyers that chose the stories told; it was the media, national organizations, and the judiciary that cherry-picked the stories they liked best.

III. Putting it into Practice: Creating a Marriage Equality Story

The *Obergefell* decision shows the importance of activists and civil rights groups to change society's opinions about a marginalized group even before the case is brought to court. Changing society's opinions is

31 Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 Fordham L. Rev. 23 (2015); Leonore Carpenter & David S. Cohen, *A Union Unlike any Other: Obergefell and the Doctrine of Marital Superiority*, 104 Geo. L.J. Online 124 (2015).

32 *Id.*

33 Cynthia Godsoe, *Perfect Plaintiffs*, 125 Yale L.J. Forum 136 (2015).

34 *Id.*

35 Part of the tension inherent in *Obergefell* stemmed from the fact that it was seen as representative of the entirety of the LGBTQ+ rights movement. But by 2013, that movement had already expanded far beyond the space allowed by its ever-growing acronym. The "movement for LGBTQ+ rights" was, and is, several movements that were shoved under one umbrella in common parlance, but which had very different needs and aspirations.

essential to make room for a narrative about individual clients that a trier of fact can empathize with. Social understanding of new rights, including newfound empathy for disenfranchised minorities, takes time to develop. Civil rights lawyers must play into that understanding by placing their clients in a context that judges, juries, and the greater population can empathize with, and even champion.

A. Putting the Clients in Context: When to Tell the Story

To create a successful narrative for their same-sex couple clients, civil rights attorneys needed to understand what would make their clients most sympathetic to judges, juries and even the public at large. To do so, they had to understand the history of the fight for legal recognition of gay marriage and how social forces had changed over time. The history of the legal fight for same sex marriage began in the 1970s but did not seriously gain steam until the early 2000s.[36] During that time, Americans' views of homosexuality also began to change, due in large part to the efforts of activists and organizations who sought to tell stories of gay people in the news media and popular culture.[37] In addition to capitalizing on national events such as the AIDS crisis and "Don't Ask, Don't Tell," the media brought gay characters in popular television shows such as *Ellen* and *Will and Grace*.[38]

The impact of the change in narrative—the change in the nation's understanding of gays and lesbians—was essential for the increased legal recognition of their civil rights. Beginning in the 1990s, courts began to entertain the idea of same-sex marriage as a fundamental right.[39] In 2004, in *Lawrence v. Texas*, the Supreme Court overruled *Bowers v. Hardwick* and held that adults, even in same-sex couples, have the right to sexual intimacy.[40] That decision sparked more activism,[41] more court cases,[42] more ballot initiatives,[43] and, ultimately, *United States v. Windsor*, in which Justice Kennedy called the right to same-sex marriage, as conferred

36 For a more in-depth history of the fight for same-sex marriage rights, see Daniel J. Canon, *Marriage Equality and a Lawyer's Role in the Emergence of "New" Rights*, 7 Ind. J.L. Soc. Equal. 212, 217–18 (2019).

37 *Id.* at 228–37.

38 *Id.* at 229.

39 *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

40 Lawrence v. Texas, 539 U.S. 558 (2003) (right of consenting adults to sexual intimacy); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraception).

41 Emily Althafer, *Leading Gay Rights Advocate to Speak at UF*, Univ. of Fla. News (Jan. 23, 2006), http://news.ufl.edu/archive/2006/01/leading-gay-rights-advocate-to-speak-at-uf-1.html.

42 David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law 64–65 (2016).

43 *Id.*

by certain states, a "dignity and status of immense import."[44] Kennedy's language suggested the country and its courts might finally be ready to take same-sex marriage head-on.

During this time, activists and organizations became sophisticated storytellers who used the media and the courts together in order to change the law. Moreover, even the losses were used to gain momentum; the issue continued to be reported in the media and motivated LGBTQ+ supporters and allies to continue to tell their stories to change the narrative about same-sex couples.[45] The foregoing shows that the efforts of these activists, and their narratives, made a big difference in legal landscapes. The attorneys involved in the marriage equality cases made use of the new, humanizing stories being told about same-sex couples in their own litigation. *Love v. Beshear* would provide another opportunity for these groups to engage in persuasive storytelling.

B. Choosing Clients, Choosing Stories

Although there were legislative and judicial gains for same-sex couples, the work of creating a successful narrative across the United States was far from finished. Public opinion regarding gays and lesbians in Kentucky (and most of the Midwest/South) was much more negative than on the coasts, as evidenced by the over 75% approval of Kentucky's 2004 "traditional" marriage amendment.[46] To win over the middle of the country in 2013, Kentucky civil rights lawyers had a more religiously conservative populace and a constitutional amendment to overcome.

Moreover, LGBTQ+ rights organizations purposefully were not bringing impact litigation in the South and Midwest because they did not believe they could win in the courts there.[47] These organizations had a national focus, not a local one. Individual activists, on the other hand, were more tied to their local communities and interested in fighting for same-sex marriage where they lived. And they were willing to be the face of that movement, meaning that their stories would be the ones heard by the courts and the national and international media. Consequently, after *Windsor*, there was no shortage, even in Kentucky, of both 1) same-sex couples who wanted to get married in their home state, and 2) same-sex

44 United States v. Windsor, 570 U.S. 744, 768 (2013).

45 Cole, *supra* note 42, at 37.

46 *Kentucky*, Initiative & Referendum Inst., Univ. S. Cal., http://www.iandrinstitute.org/ states/state.cfm?id=36 (last visited Aug. 30, 2019).

47 In one sense, the organizations were right—plaintiffs lost at the Sixth Circuit Court of Appeals. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd*, Obergefell v. Hodges, 135 S. Ct. 2594 (2015).

couples who were already married, and who would like their out-of-state marriages to be recognized by their home state.

The attorneys in the marriage equality cases had a myriad of concerns to address when choosing clients and a case theory. First, they needed people who wanted to get married simply because that was the right they were pursuing. Finding same-sex couples who wanted to get married (or who were already married in another state) necessarily limited who the lawyers could choose; the available pool of potential plaintiffs was self-selecting.

The couples' reasons for getting married were also salient. Attorneys needed to find couples who had articulable reasons for wanting their marriages recognized, partially to underscore the importance of the right. It is not enough to explain the benefits of marriage in the abstract—the attorneys needed to find people who were suffering without those benefits. For that reason, the attorneys focused on couples who had practical reasons for getting married, such as looming medical emergencies, adopted children with only one recognized parent, or the additional burden of drafting legal documents to commemorate their relationship in the event one of them should die.

The attorneys also needed to find people the audience would connect with. The audience in this case, as in many civil rights cases, was not just the judges who would hear the case; it was the public as a whole, and particularly the segment of the public that had still not thought much about the issue.[48] Thus, people who had what could be called "typical" relationships that resembled heterosexual marriages were the most natural vehicle for relating to both judges and the wider audience. Recognizing this, attorneys in every state tended to select couples who had been together for a long time and had children. This strategy allowed attorneys to create a story that their audience could relate to that involved people they could empathize with.

In the pleadings, Kentucky's lawyers gave equal weight to each couple's story, to present as many narrative angles as possible within the framework they were given.[49] As far as client selection was concerned, the marriage cases were more like *Loving* than *Lawrence*. The marriage bans affected thousands of people in every state, unlike the selective and infrequently used criminal penalty in *Lawrence*. This state of affairs gave a degree of leeway to attorneys in selecting plaintiff couples, and by extension in selecting the stories that could be told. But unlike many legal teams nationwide, the Kentucky attorneys, acting without the narrative

48 As shown below, portions of the judicial opinions in *Love v. Beshear* were pointedly aimed at a skeptical general audience.

49 This was a decidedly different approach from the litigation in Michigan (*DeBoer v. Snyder*), which had only one plaintiff couple: two professionals with children. *See infra* part IV.C.

impulses of the national organizations, made an effort to be more inclusive. As such, they selected couples that represented a "traditional," heteronormative marriage—suburban, church-going professionals with children—as well as couples that were outside that norm: rural-based, childless, blue-collar, and otherwise refusing to conform. The twelve plaintiffs represented by Kentucky's lawyers were among the largest groups in any marriage case in the country (excluding class-action cases)[50] and by far the largest to go to the Supreme Court in *Obergefell*.

Still, reaching to the farthest fringes of the marginalized to ensure a population is well-represented, even if desirable, is not always possible. Self-selecting clients are likely to have more education and more resources than the average member of their group, and the Kentucky plaintiffs were no exception. Furthermore, the available stories were limited to those who thought marriage was a good idea in the first place.[51] This basic fact excluded a large number of nontraditional couples falling under the expansive LGBTQ+ umbrella, though many of those couples undoubtedly had a stake in the outcome of the litigation. Telling only the stories of the plaintiffs that found their way to lawyers necessarily meant that the stories of others would be silenced, at least in the short term.

The first case, styled *Bourke v. Beshear*, involved Greg Bourke and Michael DeLeon, an upper-middle-class couple who had been together for more than thirty years, and who had officially married in Canada in 2004.[52] Bourke and DeLeon had two adopted children, and a suburban lifestyle right out of a magazine spread.[53] Similarly, plaintiffs Paul Campion and Randy Johnson, a youthful-looking middle-aged couple with four adopted children, lived the married life of a 1960s sitcom couple (with a notable exception).[54] Paul is a nurse and Randy is a schoolteacher.[55]

Two other couples, Kim and Tammy Boyd, and Jimmy and Luther Meade-Barlowe, were from small towns in Kentucky.[56] Each couple

50 *See, e.g.,* Strawser v. Strange, 307 F.R.D. 604 (S.D. Ala. 2015) (granting class certification to Alabama marriage plaintiffs).

51 Tom Geoghegan, *The gay people against gay marriage*, BBC News Mag., June 11, 2013, https://www.bbc.com/news/magazine-22758434 ("Some lesbians are opposed to marriage on feminist grounds, says Claudia Card, a professor of philosophy at the University of Wisconsin-Madison, because they see it as an institution that serves the interests of men more than women. It is also, in her view 'heteronormative', embodying the view that heterosexuality is the preferred and normal sexuality."). For a very different take on (arguably) LGBTQ+ opposition to marriage, see Brief of Amici Curiae Same-Sex Attracted Men and their Wives in Support of Respondents and Affirmance, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Same-Sex_Attracted_Men_and_Their_ Wives.pdf.

52 Brief for Petitioners at 9, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-574_Brief_Of_Bourke.pdf.

53 *Id.*

54 *Stories*, Freedom to Marry, http://www.freedomtomarry.org/stories/P10 (last accessed June 1, 2020).

55 *Id.*

56 *Id.*

had been together for decades—Luke and Jimmy since 1968.[57] Their hometowns would not likely have approved of same-sex attractions, and certainly would not have voted in favor of same-sex marriage.[58] But these couples had been road-tested; they were well-known—and widely accepted—by their communities.[59] While they were emblematic of small-town same-sex couples everywhere, they were not the nuclear family analog that conventional wisdom suggested middle-America would relate best to.[60]

Luke and Jimmy were particularly relatable because they had been through the worst of anti-gay rhetoric and understood how far the country had already come. When they met in 1968, the thought of same-sex marriage was "who in their wildest dreams could ever dream that? And to adopt children? I mean, how weird is that?"[61] They were "so in the closet" that they exchanged rings under the table at their wedding ceremony in Iowa.[62] Luke and Jimmy's story also had the added element of the medical treatment issues first brought to light during the AIDS epidemic.[63] Jimmy had been diagnosed with non-hodgkins lymphoma a decade before the case began.[64] His prognosis showed no immediate danger, but the couple was well aware of the impact the legal status would have on Jimmy's healthcare in the future.[65]

The "licensure" plaintiffs were similarly diverse. The fortuitously-named Tim Love had been with his partner, Larry Ysunza, for thirty-three years.[66] They were (and are) a typical story of monogamous romance, with the attendant typical problems that defined same-sex marriages in 2014.[67] Tim had heart problems that had put him in the hospital some months before.[68] The couple decided to delay emergency surgery so that

57 *Id.*

58 *Id.*

59 Clare Galofaro, *After four decades in secret, Kentucky couple fights for the next generation*, LGBTQ Nation (Apr. 25, 2015), https://www.lgbtqnation.com/2015/04/after-four-decades-in-secret-kentucky-couple-fights-for-the-next-generation/.

60 Noted legal journalist Dahlia Lithwick has discussed the "Will & Grace" theory of cultural change: "A mainstream television comedy featuring openly gay characters demonstrated what social scientists have long known: the single most important indicator of one's support for gay rights is whether one knows someone who is gay. In a pinch, it seems, a fellow on TV will do." Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, New Yorker, Mar. 12, 2012, https://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick.

61 Love v. Kentucky (Informavore Media 2017).

62 *Id.*

63 *Stories*, supra note 54.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

they could execute documents to prevent anyone from interfering, and to ensure access to one another, should the unthinkable happen.[69]

Also involved were Maurice Blanchard and Dominique James, young activists living in Louisville.[70] In 2013, Blanchard and James went to the county clerk's office and demanded a marriage license.[71] When the clerk informed them that she could not legally issue a license to two men, they refused to leave.[72] They were arrested, prosecuted, and fined one penny by a Louisville jury.[73] Their prosecution was six months before the Supreme Court's opinion in *United States v. Windsor*,[74] and about seven months before *Bourke v. Beshear* was filed.

Compared to Tim and Larry's relative conservativism, Maurice and Dominique represented what people now think of as gay rights activists. Tim and Larry were demure, studious, and decidedly working-class in their affect and dress; Maurice and Dominique dressed colorfully, wore dark glasses, and were more oratory. Maurice (also known as "Bojangles") in particular was unafraid of media; he was the first openly gay Baptist minister in Kentucky.

There was, at first, some concern by the legal team (and by some of the original plaintiffs) that Maurice and Dominique might have been more alienating to the general public in Kentucky, and perhaps to the judiciary, than Tim and Larry. On the other hand, Maurice and Dominique, perhaps more than any of the other Kentucky plaintiffs, represented the face of the young LGBTQ+ movement in the 2010s—out, proud, unashamed, and willing to fight.

Despite the variety of plaintiffs' stories, the popular media's treatment of the wave of marriage litigation reflected the narrative angle that most national advocacy groups thought would be most successful: one making a direct comparison between "normal" married couples and same-sex couples, with as few differences highlighted as possible. One of the first cases to be filed after *Windsor*, the unexpectedly successful *Kitchen v. Herbert*,[75] featured two plaintiffs who met later in life and apparently

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *See* Andrew Wolfson, *KY Gay Couple Fined 1 Cent In Fight For Marriage,* USA Today, Nov. 27, 2013, https://www.usatoday.com/story/news/nation/2013/11/27/kentucky-gay-couple-marriage-protest/3765599/. Maurice and Dominique's decision to take that criminal trespass case to trial was in itself a tried-and-true example of the use of a civil disobedience narrative to raise awareness about a larger cause. *See* United States v. Anthony, 24 F. Cas. 829 (N.D.N.Y. 1873). As evidenced by Susan B. Anthony's famous speech to the court for illegal voting, victory at trial was not the goal. *See* Andrew Glass, *Susan B. Anthony found guilty of voting, June 19, 1873*, Politico, June 19, 2018, https://www.politico.com/story/2018/06/19/susan-b-anthony-found-guilty-of-voting-june-19-1873-649110.

74 570 U.S. at 768.

