# LEGAL COMMUNICATION & RHETORIC: JALWD

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## General Guidelines

### Submission of articles and essays

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

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

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

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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### 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

The overarching theme of Volume 19 of *Legal Communication & Rhetoric: JALWD* is how legal communication shapes the law, and how doers of legal writing can use their resources to make it better. The volume begins with a fascinating article from Aaron Kirschenfeld and Alexa Chew, "Citation Stickiness, Computer-Assisted Legal Research, and the Universe of Thinkable Thoughts." In their article, Professors Kirschenfeld and Chew shed light on whether the switch from print research to digital research has changed the way that law students and lawyers conduct research. To do so, the article uses the "citation stickiness" metric, which analyzes whether a citation appears in at least one party's brief and again in the court's opinion. Professors Kirschenfeld and Chew used citation stickiness to study how often parties to an appeal and judges hearing that appeal agreed on the relevant cases to resolve the issues presented, focusing on cases from 1957, 1987, and 2017. Their research shows, surprisingly, that citation stickiness increased over time, meaning that there was less coherence and agreement between advocates and courts in the pre-digital era, not more, as predicted by earlier scholarship.

Next, in "Dimensions of Being and the Limits of Logic: The Myth of Empirical Reasoning," Kenneth Chestek takes on the common misperception that the law should be purely objective, logical, and rule-bound. Rather, law is a human institution that must respond to human needs to maintain its relevance. Professor Chestek identifies human interests, or "dimensions of being," and explains how each of these dimensions might become the subject of a legal dispute that courts must be prepared to account for in the cases before them. To make decisions that serve the needs of the litigants as well as society in general, judges must appreciate all of these dimensions of being.

In "Reclaiming the Singular They in Legal Writing," Robert Anderson challenges the labeling of the singular "they" as ungrammatical, concluding this labeling is a sexist attempt to institute the use of the masculine "he." Professor Anderson substantiates his argument by tracing the history of the use of the singular they, which predates the emergence of modern English. Professor Anderson argues that today's legal writing authorities perpetuate efforts to subordinate females to the role of second-class citizens within their own language by refusing to adopt the singular they. Ultimately, Professor Anderson concludes that the singular they is not only grammatical, but simple and inclusive.

In the volume's final article, Jacob Carpenter explores passive voice and nominalizations in a depth that style guides, textbooks, and speakers have not. Professor Carpenter uses interdisciplinary linguistics and cognition studies to explain how passive voice and nominalizations impede readers and weaken writing. To further flesh out the nuance of passive voice, the article also examines how passive voice can be used effectively to create flow and help focus readers. Professor Carpenter concludes that attorneys can become more effective advocates when they learn to control passive voice and nominalizations in their writing.

Next, noteworthy practitioners Raffi Melkonian and Tiffany Graves contribute invited essays that examine the impact of COVID-19 on lawyers' work. First, in "Thoughts and Worries About Appellate Practice Post-Pandemic," Melkonian, in a beautifully written piece, asks whether, and if so, how and why the pandemic will change legal writing, appellate work in court, attorney development, or the collegiality of the appellate bar. He offers ways he thinks the readers have changed, and the impact those changes should have on attorney writing. Melkonian concludes that while we will likely remember these years as world-changing, attorneys can manage these changes in a way that makes the profession a better one. This essay is not to be missed.

In "Remote Legal Services in the Age of COVID: How Legal Services Organizations Adapted to the Pandemic to Serve Pro Bono Clients," Graves, law firm pro bono counsel, explores how the pandemic disrupted pro bono work by legal services organizations. Graves highlights the monumental work that legal services organizations did to continue serving their clients throughout the pandemic, focusing first on how legal services organizations, in general, were able to adapt to serve clients with civil legal needs. Graves then explores specific challenges and solutions in the areas of domestic violence and immigration cases. Graves concludes that the lessons learned in the pandemic can continue to increase access to justice and offers a list of specific services that she hopes organizations will maintain even after the pandemic.