75 755 F.3d 1193 (10th Cir. 2014).

did not plan to have children. Nonetheless, the *Salt Lake Tribune* emphasized the normalizing aspects of their relationship: "Call, a native Utahn, and Archer, who is originally from Colorado, said they married for the same reason most couples do: as a public declaration of their love, commitment and fidelity to one another."[76] Similarly, *USA Today*'s story on the Kentucky litigation focused solely on one couple (Bourke-DeLeon), and did not even mention the other plaintiffs.[77] The article mentioned the couple's son's activity in scouting, and quoted DeLeon as saying "'There's no reason why we should be second-class citizens. . . . We should be at the table with everybody else.'"[78]

Despite the effort to provide a broad base of narratives to the public, the story told to the media by Kentucky's legal team also became one of drawing similarities with straight couples almost immediately after suit was filed. One of the plaintiffs' attorneys (and one of the authors of this article) described the clients in an editorial dated December 18, 2013:

> Our clients are four ordinary, lawfully wedded couples. They go to work, attend school, raise their children, go to church, pay taxes, and in most respects live as any other married couple in Kentucky. Like many married couples in the commonwealth, the plaintiffs were wed outside of their home state. Their marriages were valid under the laws of the jurisdictions in which they were registered. The federal government recognizes plaintiffs' marriages and extends certain benefits to them as a result. And yet, Kentucky refuses to accept that these couples are married simply because they are same-sex couples.[79]

This story, as told by lawyers and the press, was not one of individual liberty, or of government intrusion, or of religious discrimination. It was fundamentally a story of sameness, of uniformity, of analogy—one designed to invoke sympathy, not outrage, in the average, undecided, middle-American media consumer. And it was the story that persisted all the way through *Obergefell*, seemingly without regard to the details of any particular plaintiff's case.

76 Brooke Adams, *Couples Determined to Topple Utah's Same-sex Marriage Ban*, Salt Lake Trib., June 28, 2013, https://archive.sltrib.com/article.php?id=27277024&itype=storyID.

77 Jessie Halladay, *Couple Challenges Kentucky Law Against Gay Marriage*, USA Today, July 26, 2013, https://www.usatoday.com/story/news/nation/2013/07/26/same-sex-marriage-kentucky/2589379/. This exclusive focus is all the more shocking because Kim and Tammy were actually the first couple to file, a filing which was later withdrawn and consolidated with Bourke in a different court.

78 *Id.*

79 Dan Canon, *Dan Canon: The Case for Marriage Equality in Kentucky*, Insider Louisville (Louisville Future, Louisville, Ky.), Dec. 18, 2013, https://insiderlouisville.com/uncategorized/marriage-equality/.

IV. How the Story in *Love v. Beshear* Evolved

Kentucky's litigation happened in two phases, one for recognition of out-of-state marriages, and the second for the right to be married in Kentucky. The strategy of bringing "recognition" cases (as opposed to "licensure" cases) was employed by Kentucky attorneys, as well as attorneys in other states, because it seemed the obvious next step from *Windsor*[80] and made a better story for the general public. As discussed below, mostly by the irresistible tide of judicial opinions and popular media coverage, the case necessarily evolved into one that made close comparisons between opposite-sex and same-sex married couples, serving to minimize the differences between the two. Despite the myriad of different stories the clients represented, both the judiciary and the media repeatedly focused on traits that same-sex and heterosexual couples have in common, effectively ignoring the stories that did not fit that narrative. The result was beneficial for all couples but, as discussed below, losing so many stories that did not fit with the judiciary and media's preferred narrative did have some far-reaching implications that future litigants and activists will have to grapple with.

A. The Kentucky Plaintiffs: Recognition Cases

The point, as was argued in the plaintiffs' briefing at the district court level, was that even if someone disagreed with allowing marriage licenses to be issued to lesbian and gay couples within the Commonwealth of Kentucky, it was unfair to withhold the rights and responsibilities of marriage from couples who had been lawfully married in other jurisdictions, simply because they were same-sex couples. As such, Plaintiffs began their Memorandum in Support of Summary Judgment by emphasizing this unfairness:

> Plaintiffs are ordinary married couples. They go to work, attend school, raise their children, go to church, pay taxes, and in most respects live as any other married couple in Kentucky. Like many married couples in the Commonwealth, Plaintiffs were wed in other jurisdictions. Their marriages were in all respects valid under the laws of the jurisdictions in which they were solemnized and registered. The federal government recognizes Plaintiffs' marriages, and extends certain benefits to them as a result. And yet, the Commonwealth of Kentucky refuses to acknowledge the commitments made by these couples because their spouses are of the same sex.[81]

80 *See, e.g.*, Laura Landenwich & Dan Canon, *The Lessons of* Love: *Kentucky Litigators Recount the Fight for Marriage Equality*, Bench & B. 16–17, May/June 2016, https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Benchbar/BB_0516.pdf.

This is, by any measure, a "normalizing" story, one that says "lesbian and gay couples who are already married are no different from straight married couples as a matter of fact, and therefore should be no different in the eyes of the law." The setup then, naturally, was to compare gay couples to straight couples in every discernible aspect, legal and otherwise. What those couples requested in this round was not so much a change in the law as it was a bare recognition of the law of another state, and for couples who were not much different from "John and Jane Q. Public." This, the thinking went in 2013, was an easier sell than asking a Kentucky federal court to require marriage licenses to be issued to same-sex couples.

Plaintiffs jumped from this normalizing story to one that was not focused on the plaintiffs themselves at all, but rather Kentucky lawmakers. The central narrative here is one of religious discrimination.

> Sen. Ed Worley described marriage as a "cherished" institution. He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school." Soon, he concluded, we will all be prohibited from saying "the Pledge to the Legiance [sic] in public places because it has the words 'in God we trust.'" In support of the amendment, he cited to the Bible's "constant" reference to men and women being married. By way of example, he quoted a passage from Proverbs 21:19, "Better to live in the desert than with a quarrelsome, ill-tempered wife."[82]

At that time, there was an Establishment Clause claim still at play in the litigation, along with other constitutional grounds. The above passage is meant to demonstrate a legislature that is willing to impose its particular brand of religion on people who take a very different view of Christianity; it is not at all meant to draw similarities between the plaintiffs and average Kentucky families.

But the primary narrative in the *Bourke* trial court briefing was still one of comparison between straight couples and gay couples, one which required the reader (judicial or otherwise) to answer the question: why should these couples be treated differently? As such, the Memorandum returned to the practical consequences of the marriage bans of the plaintiffs. It discussed tax implications, employment complications, medical decisionmaking, and a host of other day-to-day consequences that attend marriage—consequences that straight married couples do not have to worry about, but the *Bourke* plaintiffs did.[83]

81 Plaintiff's Memorandum in Support of Their Motion for Summary Judgment, Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014), 2013 WL 6762140, at *1–2 (internal citations omitted).

82 *Id.*

83 *Id.*

Yet a third narrative running through this initial memorandum, and throughout most all of the marriage litigation nationwide, was that of broader social consequences. This argument is where academics are often featured most prominently, in true Brandeis-brief style. For example, plaintiffs quoted the American Academy of Pediatrics for the proposition that "[i]f a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interests of their child(ren) that legal and social institutions allow and support them to do so, irrespective of their sexual orientation."[84] As shown below, these arguments became indistinguishable from the "sameness" narrative by the time the case reached the Supreme Court.

The Kentucky Attorney General's response to the complaint was only a few pages, and was not what one might call a labor of love. It basically stated that it was their duty to uphold the laws of the Commonwealth of Kentucky.[85] As such, the trial court took the unusual step of requesting additional briefing from the plaintiffs in response to the amicus brief of the Kentucky Family Trust Foundation, an adamantly anti-gay group.[86] While the court did not explicitly state the reasons for soliciting a response, the ruling made it clear that it was to address, and hopefully allay, any potential concerns of the general public—not of jurists, or even lawyers.

After all the briefs were filed, Judge John G. Heyburn, appointed to the federal bench by George H.W. Bush, issued a thoughtful 23-page opinion vindicating the plaintiffs' rights—rights that were scarcely worthy of judicial discussion just a few decades prior.[87] The opinion began by acknowledging that "[f]or those not trained in legal discourse, the questions may be less logical and more emotional. They concern issues of faith, beliefs, and traditions. . . . The Court will address all of these issues."[88] In other words, his opinion was meant for public consumption, or for "those not trained in legal discourse." In the next section, he wrote explicitly about the importance of narrative to an apparently legal decision: "No case of such magnitude arrives absent important history and narrative. That narrative necessarily discusses (1) society's evolution

84 *Id.* at *6 (quoting Am. Acad. Of Pediatrics, *Committee of Psychosocial Aspects of Child and Family Health, Policy Statement: Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, Pediatrics, Apr. 2013, https://pediatrics.aappublications.org/content/pediatrics/ 131/4/827.full.pdf).

85 Respondent's Brief, Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014), 2014 WL 221586.

86 *See* L. Joe Dunman, *Bourke v. Beshear—Think Of The Children*, Professor at Law Blog (Feb. 5, 2014), https://www.joedunmanlaw.com/?offset=1391885844694&category=Constitutional+Law.

87 *See Bourke*, 996 F. Supp. 2d 542, *rev'd*, *Obergefell*, 135 S. Ct. 2594.

88 *Id.*

89 *Id.* at 544.

on these issues, (2) a look at those who now demand their constitutional rights, and (3) an explication of their claims."[89]

After a short recitation of the history of marriage equality cases, Heyburn began his description of the plaintiffs by referring to them as "average, stable American families."[90] The opinion then included basic biographical information about the couples and their children.[91] Here, it became apparent why Heyburn solicited input on the Family Foundation's brief: it, unlike the Attorney General's memorandum, made arguments rooted in tradition. As noted by the court, such arguments had already been all but universally discarded as a matter of law following *Lawrence v. Texas*.[92] But the arguments gave the court a counternarrative that it could then explain away—something that was not necessary for legal audiences, but, as the court explicitly recognized, was needed for a general audience. Heyburn essentially presented that counternarrative in the third person:

> Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused—even angry—when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.[93]

While faith and tradition were addressed broadly, the court did not mention the discriminatory animus arguments made by plaintiffs, and conducted no analysis of the Establishment Clause claim. Heyburn's "answer" was that personal religious beliefs should not play into Fourteenth Amendment analysis.[94]

Ultimately, the court concluded that "Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review."[95] But two sentences in the opinion changed the course and scope of Kentucky plaintiffs' narrative entirely: "[T]he Court was not presented with the particular question whether Kentucky's ban on same-sex marriage is constitutional. However, there is no doubt that *Windsor* and this Court's analysis suggest a possible result to that question."[96]

90 *Id.*

91 *Id.* at 546.

92 *Id.*

93 *Id.* at 554.

94 *Id.*

95 *Id.* at 544.

96 *Id.* at 555.

The day before Valentine's Day, 2014, *Time* magazine pronounced, "Kentucky Judge Turns Gay Marriage Tide in the South."[97] *Time* focused on the legal aspects of Heyburn's ruling, but selected the Bourkes as the human face of the case:

> For Greg Bourke and Michael DeLeon, the ruling cements what after 32 years together and two children, they already knew: They are a family. But Bourke said the message sent by the decision is powerful for them and for their children Isaiah and Bella, who are teenagers in the local Catholic schools.
>
> "That is a big deal for us," Bourke said. "Our kids already recognize us as a married couple, but it's important that they know the law does too. . . . We've already got texts from both them today congratulating us. They love and wanted this for us."[98]

Again, the media used a normalizing story—one that suggests the plaintiffs are just like any other married couple. This was not anything particularly new; most media throughout the litigation had focused on Greg and Michael or, in a few cases, Randy and Paul—the metropolitan couples with children.[99] Few media outlets chose to focus on the stories of the childless couples from rural areas, i.e. Jimmy and Luke, or Kim and Tammy. In this way, the earlier, post-*Windsor* media coverage became a self-fulfilling prophecy: the press expected a "sameness" narrative, the courts told that narrative regardless of what was in the pleadings, and the press retold their original narrative, this time through the filter of the court's opinion.

If, as suggested by Whalen-Bridge and others, the purpose of legal narrative is to provoke an emotional response, the *Bourke* case was highly successful. The stories of Kentucky's plaintiffs were so sympathetic, in fact, that Kentucky Attorney General Jack Conway, in a tearful press conference, announced that he would no longer litigate the marriage ban on behalf of the state.[100]

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97 Michael A. Lindenberger, *Kentucky Judge Turns Gay Marriage Tide in the South*, Time, Feb. 13, 2014, http://nation.time.com/2014/02/13/kentucky-judge-turns-gay-marriage-tide-in-the-south/.

98 *Id.*

99 Halladay, *supra* note 77. *USA Today* focused exclusively on Greg and Michael.

100 *Raw video: Attorney General Jack Conway Announces He Won't Appeal Gay Marriage Ruling*, WLKY (Mar. 4, 2014), https://www.wlky.com/article/raw-video-attorney-general-jack-conway-announces-he-wont-appeal-gay-marriage-ruling/3461265.

B. The Kentucky Plaintiffs: Licensure Cases

After the initial decision in *Bourke*, many Kentucky couples who wanted to get married contacted attorneys representing the couples who "turned the tide in the South." One of the calls came from Timothy Love. Tim and Larry, like many of the plaintiff couples who had been together since the 1970s and 1980s, had spent a lifetime in the closet out of necessity; they were less willing to loudly upset the status quo. This can be a boon to a narrative in litigation, where an advocate is almost always trying to convince a judge that the rule she is asking for is not one that is a radical departure from jurisprudential norms, destined to be overturned on appeal.

After the victory in the recognition case, Tim and Larry, along with Maurice and Dominique, filed an intervening complaint asserting a federal constitutional right to marriage equality, thus allowing "the rest of the story"—licensure—to be decided by the same district court.[101] The *Bourke* order was made final, and was briefed concurrently with three other cases in the Sixth Circuit Court of Appeals, involving plaintiffs from Michigan, Tennessee, and Ohio.

The plaintiffs' narrative strategy in *Love* was much the same as in *Bourke*—play up similarities between straight and gay couples so as to underscore the unfairness of their disparate treatment, but also underscore their differences and the importance of keeping individual liberty interests safe from an oppressive, discriminatory state. The trial court, after the ruling in *Bourke*, left the defendant state (now represented by private counsel) holding a big bag—one that contained no compelling narrative. In the end, the centerpiece of Kentucky's argument was that "traditional marriages contribute to a stable birth rate which, in turn, ensures the state's long-term economic stability."[102] This time, there was no lengthy exegesis of defendant's arguments in the court's opinion, which held curtly, "These arguments are not those of serious people."[103] Narratives of tradition and faith having been stripped away from consideration in the *Bourke* case, the court held that it could "think of no other conceivable legitimate reason for Kentucky's laws excluding same-sex couples from marriage."[104] On July 1, 2014, the trial court again ruled in plaintiffs' favor. The parties' stories again featured prominently in the judge's decision. Judge Heyburn devoted two long paragraphs at the beginning of the opinion to the plaintiffs' personal travails, including the stories of Tim's heart surgery and Maurice and Dominique's inability

101 Love v. Beshear, 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014).

102 *Id.*

103 *Id.*

104 *Id.*

to adopt.[105] Judge Heyburn went a step further than the *Bourke* opinion, holding that Sixth Circuit precedent declining to characterize gay and lesbian people as a suspect class for equal protection analysis should be overruled, and that heightened scrutiny should apply to the plaintiffs. While the court did not explain much about why lesbians and gay men have been subjected to historical discrimination (facts which, as discussed above, undoubtedly had a significant impact on the court cases leading up to *Bourke* and *Love*), Heyburn explicitly singled out the marriage narrative as distinct and important in its own right: "The ability to marry in one's state is arguably much more meaningful, to those on both sides of the debate, than the recognition of a marriage performed in another jurisdiction. But it is for that very reason that the Court is all the more confident in its ruling today."[106]

Heyburn's opinions had a dramatic effect on not only the legal claims, but the dominant narratives, going forward. Not only was the idea of religious animus essentially jettisoned, along with its colorful stories from the floor of the Kentucky General Assembly, but Heyburn called for a whole new set of stories about people who *wanted* to get married in their home state. As a result, the judiciary, like the media, reduced the *Bourke/Love* cases to a narrative about what married couples have in common, rather than what ideologies separated them. Stories of faith and tradition, as with those of discrimination based on religion, no longer loomed over the proceedings. This was simply about whether it was fair to treat same-sex couples differently from opposite-sex couples. In retrospect, though there may have been some considerable merit to other legal arguments, this made for a cleaner narrative; one that was a plain and simple narrowing of the gap between straight and gay. Arguments based upon the history of marriage as an institution, or religious beliefs, or really just about anything else, would only serve to highlight a gulf of differences between marriage as envisioned by plaintiffs, and the version clung to by the Family Foundation and other opponents.

Similarly, despite the more momentous implications of the *Love* opinion, most popular media continued to focus on Bourke-DeLeon or, secondarily, Johnson-Campion, rather than Love-Ysunza or one of the other childless couples. Even now, the ACLU's main page regarding the case features a photo of Bourke, DeLeon, and their two children.[107] *Time* did a follow-up story on the litigants from all four states, nearly a year

105 *Id.* at 540.

106 *Id.* at 550.

107 *Bourke v. Beshear & Love v. Beshear—Freedom to Marry in Kentucky*, ACLU (June 26, 2015), https:// www.aclu.org/cases/bourke-v-beshear-love-v-beshear-freedom-marry-kentucky.

after the initial *Bourke* decision. Again, the Bourke-DeLeon story was the only one selected from Kentucky.[108] And as per usual, the article focused on their parental status—i.e., their inability to co-parent their adoptive children.[109] This is a traditionally heteronormative reason for marriage, and, ironically, the supposed lack of ability to procreate was one of the most common reasons put forth by opponents to *deny* same-sex marriage. But it is the piece that consistently kept the Bourke-DeLeons and the Johnson-Campions in the spotlight.[110]

Perhaps as a result of the focus on more traditional marriages, particularly those involving children, backlash to the Kentucky opinion was practically non-existent, especially compared to the reaction of many state legislatures following a similar victory in the *Goodridge* case in Massachusetts just ten years earlier.[111] In that intervening ten years, along with the media's continuing trend toward humanizing lesbians and gay men, a popular narrative of the essential "sameness" of the couples involved in litigation had been disseminated. From the very beginning, even though legislatures were doing their best to delineate the differences between gay and straight, the (surprisingly scant) mainstream media coverage of *Goodridge* underscored the ways in which same-sex couples were the same as "the rest of us."

Just months after *Goodridge* was decided, Mayor Gavin Newsom took the unprecedented step of offering licenses to same-sex couples in San Francisco. The San Francisco Chronicle covered the story in depth, focusing on the Mayor's Chief of Staff, Steve Cawa. Cawa "said he has had three life wishes: to have a family, to be an out gay man in public service and to get married."[112] The story does not, however, breach in any meaningful way the story of the first couple to get married in San Francisco; Del Martin and Phyllis Lyon were radical feminists who founded a lesbian social club in the 1950s, and who evidently never wanted to raise children (or grandchildren) together. They were, in short, decidedly unlike a stereotypical heterosexual couple.[113] Newsom's administration, which came up

108 Charlotte Alter, *Meet the Plaintiffs in the Supreme Court's Gay Marriage Case*, Time, Jan. 17, 2015, https://time.com/3672404/supreme-court-gay-marriage-plaintiffs/.

109 *Id.*

110 Lindenberger, *supra* note 97.

111 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

112 Rachael Gordon, *The Battle Over Same Sex Marriage*, SFGate, Feb. 15, 2004, https:// www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php.

113 Jeffry J. Iovannoe, *Del Martin and Phyllis Lyon: The Lesbian Daughters*, Medium (June 7, 2018), https://medium.com/queer-history-for-the-people/del-martin-and-phyllis-lyon-the-lesbian-daughters-6b5a6db6cef9 ("Though some perceived Martin and Lyon as having a classic 'butch/femme' relationship, they did not see their partnership as defined by conventional gender roles. 'It didn't work for us no matter how we tried,' explained Lyon.").

with the idea to ask Martin and Lyon to be the first license recipients, could not turn the tide of "sameness" in the media, even in their own city.

In the end, the focus on heteronormative expectations of marriage arrangements did not occur simply because of counsel's selection of plaintiffs, nor because of the stories they chose to highlight—*all* the plaintiffs' stories were told in the briefing. However, both the media and the trial judge—who was clearly writing to a general audience—seized on the heteronormative aspects of the marriage relationships plaintiffs sought to validate, so as to draw as close an analogy to "real" marriage as possible.

C. Moving Past Kentucky: Combining Stories

The emphasis on "normal" marriages continued as the litigation advanced to the Sixth Circuit. By the time the trial court decided *Love*, the *Bourke* briefing in the Sixth Circuit was nearly complete, and the country had seen more and more federal courts striking down marriage bans. The summer of 2014 saw appeals from Ohio, Tennessee, and Michigan district courts striking down their states' respective marriage bans.[114] The Sixth Circuit Court of Appeals scheduled arguments for these cases, and for Kentucky's, on August 6, 2014. The Sixth Circuit quickly agreed to consolidate the *Bourke* and *Love* appeals and entered a new briefing schedule. The last *Love* brief was due just seven days before oral argument. While the legal bases for highlighting the differences between opposite-sex and same-sex couples had been excised, the plaintiff stories remained—each one told in equal measure, with no particular weight given to any plaintiff couple.[115]

The Sixth Circuit reversed, upholding the marriage bans under the case name *DeBoer v. Snyder*.[116] But Judge Sutton could not focus on narrative in his opinion without exposing the marriage bans for what they were, i.e., bare discrimination against lesbians and gay men.[117] This was so because of the myriad similarities between straight and gay couples—similarities that had been drawn so as to make the two categories virtually indistinguishable. Instead, the court began its opinion by stating, "This is

114 Bill Chappell, *Gay-Marriage Bans are Upheld in 4 States by Circuit Court*, NPR (Nov. 4, 2014), https://www.npr.org/sections/thetwo-way/2014/11/06/362105290/gay-marriage-bans-are-upheld-in-4-states-by-circuit-court.

115 *See* Brief for Appellees, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), 2014 WL 2631913.

116 772 F.3d 388 (2014).

117 *Id.* Similarly, the few lower courts to uphold the marriage bans after *Bourke* did so with deliberate apathy to the human element presented by plaintiffs. The Eastern District of Louisiana engaged in no storytelling at all, and scarcely mentioned the plaintiffs by name, opting instead for a garden-variety slippery slope narrative: "[I]nconvenient questions persist. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female?" Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 926 (E.D. La. 2014), *rev'd*, 791 F.3d 616 (5th Cir. 2015), *abrogated by Obergefell*, 135 S. Ct. 2584.

a case about change—and how best to handle it under the United States Constitution."[118] The court made obligatory reference to plaintiffs' personal stories, but not at great length, and with clinical detachment. For example, James Obergefell's undeniably moving story of flying his ailing spouse, John Arthur, to Maryland so that their ceremony could be performed on the Tarmac before John died,[119] was hastily coupled with another story of Ohio plaintiffs and condensed: "When Arthur and Ives died, the State would not list Obergefell and Michener as spouses on their death certificates. Obergefell and Michener sought an injunction to require the State to list them as spouses on the certificates."[120] And the story of Michigan's plaintiff couple April DeBoer and Jayne Rowse, nurses who adopted three special-needs children (though only one of them could be a legal parent to each child under Michigan law), was reduced: "Marriage was not their first objective. DeBoer and Rowse each had adopted children as single parents, and both wanted to serve as adoptive parents for the other partner's children."[121] Ultimately, the panel concluded it was powerless to help the plaintiffs, primarily citing a 1972 one-sentence Supreme Court decision that dismissed a claim for same-sex marriage as not raising a substantial federal question.[122]

The Sixth Circuit dissent, by Judge Martha Craig Daughtrey, immediately chided the majority for ignoring the narrative aspect of the cases, quipping that Judge Sutton's opinion would "make an engrossing TED Talk":

> [T]he majority sets up a false premise—that the question before us is "who should decide?"—and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it.[123]

Judge Daughtrey continued, not by emphasizing the right to be married as an abstract legal proposition, but by emphasizing the similarity between plaintiffs and everyone else:

> [The plaintiffs] are committed same-sex couples, many of them heading up de facto families, who want to achieve equal status . . . with

118 *Deboer*, 772 F.3d at 395.

119 Steve Rothaus, *Couple's Tragic Love Story Led to Same-sex Marriage Throughout U.S.*, Miami Herald, Aug. 15, 2016, https://www.miamiherald.com/news/local/community/gay-south-florida/article84122297.html.

120 *Deboer*, 772 F.3d at 398.

121 *Id.* at 397.

122 *Id.* at 400 (citing Baker v. Nelson, 409 U.S. 810 (1972)).

123 *DeBoer*, 772 F.3d at 421.

> their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools.[124]

Daughtrey also spent several paragraphs of her dissent on the story of the Michigan plaintiffs, discussing at length the specific challenges faced by each of their adopted children—a discussion which humanized the plaintiffs perhaps even beyond the narrative contained in their briefs.[125]

Daughtrey's dissent underscores the important role of narrative in the marriage cases, and in all civil rights litigation. The constitutional right to marry presumably existed in some form for plaintiffs, regardless of the apparent similarity between their marriages and opposite-sex marriages, and certainly regardless of the institutional connections of the plaintiffs (to school, church, etc.). Yet it is those similarities that allow a judge to tell the right story, a story of a palatable, cautious step from a right enjoyed by one group being extended to another group that looks much the same as the group that already has it.

D. Fighting the Alternative Story

Another advantage plaintiffs had in the battle for marriage equality overall was that there was no "other side"; at least, there was no compelling, countervailing narrative. In fact, there was no story with any human element at all on the defendants' side. In part, this was the doing of the lower courts, who, pursuant to the mandate in *Lawrence* and related precedent, eliminated virtually all discussion of tradition or religion from *Obergefell* by the time it was argued. The marriage bans, whether one was for or against them, were reduced to bare unfair treatment of an outgroup that looked more and more like the ingroup every day. The only aspect of the states' case that one could feel passionately about is the idea that states should have control over marriage, and by 2015, very few people were passionate about that.

As part of Michigan's marriage litigation, the plaintiffs submitted the testimony of six expert witnesses, including professors at Yale, Stanford, and Harvard.[126] In contrast, the closest thing Michigan could get to a star witness—Mark Regnerus—had been so totally discredited by mainstream sociologists that his testimony actually tipped the scales in the plaintiffs' favor.[127] As one amicus put it, the "scientific and medical consensus"

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124 *Id.*

125 *Id.* at 423–24.

126 *Civil Rights Litigation Clearinghouse*, Univ. of Mich. Law Sch., https://www.clearinghouse.net/detail.php?id=12811 (last visited June 1, 2020).

debunking same-sex attraction as a social or mental illness had "become widely accepted over the past decades, to the point where there is so 'great an analytical gap between the data and the opinion proffered'" that its scholarly opponents often "would not qualify to testify as expert witnesses."[128] Because the academic consensus was so broad, it became difficult for even the most curmudgeonly of jurists to ignore it.

What this academic consensus was (perhaps necessarily) reduced to was a bare gainsaying of Regnerus's point, which was "they're not like the rest of us." The Michigan plaintiffs discussed this in their principal brief to the Supreme Court:

> The expert testimony credited by the district court showed that children raised by same-sex couple parents fare no differently than children raised by heterosexual couples. It is the quality of parenting, not the gender or orientation of the parent, that matters. This is a matter of scientific consensus recognized by every major professional organization in the country focused on the health and well-being of children, including the American Academy of Pediatrics, the American Psychological Association, and the Child Welfare League of America.[129]

The experts, in other words, were mostly there to discuss one particular aspect of the lives of same-sex couples: parenting. And the major debate was whether they were like, or unlike, opposite-sex couples in that aspect. There was little deeper discussion about sexuality as a spectrum, healthy gender expression, the psychological effect of marriage on the individual (outside of the child-rearing context), or the like.

In contrast, one can find nearly every sort of argument, and accompanying narrative, in favor of the plaintiff couples in the almost eighty amicus briefs filed in their support in *Obergefell*. A great number of these

127 See *Statement from the Chair Regarding Professor Regnerus*, Dep't of Sociology, Univ. Tex. Austin (Mar. 3, 2014), https://sites.la.utexas.edu/utaustinsoc/2014/03/03/statement-from-the-chair-regarding-professor-regnerus/, in which Regnerus's own institution notes that his research does not

> reflect the views of the American Sociological Association, which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that findings from Dr. Regnerus' work have been cited inappropriately in efforts to diminish the civil rights and legitimacy of LBGTQ partners and their families.

Indeed, as *United States v. Windsor* litigator Roberta Kaplan notes, Regnerus had been thoroughly discredited even before *Windsor* was argued. "[T]he American Sociological Association, in its amicus brief submitted to the Supreme Court, condemned his work in no uncertain terms, stating that it 'provides no support for the conclusions that same-sex parents are inferior parents.'" Roberta A. Kaplan, *"It's All About Edie, Stupid": Lessons from Litigating* United States v. Windsor, 29 Colum. J. Gender & L. 85, 95 (2015).

128 Brief of Amici Curiae Survivors of Sexual Orientation Change Therapies in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), at *5, http://www.nclrights.org/wp-content/uploads/2015/03/2015.03.04.-Survivors-of-Sexual-Orientation-Change-Therapies-Amicus.pdf.

129 Plaintiffs' Brief, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), 2014 WL 2631744, at *39 (internal citations and footnote omitted).

briefs were penned by academics: legal scholars, historians, and universities themselves.[130] But there are also sociological organizations, labor organizations, religious (and non-religious) groups, survivors of sexual orientation "therapies," and a men's choir, all of which provide different, sometimes deeply personal angles as to why same-sex marriage should be made the law of the land.[131] In these briefs, the vibrant diversity of the LGBTQ+ community is brought forward perhaps better than anywhere else in any marriage case.

The nearly seventy amicus briefs in opposition, however, aside from the few devoted solely to some aspect of history or judicial restraint, largely tell the same story over and over: same-sex marriage denigrates the family because same-sex couples are fundamentally different.[132] The response demanded by this refrain was not the rainbow of experience presented by the petitioners' amici. It was the same story that the courts and the media had been telling all along: our families are fine, because we are *not* different.

E. *Obergefell*: The Final Story

When the Supreme Court agreed to hear *Obergefell* in January 2015, more than sixty courts, including the Kentucky district court, had declared marriage bans unconstitutional, resulting in a cumulative avalanche of media coverage.[133] The narrative aspect of the marriage cases, while lost in the Sixth Circuit's majority opinion, was alive and well outside the courthouse. It was largely a narrative which reflected favorably on the plaintiffs and one that persisted throughout the Supreme Court proceedings.

By the time the Kentucky clients made it to the Supreme Court, their cases were combined with those from Michigan, Ohio and Tennessee, giving the Supreme Court justices several stories to choose from. In the end, it was Justice Kennedy who decided which plaintiffs' stories would be told in his majority opinion. He chose to leave the stories of the Kentucky plaintiffs (and the majority of the plaintiffs overall) out of the *Obergefell* opinion entirely.

After a sweeping recitation of the importance of marriage to humanity itself, which included cites to Confucius and Cicero, Justice Kennedy first recounted in full the story of James Obergefell and John

130 Ruthann Robson, *Guide to the Amicus Briefs in Obergefell v. Hodges: The Same-Sex Marriage Cases*, Constitutional Law Prof. Blog (Apr. 16, 2015), https://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html.

131 *Id.*

132 *Id.*

133 Cole, *supra* note 42, at 87.

Arthur.[134] It is indeed difficult to imagine a more sympathetic, heart-rending story than theirs, and Kennedy's telling presents a sharp contrast from the brusque, detached briefing Judge Sutton had given it nearly a year before. Together for more than twenty years, John developed Lou Gehrig's disease and deteriorated quickly.[135] The couple flew from their home in Ohio to Maryland, where marriage was legal, in 2011.[136] John was too sick to exit the plane, and the ceremony was performed on the tarmac.[137] John died three months later. The focus of Obergefell's suit was not the right to be married at all; at issue was James's right to be listed on the death certificate.[138] The fact that Kennedy led with this story, and with this level of detail, is indicative of just how powerful narrative can be in this context.[139]

In the first few pages of his opinion, Kennedy went on to tell a thorough version of Michigan's DeBoer/Rowse story, one which included the plaintiffs' challenges in parenting special-needs children.[140] He then turned to Tennessee's Ijpe DeKoe and Thomas Kostura, who married in New York shortly before DeKoe deployed to Afghanistan. When DeKoe returned, the Army Reserve moved the couple to Tennessee. Kennedy wrote, "Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden."[141]

These stories—one of a debilitating medical condition ending in death, one of struggling parents of special needs children, and one of a military family—were apparently the ones that resonated the most with the Court. Indeed, only five plaintiffs out of a total of 32 were discussed. Although the Ohio plaintiffs, led by Obergefell, were the first to file a petition for certiorari, which gave them top billing in the Supreme Court case name, there was no requirement that their story (or the stories of the other Ohio plaintiffs) be featured in Kennedy's opinion. However, the stories of the Kentucky plaintiffs, perhaps ordinary by comparison, along with other plaintiff couples in Ohio and Tennessee, did not make the cut. It is instructive to look at which stories were *not* told by Justice Kennedy.