Amy Griffin's essay, "If Rules They Can Be Called," asks who gets to decide what counts as law in the U.S. legal system, which is governed almost entirely by unwritten rules. In 2016, Bryan A. Garner and twelve judges published The Law of Judicial Precedent, which essentially codified unwritten rules related to the operation of precedent. That text has since become a source of authority on legal authority. Professor Griffin's essay asks for further discussion as to whether this pseudo-codification of norms should be appropriately presented as definitive blackletter law. Professor Griffin notes, for example, that textualization may cement norms prematurely, inhibiting their evolution. In addition, it reduces

many of the most frequently cited blackletter principles, the result of complex tools of judicial reasoning, to a rule format to which they are not well suited.

The volume continues with two annotated bibliographies, sure to be extremely useful to anyone wanting to read or write in these areas. First, Barbara Gotthelf compiles resources on oral argument: why it is important; how to do it; how to teach it; what judges think about oral argument; and how bias affects oral advocacy. Second, Margaret Hannon contributes a comprehensive bibliography of scholarship that involves legal writing "mechanics": grammar, usage, and punctuation; plain language; and citation. We have heard a great deal of positive feedback from our readers about these bibliographies, and we are pleased that we can continue to offer entries in this genre.

The volume concludes with book reviews that provide a range of different resources for improving teaching and writing. Ashley B. Armstrong reviews Small Teaching: Everyday Lessons from the Science of Learning, by James M. Lang, which describes small things that educators can do to improve learning outcomes in their classrooms. In his review of Noise: A Flaw in Human Judgment, by Daniel Kahneman, Olivier Sibony, and Cass R. Sunstein, Patrick Barry focuses on the distinction between bias and noise, and how failing to recognize and separate the two leads to flawed decisionmaking. Ian Gallacher reviews George Saunders's A Swim in a Pond in the Rain: In which Four Russians Give a Master Class on Writing, Reading, and Life, in which Saunders presents and dissects seven short stories from Russian nineteenth-century literature. Anne E. Mullins reviews The Legal Scholar's Guidebook, by Elizabeth Berenguer, an outstanding resource for newcomers to scholarly legal writing. Todd M. Stafford reviews James Boyd White's Keep Law Alive, in which Boyd calls on all of us to defend and preserve the rule of law. DeShayla M. Strachan reviews Rhetoric, Persuasion, and Modern Legal Writing: The Pen is Mightier, by Brian L. Porto, which enhances our understanding of classical rhetorical techniques through the words of five Supreme Court justices. The volume's book reviews conclude with Carolyn V. Williams's review of Her Honor: My Life on the Bench . . . What Works, What's Broken, and How to Change It, by Judge LaDoris Hazzard Cordell, which uses personal narrative, statistics, and history, to explain why diversity in the law matters.

Finally, we must say farewell to two of our editorial board members: Jeffrey Jackson, lead editor, to serve as Interim Dean of Washburn University School of Law; and Abigail Patthoff, associate editor, to create space to focus on other projects. We were incredibly lucky to have

someone with Jeff's expertise and experience to provide guidance not only to our authors but also to the board itself. Jeff has served as a lead editor for the journal for nine years and as an associate editor prior to that. Jeff is a scholar in his own right who has written on, among other topics, the history of legal writing and legal education. Abby was the journal's first social media editor and we are deeply grateful to her for the time and effort that she put into setting the foundation for the journal's social media presence. Even when Abby transitioned into an associate editor role, she continued to provide invaluable support for subsequent social media editors. In addition to being a valued member of our journal, Abby is also a wonderful teacher and scholar who was recently awarded Chapman University's Faculty Excellence Award in recognition of her exceptional service in the areas of scholarly and creative activity, teaching, and service.

We also send our heartfelt thanks to Dr. JoAnne Sweeny, Co-Editor-in-Chief, who will be transitioning to the role of Editor-in-Chief Emeritus. JoAnne has been a valued member of our Editorial Board for seven years and Co-Editor-in-Chief for the last six. In that time, she has been an outstanding leader and a relentless advocate for the journal, and a joy to have as a colleague. We're delighted that she'll remain a member of the board in the Emeritus role and are very grateful for the support that she will continue to offer to the journal.

One last note from Margaret, on behalf of the entire Board: a huge thank you to Editor-in-Chief Emeritus Ruth Anne Robbins, who stepped in this year as Co-Editor-in-Chief while JoAnne was on leave. We're so lucky to have Ruth Anne's leadership and are incredibly grateful for her continued dedication to the journal.