For example, the lead plaintiffs in the Tennessee case, *Tanco v. Haslam*, Dr. Valeria Tanco and Dr. Sophy Jesty, are mentioned nowhere in the Court's opinion. Tanco and Jesty are photogenic, relatable veterinarians in a committed relationship who did not wish to leave their

134 *Obergefell*, 135 S. Ct. at 2594.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 2595.
140 *Id.*
141 *Id.*

teaching positions in Tennessee. Matthew Mansell and Johno Espejo, the other unmentioned Tennessee couple, moved from California to Tennessee at the behest of Mansell's employer, a law firm.[142] Greg Bourke and Michael DeLeon, the nearly exclusive benefactors of media coverage in Kentucky, suffered many of the same disadvantages as the other families mentioned by Kennedy—they could not fully adopt, their names would not be listed as "spouse" on death certificates, they had to file separate tax returns, etc. Tim Love and Larry Ysunza had a medical scare. Why were they not even mentioned?

To the extent there is a formula to Kennedy's selections, it may be that couples were highlighted who faced practical burdens, imposed by the state, beyond the indignity of the marriage bans and the general demands of family life. In other words, it was not enough for couples to have adopted children; a more sympathetic story is a couple who has adopted children with severe special needs who require "around-the-clock care."[143] Nor was it enough to have had to move for a corporate lawyer job; a better story is one of a couple who was compelled to move because of military service. Nor was it enough to have a medical scare; the horrific loss of a beloved spouse is far more evocative. The "old guard" couples simply did not make the cut; there was no immediacy to their situations, the stories were less resonant with those who had been watching, and the story of an elderly, committed couple had already been told—in *Windsor*. In a sense, the stories chosen by Kennedy were "sameness *plus*": they built on earlier popular narratives of how the plaintiffs were just like opposite-sex couples, and then highlighted painfully cruel ways in which these couples—who are "just like us"—were disadvantaged by the marriage ban.

This formula tracks Whalen-Bridge's explanation of a legal narrative's purpose, i.e., to invoke an emotional response in the reader. By this time, the theme at work in same-sex marriage narratives was widely known: two people, a couple like any other couple (or close enough, anyway), want to get married; why should the state stand in their way? Perhaps this dish had become bland by 2015, and the stories Kennedy selected added more emotional spice in order to bring those who may still have been unconvinced to the table (and, one may speculate, to discredit the dissenters).[144] For all the plaintiffs, the result was what mattered: the creation of a new

142 Petitioners' Brief, Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), stay granted, No. 14-5297 (6th Cir. Apr. 25, 2014), http://www.nclrights.org/wp-content/uploads/2015/02/Tennessee-Tanco-Merits-Brief.pdf at 3–4.

143 *Obergefell*, 135 S. Ct. at 2595.

144 For example, Chief Justice Roberts's dissent asserts, "The real question in these cases is what constitutes 'marriage,' or—more precisely—who decides what constitutes 'marriage'?" *Id.* at 2612 (Roberts, C.J., dissenting). Kennedy's human stories say, in effect, that that is not the "real question" at all.

right. Even if their stories were omitted from Kennedy's opinion, they were still, in a real sense, heard.

V. Conclusion

Civil rights attorneys must walk a difficult line—fighting for their clients while also fighting for the rights of similarly situated others who may not have the exact same needs. In addition, when trying to create a new right, the easiest way to get judges, legislators and the public on board is to present that right in a way those decisionmakers will easily understand and empathize with, which means telling a story that shows the common ground between the majority and the oppressed minority.

All told, the difficult truth is that an advocate may have little control over the shape her client's narratives take. The stories told in *Love v. Beshear* and the other *Obergefell* cases show us how to tell these stories in a compelling way, but they also reveal the limitations of impact litigation. The narratives presented by plaintiffs—even messy, imperfect ones—take on lives of their own when clients are thrust into the public eye, and this tends to cause plaintiffs' stories to morph into something the general public might more readily relate to, whether the lawyers like it or not. While a lot of ground was gained in *Obergefell*, the litigation overall presented stories of cis-gendered couples that furthered heteronormative values. These stories undeniably overshadowed other stories that could have been told.

However, despite what Godsoe and others may argue, the stories chosen were ultimately due to the influence of the media and the judiciary, not by the hand-picking of plaintiffs by civil rights lawyers or advocacy groups. Still, there is value in Godsoe's criticism: the outcomes in cases like *Obergefell* and *Lawrence* counsel less caution in selecting the "perfect" plaintiffs, but perhaps more caution in the packaging of information about those clients to be shared with courts and the media. In other words, the square peg of sympathetic information that an advocate disseminates will likely be crammed into the round hole of a familiar narrative. The volume of this sympathetic information probably matters a great deal more than how a client presents, what their background is, or how "normal" they truly are.

Moreover, although the emphasis on more traditional-looking couples may be a legitimate limitation of *Obergefell*, as Godsoe notes, it does not have to be the end. *Obergefell* built a bridge to same-sex marriage, creating solid ground for the next group of civil rights lawyers to again expand our understanding of what relationships and "equal

dignity" really mean. As the country's understanding of same-sex couples has evolved, so has the array of stories that lawyers can tell about groups that may be insular or unfamiliar to the broader public. For example, now that transgender, bisexual, nonbinary, and polyamorous people's stories are becoming more mainstream, their stories can be used to champion a broader understanding (and legal recognition) of fundamental rights. This continuous opening of new chapters to familiar stories is the essence of civil rights advocacy.

From the Judge's Desk to Your Hands

Legal Writing Tips from the Bench

Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word
Hon. Robert E. Bacharach (American Bar Association 2020), 168 pages

Maikieta Brantley, rev'r*

"Effective legal writing calls not only for artistry but also for scientific understanding," observes Tenth Circuit jurist, Judge Bacharach, in his new book on legal writing, *Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word*.[1] Taking it a step further, Judge Bacharach reminds us that while an understanding of the science behind legal writing is important, we must also remember that legal writing is an art.[2] Throughout the book, Judge Bacharach guides the reader on how to perfect this science and art by using examples from both written word and speeches alike. From junior scholars to experienced judges, legal writers can benefit from adding this book to their library as it addresses the "traditionalist" viewpoints many of us have been taught, and justifications for deviations from the same.[3] Judge Bacharach not only describes his guidance but executes that exact same guidance throughout the book itself. Thus, the reader is able to experience the effectiveness of writing with science and rhetoric in mind.

Structurally, the book is written in an easy-to-follow format, with eleven chapters, each comprised of its own subheading. Chapter One,

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1 Hon. Robert E. Bacharach, Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word xi (2020).

2 *Id.* at xii.

3 *Id.* at 41, 91, 95, 111, 143.

Introductions; Chapter Three, *Headings*; Chapter Four, *Fact Sections*; and Chapter Nine, *Conclusions*, can be described as the overall essentials for what virtually all memorandums and briefs must contain.[4] The book's *Introductions* Chapter begins with a section on *Context* and supplies the reader with information needed to craft a "meaningful introduction" while operating as an example of the same.[5] Within each subheading the reader is provided with examples of successful execution of the topic at hand.[6] The *Introductions* chapter concludes by explaining to the reader that it is important to be clear and concise while expressing what is essential for the reader to follow the rest of the argument.[7] It is my hope that I have executed the same in the introductory paragraphs of this review.

Chapter Two, *Organization*, is placed near the beginning of the book, instructing the reader on organization before moving to the pieces that construct the document.[8] Though not literally included as a section of a legal writing document, like an Introduction or a Statement of Facts, organization is certainly required with respect to any writing piece.[9] Judge Bacharach instructs the reader to focus on three guiding principles: "(1) parallelism, (2) logical sequence, and (3) development of the point before responding to the adversary's argument."[10] After elaborating on these principles, the reader is instructed to edit for clarity, a theme visited throughout the book.[11] It logically follows that the reader is next instructed on how "to crystallize the organization" via the *Headings* chapter.[12] Next, Chapter Four, *Fact Sections*, starts with the theme seen throughout: clarity.[13] The chapter guides the reader on selecting the appropriate organizational framework and reemphasizes the use of headings.[14] Though it follows much later, Chapter Nine, *Conclusions*, also emphasizes the need for clarity and quickly provides an example to "crystallize" what had been developed up until that point in the document.[15] It's worth nothing that these chapters comprise only a small portion of the book, thus providing experienced practitioners with the opportunity to quickly refresh and review the pointers while simultaneously not overwhelming the law student or recent grad with information overload on best writing practices.

Moving on from these overall essential chapters, Chapter Five, *Sentences*, gets into the meat of the science, citing to works in the fields of

4 *Id.* at 1–17, 25–29, 31–36, 146–47.
5 *Id.* at 1.
6 *Id.* at 1–17.
7 *Id.* at 17.
8 *Id.* at 19–23.
9 *Id.*
10 *Id.* at 19.
11 *Id.* at 22.
12 *Id.* at 29.
13 *Id.* at 31.
14 *Id.* at 36.
15 *Id.* at 147.

neuroscience, cognitive linguistics, and psychology.[16] Sentence structure is analyzed in multiple ways, from how many words to use to methods of persuasion through emphasis.[17] Judge Bacharach effectively uses examples to illustrate each point, italicizing focal words and phrases to assist the reader in understanding the illustration.[18] Readers are advised to avoid "throat clearing," a concept not always applied to the legal writing context.[19] "Throat clearing" refers to the use of "preliminaries," such as, "It is important to note that . . . ."[20] Judge Bacharach advises that such phrases "add no meaning and dilute the impact."[21] Nouns and verbs are given their time to shine in this chapter, with Judge Bacharach identifying fifteen pages of "vivid verbs" with examples.[22] An analysis of the use of adjectives and adverbs follows shortly thereafter.[23] The reader can then put all of this together with the help of Chapter Six, *Paragraphs*, which emphasizes the art of . . . emphasizing, for lack of a better word.[24] As a technique, Judge Bacharach advises writing paragraphs that are "between three and eight sentences."[25] Naturally I found myself rereading the preceding paragraphs to count the sentences and noting where a paragraph could use a trim. Fortunately, there was not much to trim.

After the in-depth discussion of sentences and paragraphs, Judge Bacharach drills down even further with Chapter Seven and the explanation of effective word selection through diction.[26] Having recently left a position as a junior associate, this Chapter required me to "unlearn" some of the word selection that had been passed down to me by the "traditionalists" I have learned from over the course of my career. Judge Bacharach includes a number of example substitutes to use in place of some of our profession's most beloved words (*e.g.*, "hereinafter" and "arguendo").[27] Readers are advised to avoid a practice that I have been taught and have also taught my students: using the name of your client while depersonalizing your adversary.[28] Judge Bacharach asserts that avoiding this practice will help the judge remember the parties, posing to the reader, "Isn't that what you want?"[29] Further, Judge Bacharach advises readers to avoid the "traditionalist" style of "elegant variation."[30] This style refers to avoiding the use of repetitive words in writing and instead using

16 *Id.* at 37–99.
17 *Id.* at 41–46, 49–67.
18 *Id.*
19 *Id.* at 90.
20 *Id.*
21 *Id.*
22 *Id.* at 73–88.
23 *Id.* at 95–96.
24 *Id.* at 101.
25 *Id.* at 102.
26 *Id.* at 109–21.
27 Id. at 113–14.
28 *Id.* at 116.
29 *Id.*
30 *Id.* at 111.

synonyms to vary the language.[31] He poses to the reader the following: If the legislature used two synonyms in a statute, would you not "suspect some subtle difference" in the meaning?[32] He has a point.

Judge Bacharach next plunges into the world of grammar, stating that he does "not purport to summarize all or even many of our common rules of grammar."[33] Nevertheless this chapter is quite comprehensive, and a review of such here would prove futile. I did hope to resolve the debate surrounding the Oxford comma once and for all, but, unfortunately, I cannot rely upon this text to prove my side of the Oxford comma debate as the discussion was omitted. After touching on Quotations in Chapter Ten, the book concludes with a discussion of typography in Chapter Eleven. Each subheading acts as a checkbox on a checklist, thus providing the reader with a resource to use for each piece of legal writing.[34] It's a resource I will use moving forward in my own writing.

For someone who began learning the art of legal writing not long ago and who now teaches it, Judge Bacharach's book was exactly the perspective I needed as both a scholar and an educator. The chapters are structured in a way that logically progresses so that the reader can follow naturally and easily reference them at a later time. The book's organization makes it an excellent go-to guide where a reader can easily and quickly refer to the table of contents and enumerated subheadings for guidance. For the busy practitioner, this means more time focusing on billable hours. While the book surely isn't meant to act as a textbook, it would be appropriate supplemental reading in a legal writing course. For some students, the review of grammar alone in Chapter Eight could prove quite beneficial, as the chapter is a high-level overview that can keep the attention of the student who thinks he or she already knows all necessary grammatical concepts. Further, the book gets straight to the point and is delivered in a style that feels like it was written by an experienced mentor—that it is authored by a circuit judge may prove an even bigger influence on some students. Overall, the book proves to be valuable to experienced practitioners, law students, and other legal writers.

31 *Id.*

32 *Id.*

33 *Id.* at 123.

34 *Id.* at 153–58.

BOOK REVIEW

An Ode to the Constitution

A Republic, If You Can Keep It
Justice Neil Gorsuch (Crown Forum 2019), 352 pages

Tessa L. Dysart, rev'r*

Many years ago, as a young, idealistic attorney who had just started working at the Department of Justice's Office of Legal Policy, I had the opportunity to meet, for just a moment, the newly confirmed Tenth Circuit Judge Neil Gorsuch. By reputation, he was a legal superstar—confirmed to the federal appellate bench before he turned forty. In person, he came across as extraordinarily kind and gracious to that very junior attorney. Now, many years later it is my honor to review his recent book, *A Republic, If You Can Keep It*.[1]

Weighing in at over 300 pages, *A Republic, If You Can Keep It* is a thoughtful reflection on the Constitution, constitutional and statutory interpretation, the role of judges, the role of lawyers, and notions of justice. It also provides insights into Justice Gorsuch's childhood and confirmation process. Written primarily for a non-legal audience, the book is quite accessible to individuals not versed in constitutional law. It was such an easy read that I read a good portion of it on my back porch gazing at the mountains behind our house—a location that Justice Gorsuch, a native Coloradan, would no doubt heartily endorse.

I was a bit surprised by the format of the book. It is made up of seven chapters on topics ranging from "Our Constitution and its Separated Powers"[2] to "On Ethics and the Good Life."[3] Each chapter starts with a few pages of text that introduce the topic. The remainder of the chapter is composed of edited speeches, articles, and judicial opinions that Justice

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1 Neil Gorsuch, A Republic, If You Can Keep It (2019).

2 *Id.* at 39.

3 *Id.* at 279.

Gorsuch has given or written since becoming a judge over a decade ago. While the format was not my favorite thing about the book, it did allow Justice Gorsuch to cover quite a diverse set of topics, something that might not have worked as well with a different format. For example, he was able to include several key judicial opinions from his time on the Tenth Circuit,[4] a Letterman-style top-ten list of things to do in your first ten years out of law school,[5] and an essay he wrote for an exchange between judges in the United States and the United Kingdom on "Access to Affordable Justice."[6]

As a fellow child of the west, I appreciated Justice Gorsuch's folksy style, which permeates the book and adds to the ease for non-legal readers. In reading the book, I gleaned three main themes that could appeal to legal and non-legal readers alike: civility, the Constitution, and courage.

Civility. Early in the book, Justice Gorsuch bemoans the "civility crisis"[7] facing our country. After citing studies that demonstrate Americans' belief that our country is facing a "'major civility problem,'"[8] he notes that this is problematic: "Without civility, the bonds of friendship in our communities dissolve, tolerance dissipates, and the pressure to impose order and uniformity through public and private coercion mounts."[9] His discussion of the issue was so poignant to me, I read a portion of it to my 1L Constitutional Law class on the first day of the Spring 2020 term. The excerpt that I read hopefully reminded them that our rights come with responsibilities, including

> tolerating those who don't agree with us, or whose ideas upset us; giving others the benefit of the doubt about their motives; listening and engaging with the merits of their ideas rather than dismissing them because of our own preconceptions about the speaker or topic.[10]

While uncivil discourse has certainly been part of America's past, I appreciate Justice Gorsuch's efforts to draw attention to the rise in incivility in our culture and urge his readers to act better. In fact, his later chapters that discuss a lawyer and a lawyer's role dovetail nicely with his earlier discussion of civility.

The Constitution. Perhaps what surprised me most about the book was how much emphasis Justice Gorsuch places on the structural protections in the Constitution, especially separation of powers.[11] Most

4 *See, e.g., id.* at 75.
5 *Id.* at 301.
6 *Id.* at 254.
7 *Id.* at 31.
8 *Id.*
9 *Id.*
10 *Id.*
11 *See, e.g., id.* at 9.

of the structural provisions of the Constitution are found in its main text, as opposed to the amendments. These provisions are what divides power among the three branches of government to protect against any one branch getting too much power. Most people like to focus on the sexier parts of the Constitution—the First Amendment, the Second Amendment, the Fourteenth Amendment—which contain many of the individual rights in the Constitution. While I certainly enjoy teaching those provisions, it is the structural parts of the Constitution that protect those rights. Justice Gorsuch devotes a significant portion of his book to discussing the need to protect the separation of powers and the institutional design of our government as set forth in the Constitution. He also carefully discusses how judges should interpret the Constitution, with a strong emphasis on originalism.[12] In fact, in reading these parts of the book, I wondered if Justice Gorsuch will be an even stronger vote for separation of powers than his predecessor. Time will tell.

Courage. Finally, Justice Gorsuch talks about the need for courageous attorneys—attorneys like Atticus Finch and John Adams.[13] People who are willing to take cases because justice demands it, not because it is the popular thing to do. He cites several examples in the book, including the Department of Justice lawyers who spoke out against the inaccuracies in the government's brief in *Korematsu*.[14] Although these attorneys did not live to see their concerns addressed, another courageous lawyer, Neal Katyal, "as acting solicitor general, took the admirable step of acknowledging the government's failure to be fully forthcoming to the [Supreme] Court" in the case.[15] He also pays tribute to courageous judges and the rule of law. He notes a few times in the book that a good judge will not always like the outcome of every case, but fidelity to the law should trump policy preferences.[16]

This book and Justice Gorsuch's distinguished judicial career confirm the reputation I heard so long ago—he is a legal superstar. The stories in his book, including a delightful one about an airplane ride sitting next to a young girl who was frightened of the turbulence and just needed a friend, also confirm my early impression of his kindness.[17] While not everyone will agree with the sentiments expressed in the book, I think many would agree that it would be enjoyable to spend an afternoon hiking or fly-fishing in Colorado with its author.

12 *See, e.g.*, *id.* at 105–27.

13 *See, e.g.*, *id.* at 182–84.

14 *Id.* at 184.

15 *Id.*

16 *Id.* at 321.

17 *Id.* at 311.

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BOOK REVIEW

Meta-Questions for Legal Writers

Dreyer's English: An Utterly Correct Guide to Clarity and Style
Benjamin Dreyer (Random House 2019), 320 pages

Kristen E. Murray, rev'r*

In today's complicated modern world, what are the rules of good writing? If you have come to *Dreyer's English* looking to answer this question with a rote set of rules, you have come to the wrong place. But the good news is, despite his rule-breaking and -bending, the eponymous Dreyer still has a lot to say about good writing. This raises, not begs (as the author notes on page 151), the question: what insights might Dreyer have for the legal writer?

Benjamin Dreyer, who is vice president, executive managing editor and copy chief at Random House, began his publishing career as a proofreader.[1] He starts his Introduction by describing his current job as, "to lay my hands on [a] piece of writing and make it . . . better," "to burnish and polish it and make it the best possible version of itself that it can be."[2] Dreyer calls this book a "conversation," his "chance to share . . . some of what I do, from the nuts-and-bolts stuff that even skilled writers stumble over to some of the fancy little tricks I've come across or devised that can make even skilled writing better."[3]

In many ways, the book reinforces traditional ideas about good writing, including the fact that "there are fewer absolutes in writing than you might think."[4] The book is divided into two sections: "The Stuff in the Front" and "The Stuff in the Back." (The overall tone of the book, as one might have already deduced, is wry.)

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1 Benjamin Dreyer, Dreyer's English: An Utterly Correct Guide to Clarity and Style 293 (2019).

2 *Id.* at xi.

3 *Id.* at xvii.

4 *Id.* at xv.

"The Stuff in the Front" includes advice, rules, and commentary about everything from clarity to punctuation to style. "The Stuff in the Back" is broken out into lists of common writing mistakes. The book is meant to be read sequentially, though there is an index for readers in search of specific content. Like its elder-sibling predecessors "Eats, Shoots & Leaves" and "Woe is I," the book reinforces its rules with amusing examples and anecdotes throughout.

Both sections offer a mix of useful, irrelevant, and (occasionally) conflicting information with respect to the "stuff" of legal writing. The Stuff in the Front (Chapters 1–7) introduces some of Dreyer's governing principles. Chapter 1 challenges writers to spend a week avoiding what he calls "Wan Intensifiers and Throat Clearers" (such as "very," "in fact," and "actually") that plague everyone's writing.[5] Chapter 2 digs deeper and includes Dreyer's "Nonrules of the English Language"—traditional rules of writing that he deems "unhelpful, pointlessly constricting, feckless, and useless."[6] Legal writers should feel free to (and possibly already do) break the "Big Three" and start their sentences with "And" or "But," split infinitives, and end sentences with prepositions.[7] But among the "lesser seven" are a few "nonrules" that a legal writer might think twice about breaking: formal legal writing still eschews contractions, (non-purposeful) passive voice, and sentence fragments.

Occasionally, the book's advice is mooted by established principles and conventions of legal writing. Chapter 4 is all about numbers,[8] and Chapter 5 discusses foreign language words,[9] but legal writers are already duty-bound to follow Rules 6.2 and 7 of the Bluebook, respectively. However, I would be glad for all new legal writers—including my students—to take heed of the convention for U.S.-style dates, so that August 11, 1965 is no longer presented to me as August 11th, 1965.[10]

The Stuff in the Front also provides a few points that present interesting food for thought for an experienced legal writer. For example, Chapter 6's extensive consideration of "a little grammar" ends with a discussion of the subjunctive mood. Dreyer calls this the mood used "to convey various flavors of nonreality."[11] This creates an interesting dilemma for a legal writer's discussion of what a client might or might not have done. Is it "if the Defendant *was* at the crime scene" or "if the Defendant *were* at the crime scene?" (Turns out the answer is also familiar to most legal writers: it depends.) Dreyer's chapter about "The Realities of Fiction"

5 *Id.* at 3–4.
6 *Id.* at 7–8.
7 *Id.* at 9–12.
8 *Id.* at 67–73.
9 *Id.* at 74–83.
10 *Id.* at 71.
11 *Id.* at 99.

might at first glance seem not useful to legal writers who trade in facts, but his advice about checking and double-checking details and "the basics of storytelling" might be an interesting read for someone crafting a Statement of Facts or other factual narrative.[12]

The Stuff in the Back is a mixed bag with respect to useful advice for legal writers. Chapter 8 and 9's lists of misspelled and misused words, respectively, are worth a skim (especially for writers who identify as bad spellers or challenged grammarians) but also include a lot of words not often used in legal English (cappuccino, anyone?). Chapter 10's "confusables" is useful both for words a writer can't remember and words spellcheck won't catch, and experienced legal writers might benefit from a reminder to set up an auto correct shorthand for commonly mistyped words (and to proofread carefully, to avoid references to a "statue" of limitations).

Chapter 11, on common mistakes using proper nouns, is one of the funniest in the book but probably not useful unless you are representing Hollywood's Gyllenhaal siblings (note the "aa"), romance author Danielle Steel (not Steele), or Patti LuPone ("This is not a woman you want to mess with, so get it right."[13]). Chapter 12 harkens back to the opening chapter with its useful call for elimination of redundancies.

It is worth noting that there is some particularly good advice lurking in Dreyer's footnotes. For example, in a footnote, Dreyer notes that he typed out the above-the-line excerpt from Shirley Jackson's *The Haunting of Hill House*, and that he once typed out a full short story to see if he might better appreciate the construction of the story.[14] Legal readers—sure to see such advice, as we are well-trained to read all the footnotes—might apply this advice to quoted passages from electronic research sources. Might we better appreciate the text if we typed it out instead of copying and pasting? In so doing, might we find that we need less borrowed text than we originally thought?

I am often asked to recommend a grammar book or manual for both new and experienced legal writers. Is *Dreyer's English* a book I can recommend? Upon reading it, my answer was that there are two types of legal readers and writers who might benefit from reading this. First, this can be a handy refresher (or recharger) on the business of good writing for an experienced legal writer who can discern the places where standard grammatical rules and practical legal English diverge. Second, it would be an interesting read for any legal writer interested in the craft of writing. I can imagine there are many. Thus, my first thought was that *Dreyer's English* is less suitable for new legal writers, and better in the hands of

12 *Id.* at 102–14.

13 *Id.* at 220.

14 *Id.* at 45 n.30.

experienced legal writers with either a need or an interest in reading about writing and editing (including a 46-page romp through the rules of punctuation).[15]

My second thought, however, is that maybe *all* experienced legal writers would benefit from reading it. This isn't a rule book—it's meant to be read from cover to cover, to immerse the reader in the rules and non-rules it contains. As a reader, you are forced to confront points of agreement and disagreement, and in so doing to contemplate meta-questions about your own writing. Why do you write the way you do? How do you get better when you are no longer being formally taught? How does legal writing evolve as new lawyers arrive in practice with very different approaches and expectations regarding formal writing?

Viewed from 10,000 feet, *Dreyer's English* becomes a meditation on the reader-as-writer in the modern age. Reading Dreyer's book cover-to-cover requires one to reflect about one's own breakable rules, pet peeves, and, perhaps, a white-knuckled clutch to rules that are no longer justified or necessary. Dreyer himself pivots from a relaxation of traditional rules in Chapter 2 to Chapter 3's admonition that "[o]nly godless savages eschew the series comma."[16] We all have rules we cling to and those we are willing to let go. But without an eye on what's next, we can be left out of entire conversations. Some of us are still fighting over the correct number of spaces following a period,[17] while younger writers are finding sentence-ending periods in text messages suggest the writer is being insincere.[18]

Calling himself an "old dog,"[19] Dreyer notes his own evolution using the singular "they." Originally he eschewed it, then acknowledged it was the wave of the present but found he was unable to use it himself.[20] Later, he avoided the topic of chosen pronouns until he worked with a colleague whose chosen pronoun was "they." Ultimately, he wrote around the "they" for months until eventually, he reflexively used it, and "that was the end of that."[21]

15 *Id.* at 20–66.

16 *Id.* at 24.

17 It's one, period.

18 Rachel Feltman, *Study Confirms That Ending Your Texts with a Period Is Terrible*, Wash. Post, Dec. 8, 2015, https://www.washingtonpost.com/news/speaking-of-science/wp/2015/12/08/study-confirms-that-ending-your-texts-with-a-period-is-terrible/?noredirect=on ("According to [Celia] Klin and her fellow researchers, that's an indication that the text message period has taken on a life of its own. It is no longer just the correct way to end a sentence. It's an act of psychological warfare against your friends. In follow-up research that hasn't yet been published, they saw signs that exclamation points—once a rather uncouth punctuation mark—may make your messages seem *more* sincere than no punctuation at all.").

19 Dreyer, *supra* note 1, at 93.

20 *Id.*

21 *Id.* at 90–95.

At the end of the day,[22] *Dreyer's English* offers the opportunity to engage in self-reflection to find out what rules and non-rules matter to each of us. As a "relatively green" copy editor, Dreyer hung a quote from *The New Yorker*'s Wolcott Gibbs on his office door: "Try to preserve an author's style if he is an author and has a style."[23] The sign plays a significant role in an anecdote about an encounter Dreyer had with an author he was editing. For the legal writer, though, it raises another question. We are all authors. What is our style?

22 Here I have cheekily violated one of the miscellaneous Rules offered in Chapter 12: "Clichés should be avoided like the plague." *Id.* at 254.

23 *Id.* at 120.

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BOOK REVIEW

The End of "It Depends"?

Data-Driven Law: Data Analytics and the New Legal Services
Ed Walters et al. (Ed Walters ed., CRC Press, Taylor & Francis Group 2019), 215 pages

Tammy Pettinato Oltz, rev'r*

> [W]hen clients ask lawyers their most important questions, lawyers often answer with educated guesses based on limited experience. In law, this is often called professional judgment, but in other industries, these judgments would be called hunches . . . .
>
> —Ed Walters[1]

Black-letter law aside, law is one of the grayest of disciplines. The highest-level work that attorneys do—predicting outcomes, persuading judges, negotiating deals, and advising clients—is, at its most fundamental level, guesswork.[2] To be sure, the guesswork is informed, educated, and strategic, but in the end, lawyers can never know with certainty where a given case is going to go.[3] When viewed from this lens, teaching students how to "think like a lawyer" is, in essence, teaching them how to guess better than others.

In his introduction to *Data-Driven Law: Data Analytics and the New Legal Services*, Editor Ed Walters makes a compelling argument for using data, both big and small,[4] to improve the accuracy of these guesses, and

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1 Ed Walters et al., Data-Driven Law: Data Analytics and the New Legal Services 1 (Ed Walters ed., 2019).

2 This is not a new observation. Indeed, over a hundred years ago, Justice Oliver Wendell Holmes, Jr. wrote, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

3 *See* Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 Penn St. L. Rev. 41, 64 (2018) ("As a result, outcome prediction—notwithstanding its major importance to the practice of law—has always been a rough science, its accuracy leaving much to be desired.").

4 While the terms "big data" and "small data" present definitional issues, for purposes of this review, they can be thought of as two sides to a coin. Big data describes very large quantities of data that typically require computer intervention to analyze

thus the satisfaction of both attorneys and clients.[5] Walters argues that data is the answer to the three questions that plague attorneys the most: how to find clients, how to keep clients, and how to do both as efficiently as possible.[6]

Walters is primarily concerned with the business side of how data collection and management, or the lack thereof, affects the provision of legal services. Several chapters follow up on this theme, addressing how firms and other legal services providers can collect both internal and external data, what types of data to collect, and how new technologies, especially artificial intelligence, can be used to process it more efficiently—i.e., to make it usable. Other chapters delve more deeply into how data can be used to improve specific legal tasks, such as contract analysis and electronic discovery.

As a whole, the book makes a convincing case that data is, as one author put it, "21st Century Gold."[7] Want to know which arguments a given judge is likely to find most convincing? Data. How about whether a potential employee is likely to perform well? Data. Whether a contract you've drafted is employing the appropriate clauses? Data. In short, "There's data for that," is the new, "There's an app for that."

Consider, for example, the costs associated with recruiting, interviewing, selecting, and retaining employees. Traditionally, employers have relied on a small amount of relatively subjective information to determine who they should hire and who is likely to stick around once they are hired: resumes, cover letters, interviews, references, etc. While this information is helpful, it is also incomplete. Data can assist in drawing a more detailed picture of both candidates and current employees:

> Employers can access more information about their applicant pool than ever before and have an ability to correlate data gleaned from the application itself, perhaps supplemented by publicly available social media sources, to determine how long a candidate is likely to stay on a particular job. Similarly, by combing through computerized calendar entries and e-mail headers, Big Data can tell us which employees are likely to leave their employment within the next 12 months.[8]

and manipulate; in the legal realm, this is data that is external to a law firm, such as information about legal outcomes in particular types of cases. Small data is data internal to the law firm, such as information on the number of hours particular attorneys bill on particular matters. *See generally* Jared D. Correia & Heidi Alexander, *Big Data, Big Problem: Are Small Law Firms Given a Sporting Chance to Access Big Data?*, 37 W. New Eng. L. Rev. 141, 142–44 (2015) (describing the difficulty of defining "big data" and discussing the difference in size between external and internal data).