*Margaret Hannon & Ruth Anne Robbins (2022)*

ARTICLE

# Citation Stickiness, Computer-Assisted Legal Research, and the Universe of Thinkable Thoughts

Aaron S. Kirschenfeld*
Alexa Z. Chew**

## Introduction

This article seeks to answer two main questions. The first is whether courts cited the same cases as the parties more often during the print era than during the digital era. The second is what, if anything, the answer to the first question can contribute to the debate about how print-era forms of organizing and describing case law influenced researchers' behavior. To that end, we sampled cases from 1957, 1987, and 2017, and used "citation stickiness" to study the differences in how parties and judges cited authorities during each of those years. In short, we found that there is less agreement about what case law authorities are relevant to an appeal between parties and judges in 1957 than in 1987 and 2017. This casts doubt on the existence of a cozy "universe of thinkable thoughts," or the longstanding theory that classification schemes like West's American Digest System led to greater coherence and stability in the development of common law in the United States.

In section I of this article, we review the literature on how switching from print research to digital research influences lawyers' research habits and conceptions of the law. We then look at prior empirical studies assessing the kind of law found by researchers within different research environments or by using different research processes.

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** Clinical Professor of Law, University of North Carolina at Chapel Hill, who had top notch help from her UNC Law research assistants, Taylor Carrere and Marshall Newman. This study would not have been possible without their careful work.

In section II of this article, we introduce the citation stickiness metric and describe our methodology.

In section III we present our results, which show that there is a significant difference between 1957, 1987, and 2017 in how often courts cite cases originally cited in at least one party's brief. We also explore some other possible conclusions gleaned from our data. Finally, we speculate on the reasons why we found what we found and identify questions for further study.

## I. "Thinkable thoughts" and legal research

This section considers the issues raised by the vibrant and long-standing debate over the influence of print-era case law classification systems on legal research and the development of common law in the United States.

### A. The influences of print-era case law classification systems

Did tools developed during the print era to publish, describe, and classify case law also influence the ways lawyers thought about the law and, consequently, the way that law developed? Many law librarians and legal scholars have taken up this question in the past forty years.[1] Some have contended that the American Digest System had a good deal of influence.[2] Some, less so.[3]

The arguments advanced are complex, but for our purposes can be reasonably simplified as follows: print-era classification systems and patterns of publication created coherence and stability in the landscape of legal information. Early digital sources mirrored the structure of these systems and patterns of publication, but new tools and sources made available during the digital era would challenge the ways that researchers come to know law.

The work of Bob Berring deserves special attention.[4] It posits that tools like the American Digest System and the headnotes that constituted it normalized "legal language and legal meanings . . . [forming] the ground

1 Stefan H. Krieger & Katrina Fischer Kuh, *Accessing Law: An Empirical Study Exploring the Influence of Legal Research Medium*, 16 Vand. J. Ent. & Tech. L. 757, 759 n.6 (2014) (collecting articles and studies about "the influence of digitization on the law generally and on legal research specifically").

2 *See* Richard A. Danner, *Influences of the Digest Classification System: What Can We Know?*, 33 Legal Reference Servs. Q. 117, 128 n.49 (2014) (collecting works about "the extent of the digest's influences in categorical terms").

3 *See, e.g.*, Peter C. Schanck, *Taking Up Barkan's Challenge: Looking at the Judicial Process and Legal Research*, 82 Law. Libr. J. 1 (1990).

4 For an excellent summary of Berring's work on this topic, see Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law*, 99 Law Libr. J. 193 (2007).

of integration and coherence in substantive law." These tools, in turn, influenced "the way legal researchers conceptualized the law."[5] Indeed, the classification systems and publishing patterns created "a cozy universe" of legal meaning such that "all of those trained within it have created a conceptual universe of thinkable thoughts that has enormous power."[6]

Plenty of other scholars have addressed questions about "the extent to which the Key Number System influences the law itself."[7] Barbara Bintliff described the West digests as "allowing researchers to understand the relationship, context, and hierarchy of identified rules . . . . [Lawyers] have to think in terms that match its organization."[8] Before the advent of computer-assisted legal research (CALR), digests and "a predictable, stable judicial system . . . became almost inextricably intertwined."[9] Bintliff noted the difficulties of constructing computerized systems that would allow researchers to discover legal rules as readily as was possible in the print era, but left the door open to technological advances someday catching up.[10] More on that in a moment.