5 *See generally* Walters, *supra* note 1, at 1–10.

6 *See id.* at 2.

7 Kenneth A. Grady, *Mining Legal Data: Collecting and Analyzing 21st Century Gold*, *in* Data-Driven Law: Data Analytics and the New Legal Services, *supra* note 1, at 11.

Because several of the authors have computer science or other IT-related backgrounds, some chapters are technical and dense. I originally opted to review this book because I was considering adopting it for a new "Introduction to Legal Technology" course that I am teaching, but I found many of the chapters too advanced for those with a non-technical background. For that reason, the book may be more appropriate for an advanced course or for attorneys with some technological training. However, for those with some technical background or those at firms or institutions with an IT specialist who can help translate some of the more high-level concepts, the book provides a wealth of unique insights into how to harness data to drive organizational and professional change.

From a legal writing perspective, the most valuable takeaway is that traditional modes of predicting and persuading are being upended by the data revolution. More and more, clients are expecting answers that rely on more than an attorney's personal judgment and analysis—the very skills that have, for so long, been the bread to the butter of communication skills. Clients no longer want to know simply what the attorney thinks will happen; they want to know what the data says will happen.[9]

What the implications for this shift in client expectations mean for the future of advocacy remains to be seen, but it is clear that, as the profession changes, legal education will need to follow. One hint of what is to come is in Professor Kevin Bennardo's article in a recent issue of this journal, in which he argues that legal writing professors should stop calling legal analysis "predictive analysis," because how a given law applies to a given case is only one piece of the larger puzzle of how decisions are made.[10] The future of legal education lies in teaching students how to complete the rest of that puzzle, and this collection provides convincing evidence that data analytics will play a crucial role in that task.

8 Aaron Crews, *The Big Move Toward Big Data in Employment*, *in* Data-Driven Law: Data Analytics and the New Legal Services, *supra* note 1, at 59, 60; s*ee also* Correia & Alexander, *supra* note 4, at 146 ("One of the most well-known and pervasive applications of big data in large law firms is its use within tools developed to predict case outcomes, including verdicts. As one company boldly assays, '[w]e help lawyers predict the future.' More specific predictions are developed via the analysis of massive aggregations of historical case information. Armed with anticipated outcomes with which to compare incoming fact patterns, large law firms can make informed and reasoned decisions when screening cases and developing case strategies. There is no shortage of service providers in this area. Some products provide case predictions for specific practice areas, including medical malpractice and patent law. Other tools analyze the litigation histories of judges and opposing counsel, and provide comparative case outcomes for every stage of litigation." (footnotes omitted)).

9 While it is beyond the scope of this book review, it should be noted that the idea that data-based predictions will be more accurate and, thus, more valuable than human-based predictions raises difficult questions about the unintended consequences of overreliance on data. *See, e.g.*, Caryn Devins et al., *The Law and Big Data*, 27 Cornell J. L. & Pub. Pol'y 357, 359 (2017) (arguing that "Big Data's asserted objectivity is a myth" and that "[d]ata require theory in order to be interpreted and applied, and any single interpretation of data is rarely conclusive" (footnote omitted)).

10 *See generally* Kevin Bennardo, *Abandoning Predictions*, 16 Legal Comm. & Rhetoric 39 (2019).

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BOOK REVIEW

How Individuals' Narratives Can Communicate What Legal Theory and Statistics Can't

Broke: Hardship and Resilience in a City of Broken Promises
Jodie Adams Kirshner (St. Martin's Press 2019), 342 pages

Sharon A. Pocock, rev'r*

In *Broke: Hardship and Resilience in a City of Broken Promises*,[1] author and bankruptcy professor Jodie Adams Kirshner examines the consequences of the City of Detroit's 2013 bankruptcy filing on the city and its residents. Her thesis, based on her study of various municipal bankruptcies, is that municipal bankruptcies do not produce the same type or level of positive outcomes as do corporate or individual bankruptcies and, in fact, can have negative consequences on the residents of those municipalities that have sought bankruptcy relief. As Kirshner states, "for changing the future of a city, bankruptcy offers a limited tool. Bankruptcy offers a legal process for restructuring debt. It does not address the deeply rooted problems that reduce municipal revenues."[2] In *Broke*, as she discusses causes and consequences of Detroit's bankruptcy case, Kirshner presents in detail the lives of several Detroit residents, her "protagonists,"[3] as a foundation and proof of this thesis.

Broke is a book of interest to anyone involved in bankruptcy work because it concerns the bankruptcy of a city, a type of bankruptcy case that has been rare but has become more frequent in the last ten to fifteen years.[4] But more generally, *Broke* illustrates the power of storytelling

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1 Jodie Adams Kirshner, Broke: Hardship and Resilience in a City of Broken Promises (2019).

2 *Id.* at 276.

3 *Id.* at xxv.

4 *Id.* at xix–xxi.

to show the effect of government process and decisionmaking on individuals. Data on the number of individuals affected by a law or by an economic downturn, the dollar figure of economic losses or penalties, and the abstract explanation of causes of reversals of fortune can be dry, cold, and distant. The stories of the seven individuals that Kirshner presents in her book reveal the full impact of one event or decision on the life of that individual, with consequences that data alone would not suggest to a reader's mind. Through reminiscences about the past as well as details of their current lives, the individuals' stories told here give the reader a glimpse into the past and present of both Detroit and its residents.

In July 2013, the City of Detroit became the largest municipality to file a Chapter 9 bankruptcy petition. It emerged from bankruptcy after "[s]eventeen months and nearly $180 million in fees and costs."[5] Through the bankruptcy, the city was able to reduce its obligations by cutting some city employees' pensions by 7%, paying financial creditors at the rate of 13 cents on the dollar, and obtaining $325 million in new loans to carry out future operations and services.[6] Yet those financial achievements did not solve the ongoing problems of a city with an impoverished and declining population, diminished job opportunities, and a decreased tax base. Consequently, Detroit's emergence from bankruptcy did little to aid city residents in their lives but instead, in numerous cases, imposed additional burdens.

Kirshner explores the many causes of Detroit's problems over the past decades. Automation and reduced transportation and communication costs allowed employers to cut jobs or move production elsewhere.[7] Starting in the 1980s, the federal government reduced federal aid to cities even though cities are "generally . . . home to the largest numbers of poor and marginalized individuals most dependent on public services."[8] A school busing decision in 1974 spurred the move of families from the city to suburbs, affecting both the city and its school system.[9] The subprime mortgage crisis of 2008 turned many Detroiters from homeowners into renters, when home ownership is generally an important financial asset for the average person.[10] The fall in both city property and income tax revenues resulted in fewer resources to provide municipal services,

5 *Id.* at xviii–xix.

6 *Id.* at xix.

7 *Id.* at 7.

8 *Id.* at xxi.

9 *Id.* at 30–31 (discussing Milliken v. Bradley, 418 U.S. 717 (1974) (holding as impermissible under the facts of the case multidistrict busing to cure single-district de jure segregation and thus preventing busing between Detroit and its suburbs)).

10 *Id.* at 19 ("Between 2005 and 2015, mortgage foreclosure turned 100,000 Detroit homeowners into renters, eliminating wealth from local families and from the city.").

causing the city, post-bankruptcy, to raise various rates and fees to generate revenue, while also cutting services to reduce costs. With fewer jobs and opportunities, a rise in crime occurred, which the reduced level of police and fire services could not stem. The Detroit school system also faced problems because of lost tax revenue and a decreasing student population. Families left Detroit or chose to enroll children in charter schools in the city, thus draining away from the city's public school system both students and the revenue per student devoted to education.[11]

Interspersed with these facts and analyses of Detroit's history, its bankruptcy, and its current condition are the stories of seven current Detroit residents. Each of these stories shows in concrete detail the impact of the city's past decline and current state on the daily lives of Kirshner's protagonists. Beginning in 2016, Kirshner began interviewing over 200 individuals in Detroit. Her seven protagonists range in age from mid-20s, to 40s and early 50s, to early 60s, some African American, some white. Most were native Detroiters, but a few had recently moved to Detroit. Most were struggling financially, but some had greater resources they hoped to use in establishing businesses in Detroit. All have been hindered in their lives and plans by the situation of Detroit—economic, financial, and social—during and after its bankruptcy.

The stories of these individuals illustrate the consequences, for many residents, of Detroit's changed status from a manufacturing center to a "rust-belt" city, which bankruptcy has not addressed. For example, state residents faced subsidiary fees, such as driver responsibility fees and driver reinstatement fees, imposed by the state to increase revenue, in addition to penalties for various driving misdemeanors.[12] In addition to those penalties and fees, Detroiters pay extremely high auto insurance rates.[13] One of Kirshner's protagonists, Miles, is a construction worker who needs his truck to get to construction jobs and to pick up necessary materials. Problems with high-cost insurance and his driver's license and subsidiary fees result in his losing much of his construction work, while dealing with these legal issues;[14] his resultant loss of income jeopardizes his home ownership and his financial stability. In addition, although Miles reviewed tax records before buying his home, the city's poor record-

11 *Id.* at 153–56.

12 *Id.* at 141. Driver responsibility fees, begun in 2003, were eliminated in Michigan as of October 1, 2018. In addition, outstanding unpaid fees were waived, including some $100 million in fees owed by 70,000 Detroit drivers. Previously, unpaid fees could prevent a driver from reinstating a suspended driver's license. Steven M. Gursten, *No More . . . Michigan Driver Responsibility Fee Waived in 2018,* Michigan Auto Law (Oct. 18, 2018), https://www.michiganautolaw.com/blog/2018/10/11/michigan-driver-responsibility-fee-waived-in-2018/.

13 Kirshner, *supra* note 1, at 139.

14 *Id.* at 140–44, 166–67. "Local governments found a steady revenue source in fines and fees." *Id.* at 173.

keeping had not reflected one year's back taxes, such that he was hit two years after his purchase with a notice of a tax foreclosure that he was ill-situated to pay and ill-informed to fight.[15]

The individual stories also show how Detroit's inability to attract and develop businesses undermines residents' efforts to work and establish a sound financial situation for themselves and their families. Another of Kirshner's protagonists, Lola, is a young, college-educated single mother who loses her managerial job in the city after her company moves its operations elsewhere. Unable to find a job in Detroit, she must endure a long commute to entry-level work in the suburbs[16]—until her car is stolen. Only the presence of grandparents able to drive her to work and her child to school enable her to remain in her job and in her home in Detroit.[17] She and her young daughter also face the dangers of increased crime when a drive-by shooting sends several bullets into the home she is renting.[18]

Detroit's diminished economic opportunities have a direct consequence on the ability of its residents to maintain a home. A few of the protagonists own a home they have purchased or inherited from parents, but often it is in disrepair or in a particularly unsafe and unpopulated area of the city, where homes have given way to vacant lots and abandoned and vandalized houses.[19] They want to stay in their homes—and often have no choice because sale at the current value would not allow them to find housing elsewhere.[20]

Much like poor members of any community, too many Detroit residents cannot buy a home, even at depressed prices, because they lack a down payment and cannot obtain bank financing.[21] Thus, they rely on land contracts to try to acquire ownership of a home, too often unsuccessfully. A land contract requires periodic payments, like a lease; only when the full price is paid does title transfer. Any breach, however, results in eviction (without the need for court process), loss of whatever money has been paid to the seller, and loss of improvements that the purchaser has made in the property. Reggie, another protagonist of the book, invests much effort and money into his home, only to find himself losing all—even after having paid off the land contract—because the seller failed to pay property taxes.[22] When he lacks the money to put a new furnace in a new house, again purchased under a land contract, he and his partner, life-long Detroit residents, consider leaving the city.[23]

15 *Id.* at 72–82.

16 *Id.* at 53–58.

17 *Id.* at 72–82.

18 *Id.* at 211–14.

19 *Id.* at 32–33.

20 *Id.*

21 *Id.* at 24 (noting that mortgage lenders stopped writing mortgages in Detroit on houses under $50,000).

22 *Id.* at 90–91.

23 *Id.* at 216.

Transplants who came to Detroit for the opportunities it offers see slower progress than they hoped for, even though they are better situated to weather financial downturns than long-term poorer residents. Kirshner's protagonists include a West Coast property developer and another entrepreneur, from New Jersey, looking to settle and establish his own business. The plans of both are affected by the difficulty of obtaining financing to rehabilitate derelict properties and the red tape often involved in obtaining necessary permits and approvals.[24]

In her epilogue, Kirshner summarizes her conclusions:

> Bankruptcy . . . does not address the circumstances that overwhelm a city's budget. In the wake of bankruptcy cities have sought to maintain their newly balanced budgets by welcoming speculative property investment and enforcing fines and fees for civil infractions, avenues for raising revenues that have inflicted further harm on cities like Detroit and [its] residents. . . . Reduced spending has further limited public services and further reduced the capacity of those communities to contribute to their cities' reinventions.[25]

The noted 1989 book *As We Forgive Our Debtors* presented results of an empirical study of consumer bankruptcies. Similar to *Broke*, it profiled several individuals in the study who had filed for bankruptcy, before turning to the statistical data and conclusions of the study. The individual profiles illustrated in detail that many debtors were driven into bankruptcy by circumstances out of their control.[26] In *Broke*, it is by focusing on individuals and relating their experiences over a year-long period in a "broke" and broken city that Kirshner complements her more abstract findings. And we as readers experience the results of Detroit's bankruptcy through the day-by-day events in the lives of these residents.

Broke does not offer solutions to the problems it highlights. It does, however, memorably inform the reader of the problems municipal residents can face even after their city's emergence from bankruptcy. The decision to tell the story of seven individual Detroiters of varied backgrounds makes this book a compelling read for general readers as well as those with more specific interests.

24 *Id.* at 208–11.

25 *Id.* at 260.

26 Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 49-62 (1989).

Making Meaning

Narrative and Metaphor in the Law
Michael Hanne & Robert Weisberg, eds. (Cambridge University Press 2018), 379 pages

Elizabeth Sherowski, rev'r*

At its core, the law is an abstract concept. Lawyers, charged with making this abstract concept understandable and relatable, often turn to the rhetorical techniques of narrative and metaphor. Litigation and negotiation revolve around competing narratives, and lawyers use metaphor to relate obscure legal concepts to concrete and familiar items. While there have been a number of articles and books about narrative and metaphor separately, including in the discipline of legal writing, few have examined both techniques in detail and compared them to one another. In *Narrative and Metaphor in the Law*,[1] editors Michael Hanne and Robert Weisberg have collected essays that explore the role that those rhetorical devices play in legal discourse and arranged them in a manner which facilitates focused comparisons of the two.

The book is arranged in nine "conversations" about types of legal discourse where narrative and metaphor can be effective: *Concepts of Legal Justice Systems,*[2] *Legal Persuasion,*[3] *Judicial Opinions,*[4] *Gender in the Law,*[5] *Innovations in Legal Thinking,*[6] *Public Debate Around Crime and Punishment,*[7] *Human Rights Law,*[8] *Creative Work by Lawyers,*[9] *and Legal Activism.*[10] Each conversation is made up of an introduction by the editors and two essays that explore different angles on the conversation's theme.

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1 Narrative and Metaphor in the Law (Michael Hanne & Robert Weisberg eds., 2018).

2 *Id.* at 13.

3 *Id.* at 55.

4 *Id.* at 111.

5 *Id.* at 151.

6 *Id.* at 193.

7 *Id.* at 243.

8 *Id.* at 289.

9 *Id.* at 325.

10 *Id.* at 359.

Two of the conversations, *Gender in the Law* and *Legal Activism*, contain only one essay. The conversation on *Gender and the Law* is Kathy Stanchi and Linda Berger's "Gender Justice: The Role of Stories and Images," which developed as a conversation between the two authors and later became a jointly published essay explaining how "advocates who thoughtfully engage in metaphor-making and storytelling may alter the law's conceptions of gender justice, and indeed of justice for all."[11] The conversation on Legal Activism is an actual conversation; the editors interview political activist and law professor Mari Matsuda about her use of narrative and metaphor in her Critical Race Theory legal scholarship to not only describe how the language of the law discriminates, but to advocate for change.[12] Although those exceptions to the dueling essay format were thought provoking and well written, they did not provide the same diversity of viewpoints as the other chapters. This review will focus on the conversations with paired essays, since that organizational system is one of the main innovations of the book.

Each conversation begins with a short introduction, characterized as "framing comments," by the editors. Hanne, who founded the Comparative Literature Program at the University of Auckland and directed it until his retirement in 2010, and Weisberg, a professor of law at Stanford and the founder of the Stanford Criminal Justice Center, have achieved an effective balance in their joint writing between rhetorical technicality and conversational ease. Their comments introduce the specific issues taken up in the conversations and provide helpful context for the contributors' opinions.

In the conversation on *Narrative and Metaphor in Legal Persuasion*[13] (which, as a teacher of advocacy, I found to be one of the most useful chapters in the book), Michael R. Smith introduces the concept of the "metaphoric parable," a short, metaphoric story designed to make a point or teach a lesson (think "The Blind Men and the Elephant" or the frog in a pot of water which is slowly brought to a boil).[14] Smith investigates how metaphoric parable has been used in judicial opinions and provides examples of judges' use of these short persuasive stories. Smith's essay focuses on individual examples pulled from judicial opinions, but it addresses those examples in isolation, rather than in the context of the persuasiveness of the whole opinion. This leaves unresolved the issue of whether the entire opinion is made more persuasive by the inclusion of an isolated metaphorical parable.

In the second essay in the conversation, Raymond W. Gibbs, Jr. recognizes that while a single metaphorical parable can be persuasive, the

11 *Id.* at 157.

12 *Id.* at 367.

13 *Id.* at 55.

14 *Id.* at 65.

stories lawyers tell are usually composed of several smaller narratives and metaphors, with each smaller narrative or metaphor contributing to (or detracting from) the overall persuasiveness of the story.[15] Gibbs discusses how to bring coherence to a multi-metaphor narrative by considering the context, teller, and audience and the effect each will have on the whole.

While both essays are interesting and informative on their own, the connection between them is made stronger by the editors' helpful introduction to the conversation.[16] The introduction provides a foundation for the essays by briefly explaining the development of legal storytelling, addressing the problem of multiple narratives, and explaining how Smith's and Gibbs's conclusions complement each other. Even a reader who is new to the idea of persuasive legal storytelling is therefore able to gain a greater understanding from the two essays together rather than separately.

However, connections between the essays in each conversation vary greatly. Some essays are direct responses to their companions, while others are more loosely related. Roughly half of the contributors are law professors; the rest are scholars in literature, communication, and rhetoric, or attorneys and writers who work in those spaces. This sometimes results in unexpected and delightful pairings, such as that of the poet and law professor Lawrence Joseph with Meredith Wallis, an Oakland attorney who practices civil rights and asylum law but centers her research on children's literature as a source of law. In the conversation on *Creative Work by Lawyers*,[17] Joseph and Wallis discuss how lawyers can use creative works to develop a professional identity and to advance professionalism in the legal community. Both essays use Joseph's 1990 poetry collection *Lawyerland*, based on interviews with lawyers and judges, as the starting point for their discussions of the "lawyer-self" and its relation to others. While Joseph's initial essay reflects *Lawyerland*'s gloom and dissatisfaction among lawyers ("becoming involved with the legal system is like three years of experimental chemotherapy, one hundred percent guaranteed not to work,"[18] one interviewee says), Wallis sees more hope for civility and change. "What satisfies readers about *Lawyerland* is not the knowledge of a crisis with which we were already familiar. It's some truth about how to live with it."[19]

Not every pairing is as successful as that of Joseph and Wallis. In the first essay in the *Crime and Punishment* conversation, popular legal commentator (and recipient of the Legal Writing Institute's Golden Pen Award) Dahlia Lithwick discusses narrative conventions in crime

15 *Id.* at 90.

16 *Id.* at 57.

17 *Id.* at 325.

18 *Id.* at 350.

19 *Id.* at 352.

reporting, focusing on the practical side of how the media's use of narrative and metaphor shapes the public conversation about crime.[20] In the second essay, communication professor L. David Ritchie (not to be confused with the legal writing professor David T. Ritchie) takes a much more scholarly and theoretical look at whether metaphor has any demonstrable effect on the public discourse surrounding crime.[21] They both essentially reach the same conclusions—in fact, Ritchie admits that "I largely agree with Lithwick's argument"[22]—leaving the reader to wonder why we needed two essays, one much more readable than the other, to get to the same place. Perhaps the editors combined these two essays to show that both practical and scholarly examination of the topic reach the same conclusions, but Lithwick's essay would have been perfectly capable of making the point by itself.

Pairings such as this contribute to the uneven nature of the collection. The essays that I found most interesting were written in a more conversational style, using examples to demonstrate the rhetorical techniques being discussed. The most interesting pairings were clearly written, explored their topic in depth from several angles, and provided a conclusion or takeaway that attorneys and law professors could use in their practice or in the classroom. However, not every conversation contained all these elements.

Although the editors achieved a gender and subject-matter balance among contributors, they were less successful in achieving cultural diversity. Only three of the sixteen contributors are people of color. While this may be explained by the strong cultural component of persuasive techniques such as narrative and metaphor, which rely on shared experiences for their effectiveness, the shared experiences of non-majoritarian authors and their stories and illustrations of legal ideas would have brought a wider range of voices to the table and made the book that much stronger.

Overall, this book will make advocates reflect more deeply on how they employ these rhetorical devices in their practice and may convince storytelling naysayers of the effectiveness of these devices. Many of the essays or conversations would make excellent stand-alone reading assignments for law school classes: Joseph and Wallis for Professional Responsibility or Attorney Wellness classes, Lithwick for Criminal Law or Criminal Procedure, among others. *Narrative and Metaphor in the Law* is a useful book for advocates and teachers of advocacy to have on their shelves.

20 *Id.* at 251.

21 *Id.* at 269.

22 *Id.* at 271.

BOOK REVIEW

Intuition, the Subconscious Mind, and the Appellate Brief

Blink
Malcolm Gladwell (Little, Brown 2005), 288 pages

Ryan D. Tenney, rev'r*

Fifteen years and four bestsellers ago, Malcolm Gladwell wrote *Blink: The Power of Thinking Without Thinking.*[1]

Gladwell is a science and business writer at *The New Yorker*. *Blink* was his second book, and it was a massive success. It sold over two million copies, and it was soon followed by several other Gladwell bestsellers. If you're reading this journal and have made it this far in this review, the odds are good that you have one (if not several) of his books on your bookshelf at home.

Gladwell's books follow something of a pattern. Each one focuses on a particular idea or question, and Gladwell then acts as a guide through scientific studies and historical examples that illustrate its contours. In *The Tipping Point,* for example, Gladwell described ways in which achieving a critical mass can influence a social or business trend.[2] In *Outliers,* Gladwell considered the question of how much of a person's high-end success can be attributed to external conditions or timing.[3] In *David & Goliath*, Gladwell argued that being an underdog can sometimes create hidden advantages.[4]

Blink is about the role that the subconscious mind and intuition play in decisionmaking. Though not written for lawyers, its insights have a

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1 Malcolm Gladwell, Blink: The Power of Thinking Without Thinking (2005).

2 Malcolm Gladwell, The Tipping Point: How Little Things Can Make a Big Difference (2000).

3 Malcolm Gladwell, Outliers: The Story of Success (2008).

4 Malcolm Gladwell, David and Goliath: Underdogs, Misfits, and The Art of Battling Giants (2013).

lot of potential application to the work of lawyering in general—and, in particular, to brief writing.

I. *Blink* and the Role of Intuition in Decisionmaking

One of Gladwell's principal insights is that the subconscious mind forms opinions about persons or things really quickly. Gladwell memorably refers to this as the "thin-slicing" phenomenon, which he describes as "the ability of our unconscious to find patterns in situations and behavior based on very narrow slices of experience."[5] Gladwell claims that humans instinctively do this, that we commonly "read[ ] deeply into the narrowest slivers of experience."[6]

In one notable example, Gladwell describes a study in which college students were shown three ten-second, soundless videotapes of a professor's lecture. When they were asked to fill out evaluations of that professor, their evaluations proved to be consistent with evaluations that had been filled out by other students who had been shown clips of "just *two* seconds of videotape."[7] Perhaps surprisingly, those evaluations were also consistent with evaluations that had been filled out by students who had taken the professor's class for a full semester.[8]

Through this and other examples, Gladwell argues that people instinctively make quick assessments of persons or things. He then argues that although these initial, instinctive assessments are not necessarily fixed or unchangeable, they often end up heavily influencing a person's long-term thinking.

Shifting gears, Gladwell also discusses some of the factors that can influence these intuitive reactions. For example, Gladwell discusses at some length the psychological phenomenon known as "priming." Priming "refers to a process in which a person's response to later information is influenced by exposure to prior information."[9] Gladwell offers several illustrations of this. For example, he points to studies showing that when companies make improvements to a food product's packaging, consumers often believe that the product tastes better, even if no changes were made to the food itself.[10] In such instances, the more attractive packaging has

5 Gladwell, *supra* note 1, at 23.

6 *Id.* at 44.

7 *Id.* at 13.

8 As someone who spends a fair amount of time in the classroom, I'll freely admit that this study absolutely terrifies me.

9 Kathryn Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 Or. L. Rev. 305, 306 (2010).

10 Gladwell, *supra* note 1, at 160–62.

psychologically primed the consumer to believe that the food is better, and this impacts how the consumer perceives its physical taste.[11]

In another study described by Gladwell, two groups of students were asked to answer a series of trivia questions. Beforehand, one group was asked to spend five minutes thinking about what it would be like to be a professor, while the other group was asked to think about soccer hooligans. Those in the professor group scored much higher in the ensuing trivia test than those in the hooligan group[12]—a result that has been replicated in other similar studies.[13] In such instances, priming acts to put a person into a particular frame of mind, and that frame of mind affects the person's performance.

To be clear, Gladwell does not claim that priming (or other related subconscious phenomena) are the only things that affect opinion or performance. In the food-packaging context, for example, Gladwell readily acknowledges that the "taste of the product itself" still "matters a great deal."[14] But Gladwell's point is simply that subconscious factors do matter, even influencing seemingly physical reactions such as taste or performance.[15]

In a related manner, Gladwell also describes the phenomenon commonly referred to as confirmation bias. Confirmation bias is the "tendency to search for, interpret, favor, and recall information in a way that confirms or strengthens one's prior personal beliefs or hypotheses."[16] Or, as memorably put by the great twentieth century philosophers Simon & Garfunkel, it's the process by which "a man hears what he wants to hear and disregards the rest."[17]

Gladwell believes that confirmation bias is another way in which the subconscious mind influences a person's conscious decisionmaking. Because of its effects, Gladwell argues that it matters a great deal what a person wants the eventual outcome of a particular decision to be,[18]

11 *Id.*

12 *Id.* at 56.

13 *Id.* at 52–56.

14 *Id.* at 165.

15 *Id.*

16 *Confirmation bias*, Wikipedia (last modified Apr. 13, 2020, 11:00 PM), https://en.wikipedia.org/wiki/Confirmation_bias; *see also* Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 Legal Comm. & Rhetoric: JALWD 45, 49 n.23 (2017) ("Confirmation bias is a widely observed phenomenon whereby people seek out and interpret information that is consistent with their expectations.") (citation omitted).

17 Simon & Garfunkel, *The Boxer* (Columbia Records 1969).

18 Gladwell, *supra* note 1, at 14.

because the person's preferences will then shade how he or she responds to arguments or evidence about that subject.

Gladwell notably acknowledges that there is a potential dark side to this. For example, he devotes an entire chapter to what he refers to as the "Warren Harding Error"—which he describes as the tendency to choose a solution (or, in his illustrative example, a presidential candidate) based on what we think the solution should be, thereby causing us to disregard objective indications that this preferred solution is actually not the best one.[19]

In this sense, *Blink*'s overall view seems to be more descriptive than prescriptive. Gladwell's point isn't that the subconscious mind plays an inherently good or bad role in decisionmaking. Rather, his point is simply that it is indeed playing a role, and that because of this, decisionmakers and decision-influencers alike should try to understand and account for its effects: "Taking our powers of rapid cognition seriously means we have to acknowledge the subtle influences that can alter or undermine or bias the products of our unconscious."[20]

II. *Blink*'s Potential Applications to Brief Writing

Again, although *Blink* was not written for lawyers, many of its concepts have clear application to brief writing. Three in particular stand out.

First, consider the potential impact of priming as it relates to the opening pages of a legal motion or brief.[21] Again, Gladwell believes that priming a person to look favorably on something can subconsciously impact how the person evaluates the thing itself. In this sense, he contends that a person's initial interactions with an item or idea can matter a great deal.

Think about how often you've read a motion that began with something like this: "Comes now Plaintiff, by and through counsel of record, Lawyer Q, Esquire, and hereby prays for relief on the grounds set forth below." Think about how often that kind of formalistic opening was followed by several pages of dry factual or procedural details. In such motions, it's not unusual for the Argument section to be the first place where the party actually advances a coherent and persuasive statement of their position on the underlying legal issue.

Or consider the appellate version of this. If a brief follows the standard format, it begins with a jurisdictional statement (hardly scintillating

19 *Id.* at 72–98.

20 *Id.* at 252.

21 For discussion of the concept applied to oral argument, see Venter, *supra* note 16.

stuff), followed by an issue statement, and then followed by a statement of facts and procedural history. In many such briefs, the Summary of the Argument is the first time that the reader is given a fully-formed version of the party's legal argument, which can be ten or fifteen pages into the brief.

If Gladwell is right, then these are wasted opportunities.[22] If the judge is subconsciously making snap judgments about the party's position all along the way, and yet the first pages don't provide any context or persuasive thrust, then the judge's snap judgments won't be particularly helpful to that party. But by contrast, if the initial pages of the brief or motion try to actively persuade the judge to rule in the party's favor on the main legal issue, then priming theory would suggest that this will positively influence how the judge responds to everything else that comes in the remainder of the brief—including the technical, factual, or procedural sections that must be set forth in its beginning stages.

This is perhaps why many attorneys have begun including standalone Introduction sections at the beginning of complex motions or appellate briefs. Viewed through the prism of *Blink,* these sections have value precisely because they appeal to the judge's intuition, thereby favorably shading the judge's perceptions of the party's position from the outset.

Second, Gladwell's arguments about priming and confirmation bias should also influence the kinds of arguments that attorneys include in motions or briefs.

Lawyers sometimes fall into the trap of thinking that judges are automatons, with judicial decisions being driven strictly by mechanical principles. But human decisionmaking does not often work that way. Aristotle, for example, believed that humans are influenced by a combination of *logos* (i.e., logic), *ethos* (i.e., the reputation or trustworthiness of the speaker), and *pathos* (i.e., emotion).[23]

Our legal system is governed by texts, so the logical interpretation of those texts must predominate in a motion or brief. But it would be folly to suggest that at least some judges aren't persuadable, at least on some level, by their sense of what the correct outcome should be. As recognized by one prominent commentator, many "trial judges and appellate judges" are indeed "'pragmatists' who care about the effects their decisions may have" and "are curious about [the] social reality" affected by their decisions.[24]

22 Others in the legal writing discipline have observed similarly. *See, e.g.,* Stanchi, *supra* note 9, at 307 ("[The article] shows advocates how priming can help them make better strategic decisions in their briefs and gives specific examples of different ways to use priming in persuasive writing.").

23 Jay Heinrichs, Thank You for Arguing: What Aristotle, Lincoln, and Homer Simpson Can Teach Us About the Art of Persuasion 39–40 (2007).

24 Ross Guberman, Point Made: How to Write Like the Nation's Top Advocates 28 (2d ed. 2014) (citation omitted).

Many of us have had experiences that confirmed this. I once had a judge tell me in an off-the-record conversation that while he tried really hard to make his decisions based solely on the text that was in front of him, "it sure makes it easier for me to do that when I think that I'm doing the right thing."