Carol Bast and Ransford Pyle added to that line of thinking with words of further warning.[11] They described the move to CALR as a paradigm shift away from coherence and stability in the law, legal thinking and, by extension, legal research.[12] The paper concluded that digital resources and processes will bring about "a more primitive legal regime," lessening lawyers' consensus understanding of hierarchic legal concepts.[13]

F. Allan Hanson then added an anthropological perspective to this argument in his analysis of information management systems and the law.[14] In seeking to explain what differentiated print resources and

5 Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Calif. L. Rev. 15, 22 (1987); *see also* Robert C. Berring, *Ring Dang Doo*, 1 Green Bag 2d 3, 3 (1997) ("Without realizing it, we all depended on West for giving us ways to think coherently about the hundreds of thousands of cases that were stuffed into the reporters.").

6 Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. App. Prac. & Process 305, 311 (2000) [hereinafter Berring, *World of Thinkable Thoughts*]; *see also* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 Calif. L. Rev. 1673, 1693 (2000) [hereinafter Berring, *Search for Cognitive Authority*] ("Generations of lawyers learned to conceptualize legal problems using the categories of the Topics and Key Numbers of the American Digest System.").

7 Daniel Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 Law Libr. J. 229, 230 (2007).

8 Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 Law Libr. J. 338, 343 (1996).

9 *Id.* at 344.

10 *Id.* at 351.

11 Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 Law Libr. J. 285 (2001).

12 *Id.* at 286.

13 *Id.* at 302.

14 F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 Law Libr. J. 563 (2002).

research processes, he also focused on the "hierarchical, taxonomic classification" of the digests, arguing that their categories "have been reified into principles thought to preside over 'the law,' understood as a self-contained, independently existing system."[15] Indeed, Hanson saw automated research as a threat to the doctrine of precedent, a cornerstone of the common law.[16] As for research, computerized systems were apt to turn up a wider variety of cases that could be considered precedential, unlike in the print era, when "opposing attorneys would tend to develop their arguments on the basis of the same cases, nearly all of which were familiar to judges and experts in that field of law."[17]

Jean Stefancic and critical race theory co-founder Richard Delgado also weighed in, arguing that "professionally prepared research and indexing systems . . . function like DNA; they enable the current system to replicate itself endlessly, easily, and painlessly."[18] And in doing so, these print-era systems facilitate the quick research of traditional legal arguments but hamper the research needed for innovative jurisprudence.[19] Writing "at the dawn of the computer revolution"[20] in 1989, Delgado and Stefancic opined that "[c]omputerized word-search strategies promise some hope of breaking the constraints imposed by older systems" by, for example, allowing a researcher to "combin[e] two [index] categories in the same search."[21] This hope had largely dissipated when Delgado and Stefancic revisited their triple helix dilemma in 2007: "our predicament is little better than it was in the days of searching in the dusty volumes of the West decennial digests and, in some respects, more acute."[22] They argued that CALR "may in fact impede the search for new legal ideas" in part because legal training still taught lawyers to think in terms of print-era index categories.[23]

15 *Id.* at 570.

16 *Id.* at 579.

17 *Id.* at 580 (citing Bintliff, *supra* note 8, at 343–44). Bintliff's claim, upon which Hanson's relies, is a descriptive one: "Lawyers in Florida and South Dakota, Ohio and Nevada, consulted the same books, used the same organizing framework, found the same cases. The arguments crafted from these cases encouraged the best legal thinking, and gave judges the opportunity to explore the many sides of an issue and make a decision that was understandable." However, Bintliff's descriptive claim is not obviously supported in *Thinking Like a Lawyer*. It appears to be a "common sense" claim rather than one supported by historical research.

18 Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 Stan. L. Rev. 207, 208 (1989).

19 *Id.*

20 Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions—The Triple Helix Dilemma Revisited*, 99 Law Libr. J. 307, 309 (2007).

21 Delgado & Stefancic, *supra* note 18, at 209, 219.

22 Delgado & Stefancic, *supra* note 20, at 310.

23 *Id.* at 310.