Given these understood realities, Ross Guberman devoted an entire chapter of his seminal book on brief writing to illustrating how attorneys can "[g]ive the court a reason to want to find for" their client.[25] Guberman advised attorneys that, in addition to making the necessary textual arguments, it's a good idea to also provide judges with "a pragmatic reason to want to rule for them—or at least to feel bad about ruling for their opponent."[26]

The degree to which such an argument will matter may, of course, vary depending on the judge or the case. But even still, an attorney would be wise to account for it when drafting a brief. In Gladwellian terms, such pragmatic or policy-based arguments can be effective precisely because they appeal to the judge's subconscious mind or intuition, thereby potentially influencing how the judge assesses even the textual arguments themselves.

Third, Gladwell's discussion about priming and packaging also helps explain why some of the seemingly trivial things that go into a brief (e.g., Bluebooking, micro-level word choices, or formatting) are worth the time we spend on them. Many of us have dealt with pushback on these fronts—perhaps from busy law students who are in the late stages of a brief, or perhaps from hourly-billed clients who are scrutinizing the fine print of their bill. Gladwell's description of how the subconscious mind works can help explain why these things are worth the investment.

If it is indeed true that a food product's packaging can influence how that food tastes to the consumer, then the same is likely true for a motion or brief. If a brief is proofed correctly and looks polished in terms of its formatting, then these packaging details will send subconscious cues of competence to the judge who reads it, thereby positively influencing how the judge perceives the underlying arguments. Conversely, if a brief has noticeable technical errors or formatting glitches, it will likely send the opposite kind of signals, thereby negatively influencing the judge's perception of the brief.

Many have recognized this. In his book on formatting technique for legal documents, Matthew Butterick argued that it is "plainly absurd" to believe that a judge would never "care[ ] how a text looks."[27] While

25 *Id.* at 27.

26 *Id.* at 38.

27 Matthew Butterick, Typography for Lawyers 28 (2d ed. 2015).

acknowledging that a document's formatting should not be dispositive on its own, Butterick nevertheless contends that formatting issues will impact a judge's assessment of a document's credibility.[28] Butterick analogizes this to how an attorney's appearance in court might impact a judge. If an attorney appears in court wearing jeans and sneakers, this would send signals about the attorney's professionalism or even competence, and no one would dispute that this might influence how the judge would think about the attorney and even the attorney's arguments.[29]

In his book on appellate advocacy, Judge Ruggero Aldisert of the Third Circuit likewise stated that to "gain the judge's attention," an attorney "must immediately establish credibility as a brief writer."[30] In this sense, he suggested that "judges become disturbed when citations are incorrect or page references inaccurate."[31]

In her law review article, Judge Patricia Wald of the D.C. Circuit similarly counseled attorneys to "proofread with a passion."[32] Judge Wald continued:

> You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel. It says—worst of all—the author never bothered to read the whole thing through, but she expects us to.[33]

Were he addressing lawyers, Gladwell would likely agree.

III. Conclusion

Blink is not without its flaws. Gladwell's detractors have sometimes accused him of overgeneralizing complicated subjects or of insufficiently accounting for contrary evidence. A limited book review of this sort is not the place to resolve such disputes.

But the basic principles described above do have intuitive resonance. First impressions and instinctive reactions matter, perhaps disproportionately so; decisions are often influenced by preconceived notions or

28 *Id.*

29 *Id.* at 24.

30 Ruggero J. Aldisert, Winning on Appeal 24 (2d ed. 2003).

31 *Id.* at 94.

32 Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 22 (1999).

33 *Id.*

preferred outcomes; and a more polished-looking product will be more appealing to a consumer than one that is not.

Ours is a profession that is centered on influencing the decisions made by others. If even these basic insights are correct, then lawyers would be wise to both acknowledge them and then actively use them in their work. If nothing else, *Blink* is a thought-provoking look at a subject that is of central relevance to our work. It's a worthwhile read.

BOOK REVIEW

The Soul of Storytelling

Daemon Voices: On Stories and Storytelling
Philip Pullman (Vintage Books 2017), 433 pages

Pamela A. Wilkins, rev'r*

What could a spinner of fantasy tales about armored bears, parallel universes, and humans with daemons—souls in the form of animals—have to say about the art of lawyering? Quite a lot, as it turns out. Philip Pullman's *Daemon Voices: On Stories and Storytelling*[1] is an exquisite guide to the craft of storytelling, useful both to neophytes and to more experienced writers.

Pullman is best known as the author of the *His Dark Materials*[2] trilogy, a reinterpretation of *Paradise Lost* that takes place in a variety of parallel universes, including an Oxford, England at once intimately familiar—consider the hierarchies and airs of the various Oxford colleges; and utterly foreign—consider the externalized souls of humans in animal form. The tale's unwitting heroine is eleven-year-old Lyra Belaqua, a "coarse and greedy little savage, for the most part,"[3] who lives largely unsupervised as a ward of Oxford's (fictitious) Jordan College. The story takes Lyra and Pantalaimon, her daemon, away from the safety of Jordan College to the arctic North and to cities in other worlds (including *our* Oxford), where they encounter, among other things, children severed from their daemons, a boy with a knife that cuts through worlds, and "dust," a mysterious substance somehow connected with human consciousness. Fantasy genre notwithstanding, *His Dark Materials* tastes nothing like the fluff of fan fiction. Rather, it's hearty fare that has the reader ruminating on meaty questions: the human tendency to absolutism, the gains and losses

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1 Philip Pullman, Daemon Voices: On Stories and Storytelling (2017).

2 Philip Pullman, His Dark Materials is comprised of The Golden Compass (1995), The Subtle Knife (1997), and The Amber Spyglass (2005).

3 Pullman, The Golden Compass, *supra* note 2, at 36.

that come with maturity, the very nature of consciousness. The trilogy is also just a rollicking good tale. It tastes good! And, remarkably, Pullman has prepared this hearty, challenging three-course meal for children.

Both a critical success and an international bestseller, *His Dark Materials* has been adapted for screen, stage, and now television with a collaboration between the BBC and HBO. And the trilogy forms only a small part of Pullman's oeuvre. He's written tales for younger children—e.g., *I Was a Rat!*; retellings of classic fairy tales—*Grimm Tales: For Young and Old*; and even a reinterpretation of the Gospels—*The Good Man Jesus and the Scoundrel Christ*. Perhaps Pullman's own daemon is a spider: though he can't spin a web, he can certainly spin a yarn.

But *Daemon Voices* suggests a different daemon entirely—an observant creature committed to plying his craft and ensuring his tools are sharp. Published in 2017, *Daemon Voices* is a collection of thirty-two essays. At first blush, the essays' topics vary. John Milton and William Blake figure prominently. But so does British children's author Phillipa Pearce. As do particle physics, and imaginary friends, and the gravestone of Sophia Ann Goddard (d. 1801), and a lot else besides. In short, the essays are quite a smorgasbord.

But the smorgasbord has a unifying theme: the art and craft of storytelling. Just as important, the selections are tasty and nourishing for both connoisseurs and first-time samplers. (For our purposes, *connoisseurs* refers to lawyers and professors well versed in the art of legal storytelling, and *first-time samplers* or *neophytes* to law students and those without formal knowledge of storytelling norms and structures.) Being neither legal storytelling connoisseur nor neophyte, I found myself foraying to the buffet again and again, eager for fresh takes on old favorites, as well as for new delicacies entirely.

Some fresh takes on old favorites:

"Where do I put the camera?" Here, Pullman borrows from David Mamet's *On Directing Film*. For Pullman, *where do I put the camera* is "*the* basic storytelling question. Where do you see the scene from? What do you tell the reader about it? What's your stance toward the characters?"[4] Take *Paradise Lost*. It begins in hell, with the camera sharply focused on Satan. Thus we feel in our bones that Satan is our protagonist, our tragic, romantic hero. Indeed, we'll probably identify more with Satan than with

4 *The Writing of Stories*, *in* Daemon Voices, *supra* note 1, at 23.

5 *Paradise Lost: An Introduction*, *in* Daemon Voices, *supra* note 1, at 51 ("The opening . . . enlists the reader's sympathy in *this* cause rather than *that*. So when the story of *Paradise Lost* begins, . . . we find ourselves in hell, with the fallen angels groaning on the burning lake. And from then on, part of our awareness is always affected by that. This is a story about devils. It's not a story about God. The fallen angels and their leader are our protagonists . . . .").

other characters, including God.[5] Students, who sometimes think that facts are "just" facts, would do well to think of themselves as filmmakers.

The writer's responsibility toward language. "If human beings can affect the climate," Pullman opines, "we can certainly affect the language, and those of us who use it professionally are responsible for looking after it."[6] This responsibility includes loving, knowing, and caring for words through our command of both vocabulary and grammar:

> If only a few people recognise [British spelling] and object to a dangling participle, for example, and most readers don't notice and sort of get the sense anyway, why bother to get it right? Well, I discovered a very good answer to that, and it goes like this: if most people don't notice when we get it wrong, *they won't mind if we get it right*. And if we *do* get it right, we'll please the few who do know and care about these things, so everyone will be happy.[7]

This responsibility extends not only to words, but to expressions and idioms, with clarity the ultimate goal:

> We should try always to use language to illuminate, reveal and clarify rather than obscure, mislead and conceal. . . . The aim must always be clarity. It's tempting to feel that if a passage of writing is obscure, it must be very deep. But if the water is murky, the bottom might be only an inch below the surface—you just can't tell. It's much better to write in such a way that the readers can see all the way down; but that's not the end of it, because you then have to provide interesting things down there for them to look at.[8]

Like writers of fiction and creative nonfiction, lawyers are entrusted with—for better or worse—our culture's language. We teachers of writing would do well to let our students in on the potential and responsibility of this powerful role.

The primacy of story over theme. Unlike some writers, Pullman does not begin writing with a theme in mind. Rather, he begins with "pictures, images, scenes, moods—like bits of dreams . . . ."[9] The theme emerges from, rather than being imposed upon, the story. The yet-to-be-discovered theme and some idea or image from the story will "leap[]

6 *Magic Carpets: The Writer's Responsibilities*, *in* Daemon Voices, *supra* note 1, at 5.

7 *Id.* at 6.

8 *Id.* at 7.

9 *The Writing of Stories*, *supra* note 4, at 30.

towards each other like a spark and a stream of gas . . . tak[ing] fire when they [come] together."[10]

I have often asked students about their theory of the case (i.e., their theme). Unfortunately, at times I've probably inadvertently given them the impression that a theory is imposed on a case, almost like a misplaced piece is forced into a jigsaw puzzle. But Pullman has me convinced, even in the nonfiction realm that is the legal profession. Once we determine where to put the camera and how to tell a satisfying and convincing story, the theme will emerge unbidden. (To be fair, where we put the camera depends in part on the governing law. We operate within a different set of constraints from fiction writers.)

The realism and moral truthfulness of good stories. The best fantasy works, like all of the best fiction, are steeped in *reality*. Characters and settings can be *non*-real but can never be *un*real:

> The writers we call the greatest of all—Shakespeare, Tolstoy, Proust, George Eliot herself—are those who have created the most lifelike simulacra of real human beings in real human situations. In fact, the more profound and powerful the imagination, the closer to reality are the forms it dreams up. Not the most *unlike* real things, but the most *like*.[11]

This reality includes not only realistic characters, but "moral truthfulness,"[12] the possibility of "those eye-opening moments after which nothing is the same. [The character] will grow up now, and if we pay attention to what's happening in the scene, so will we."[13]

Again, Pullman's insight about the realism and moral truthfulness of good storytelling has made me question both my own teaching and storytelling. *Emphasize and be specific about the positive facts and subtly downplay or generalize the negative ones*, I often tell students. But what if I'm urging a story that ultimately isn't believable, that doesn't have the ring of moral truth? For example, in a capital post-conviction proceeding, if I paint a (guilty) death-sentenced inmate as *merely* a victim of various traumas, am I immersing the court in unreality, thereby reducing my own credibility and hurting my client? Can I tell a realistic, morally truthful story that will also evoke a deeply human, deeply moral response from the court?

I also savored some new (to me) delicacies:

10 *Id.*

11 *Writing Fantasy Realistically: Fantasy, Realism, and Faith*, *in* Daemon Voices, *supra* note 1, at 326.

12 *Id.* at 327.

13 *Id.* at 328.

Phase space. Pullman loves physics. Here, he introduces the physics metaphor of "phase space" as relevant to the storytelling craft. Phase space is "something like the sum of all the consequences that could follow from a given origin."[14] If a story itself is a path (the storyline), the phase space is the forest surrounding the story (the story world)—the world the characters inhabit, along with all of the possibilities of that world.[15] And Pullman stresses that "the business of the storyteller is with the storyline, with the path. You can make your story-wood, your invented world, as rich and full as you like, but be very, very careful not to be tempted off the path."[16]

The recurrence of image schemas within a story. Pullman observes that image schemas tend to recur within stories. An image schema is a "skeletal pattern[] that recur[s] in our sensory and motor experience. Motion along a path, bounded interior, balance and symmetry are typical image schemas."[17] These schemas often recur without the author's conscious awareness, and the consistency of the recurrence provides coherence for the story as a whole. Once a writer becomes conscious of these image schemas, she can make choices about their use. For example, Pullman himself recognized a schema in *His Dark Materials*: things that were once closely bound together—a set of friends, a person and a place, even a person and his daemon—would be split apart. He had created this pattern over and over without being aware of it, but his eventual awareness guided key decisions in the third book of the trilogy: the fate of Lyra and her fellow traveler Will, the course of Lyra's journey into the land of the dead, the closing of traffic between parallel worlds.

As was true of the old favorites, these new delicacies apply almost as much to the lawyer's storytelling craft as to that of the writer of fiction. To be sure, the stories we lawyers tell are grounded in real people, real conflicts, real events, but the stories are still constructed: we privilege one point of view over another; we aim our camera somewhere; we consider what's part of the storyline versus merely the story world.

And, like the reader of fiction, our readers—judges, clients, other lawyers, other academics—get to decide what they think of our story:

> Don't tell the audience what the story means. Given that no one knows what's going on in someone else's head, you can't possibly tell them what it means in any case.

14 *The Path Through the Wood: How Stories Work*, *in* Daemon Voices, *supra* note 1, at 77.

15 *Id.*

16 *Id.* at 79.

17 *The Writing of Stories*, *supra* note 4, at 26–27 (quoting Mark Turner, The Literary Mind: The Origins of Thought and Language (1998)).

> Meanings are for the reader to find, not for the storyteller to impose. . . .
> The way to tell a story is to say what happened, and then shut up.[18]

Somewhat unlike the reader of fiction, however, our readers often write the next chapter of the story. In litigation, we tell a story, and a judge or jury then writes our client's next chapter. Thus, our duty is to tell a story that makes certain next chapters possible and other next chapters implausible. But how?

The notion that image schemas recur especially struck me here. As mentioned above, in *His Dark Materials*, the primary image schema was the separation of something that had once been closely connected. Given this image schema, the only sensible ending to the story required the permanent separation—the parting—of the protagonists, initially bound by fate and a common purpose and later bound by love. Pullman seems to be saying that if one or two image schemas dominate (whether consciously or unconsciously) a narrative, then any resolution of that narrative will remain consistent with those schemas.

Let's translate this to law. In rendering a decision, a judge or other decisionmaker may intuitively continue the image schemas we have summoned in our litigation narratives. For example, if a defense lawyer in a capital case unwittingly tells his client's story in a way that emphasizes, say, that the vulnerable client was failed by all of those who ever held power over his life, then, like it or not, the judge may unconsciously continue the story, ensuring its coherence by, you guessed it, "failing" the vulnerable capital defendant yet again.

I don't know whether I'm right about how image schemas work within law. I do know that *Daemon Voices* has given me food for thought, new ideas for both teaching and scholarship (like, say the effect of recurring image schemas on legal decisionmaking), an expanded reading list, and—not least—a renewed sense of wonder and delight in our shared craft. If you care about good storytelling, this book belongs on your shelf.

18 *Children's Literature Without Borders: Stories Shouldn't Need Passports*, *in* Daemon Voices, *supra* note 1, at 127.