These arguments about revolutionary changes can be understood in context, as legal publishers consolidated, added materials, and developed newer and more powerful computerized resources. In 1986 and 1987, when Berring began writing on the topic, full-text searching on Westlaw had only been available for a handful of years. And throughout the 1990s, the habits of law students were changing. On both counts, it was certainly worth speculating—and cautioning—about the new era to come.[24] But after a decade of relative stasis in how legal resources are created and how legal research is conducted, we figured it was time for a reappraisal.

We have chosen to pick up this line of thought with a question posed by Dick Danner: "How does one show what influences research tools might have on lawyers' thinking about the law . . . during the late twentieth century when print digests began to be bypassed in favor of electronic tools?"[25] The first step in that process is to look at studies that have attempted to answer it.

## B. Studies of research and resources

In seeking to quantify the influence of print-era classification tools on the habits of legal researchers, law librarians and other legal scholars have conducted surveys and crunched numbers. There have been many empirical studies on the topic.[26] Below, we look at the ones relevant to our question.

### 1. User studies

Several studies have looked at the thought processes and habits of legal researchers to distinguish between how researchers use print or print-era sources and how they use electronic sources and methods.

Lee Peoples set about to test whether researchers use digests or other subject-organized systems to locate relevant legal rules but use electronic sources, such as full-text searches, to locate relevant facts.[27] To that end, Peoples designed a study to learn whether electronic resources were superior to print digests for locating cases with similar fact patterns.[28] The subjects were law students, and the study was conducted in 2004.[29]

24 Berring noted that the changes he had anticipated in the late 1980s were not as extensive as he had suspected. Berring, *Search for Cognitive Authority*, *supra* note 6, 1707–08; *see also* Hanson, *supra* note 14, at 579.

25 Danner, *supra* note 2, at 129.

26 *Id.* at 134 n.74.

27 Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 Law Libr. J. 661 (2005).

28 *Id.* at 668.

29 *Id.*

Peoples's results cast doubt on the hypothesis that students would be more successful locating relevant legal rules by using digests and more successful locating relevant fact patterns by using full-text searching.[30] The study found that electronic resources were not superior to print digests for finding cases with similar fact patterns.[31] Electronic sources, likewise, were not superior to print sources for locating relevant legal rules.[32]

This study is important to our inquiry because it challenges the notion, developed in the literature, that print-era tools would be better for locating relevant legal rules. It suggests that the structure of these print-era tools may not be as influential on the thoughts and habits of legal researchers as theorized. But there are a couple of problems. First, 2004 is far enough in time from the introduction of electronic sources that differences between print-era structures and digital structures may be hard to parse. Second, the subjects of the study were law students, who might be presumed to have less experience with solving legal problems and using legal sources than practicing attorneys.

A few years later, the behavior of practicing attorneys was studied by Joseph Custer, who cast a bit more light on how researchers with more domain-specific problem-solving experience would use legal resources.[33] Custer's survey sought to test whether (1) attorneys use more than one system to locate relevant law, (2) some attorneys never use digests, (3) attorneys tend to research facts more than legal rules or doctrines, and (4) attorneys pay little attention to digest categories.[34] The subjects of the study were attorneys in Kansas.[35]

Significantly for us, the survey found that more than half of the attorneys did not use digests at all.[36] It also found that attorneys pay little attention to digest categories.[37] These findings challenged assertions that print-era digest categories led attorney researchers to think about the law in terms of those abstract classifications.[38] Instead, the findings suggest a weak connection between practitioners and subject-based classifications of case law. However, the survey was conducted in the late aughts, meaning it is even further in time from the introduction of digital

30 *Id.* at 670.

31 *Id.*

32 *Id.*

33 Joseph A. Custer, *The Universe of Thinkable Thoughts Versus the Facts of Empirical Research*, 102 Law Libr. J. 251 (2010).

34 *Id.* at 258. The contentions were derived from those first posed by Schanck, *supra* note 3.

35 *Id.*

36 *Id.* at 260.

37 *Id.* at 262–63.

38 *Id.* at 264. Custer's criticism is mostly directed at Dabney, *supra* note 7.

sources than Peoples's study. Again, we were stymied in our search for a study comparing how practitioners would behave with print-era sources as compared with digital sources.

Susan Nevelow Mart tested the differences between subject-organized case law systems created with human intervention and those created with computer algorithms.[39] The study pitted subject-organized system against subject-organized system, and it found that researchers were more successful using systems where case indexing was done by humans.[40] The research subjects were law students, and the study was conducted in the early 2010s.[41]

Finding that a higher percentage of relevant cases are located using a human-curated case-indexing system[42] suggests that the print-era digest systems remained powerful tools for researchers looking to find legal rules well into the electronic era. The question remains, however, whether print-era tools would perform the same way when they were the only game in town.

Stefan Krieger and Katrina Fischer Kuh sought to study the differences between the processes used in print and electronic research, as well as the results of each.[43] Law students in the early 2010s were the subjects, and these students researched a problem and described their research processes.[44] Half used print sources and half used electronic sources.[45]

The study's findings showed that students conceived of and structured their research differently depending on which research medium they were using.[46] The findings are at odds with those of Custer, suggesting that "electronic researchers can, in fact, be expected to emphasize fact terms as compared to legal concepts in their research and to rely more on primary sources and less on secondary sources than print researchers."[47] This tension might be the result of the different populations studied by each, or perhaps of the small sample size used by Krieger and Kuh. It also might be the result of different legal research training. The study subjects were

39 Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citator Results in Westlaw and Lexis*, 32 Legal Reference Servs. Q. 13 (2013).

40 *Id.* at 14–15.

41 *Id.* at 26.

42 *Id.* at 38.

43 Krieger & Kuh, *supra* note 1, at 762.

44 *Id.* at 766–67.

45 *Id.* at 762.

46 *Id.*

47 *Id.* at 789.

selected in part based on the students' print research experience beyond the required first-year course, which typically included one print research assignment,[48] but the study does not describe how first-year students were instructed to use print sources and electronic sources. In any event, whether a tendency to focus on facts in research using electronic sources suggests much of anything about the influence of print-era systems also remains unanswered.

These studies, conducted on users of legal research systems, approach the problems raised by Berring from different angles and ultimately do not reach a consensus. None test attorney research habits from the print era. To get a better sense of that, we turn now to citation studies that more directly address the question.

### 2. Citation studies

Two recent studies sought to explain historical differences between pre-CALR legal research and post-CALR legal research. Both, like ours, are citation studies of court decisions. And both, therefore, consider the work of practitioners—namely, judges—and draw data from the past. But both studies also limited their scope to judicial writing, looking at citation practices in judicial opinions but not attorneys' briefs.

Paul Hellyer studied a sample of California Supreme Court opinions to test whether research is more efficient using CALR tools and whether those tools reshape the law.[49] Looking at a sample of 180 cases from 1944 to 2003, Hellyer sought to identify changes in quantity, recency, and type of legal authority cited by courts.[50] Hellyer hypothesized that, if CALR had influenced research practices, contemporary courts would be (1) citing more cases in their opinions, (2) citing more cases from outside their jurisdiction, (3) citing more recent cases, (4) citing authorities only available electronically, and (5) citing more secondary sources as authoritative.[51] Hellyer did find "some significant changes in the court's citations to legal authority," but concluded that there was "no clear indication" that the introduction of CALR had caused the changes.[52]

Hellyer's study differs from ours in several important respects. First, it studied only judicial behavior, and judges form only a small subset of all practitioners. Second, it studied only citations in majority opinions,[53]

48 *Id.* at 764 n.29.

49 Paul Hellyer, *Assessing the Influence of Computer-Assisted Legal Research: A Study of California Supreme Court Opinions*, 97 Law Libr. J. 285 (2005).

50 *Id.* at 285.

51 *Id.* at 290.

52 *Id.* at 293.

53 *Id.*

thus excluding citations in concurrences and dissents that might reflect additional judicial research. Third, it excluded citations that appeared in quotations from other cases and citations to prior opinions in the same case, which would lead to a lower number of cited cases than our study. And finally, by analyzing only three cases per year, the results are likely difficult to replicate.

Next, Casey Fronk conducted an empirical analysis of 1,200 federal appellate cases from 1957 to 2007.[54] The study was designed, among other things, to examine "quantitative and stylistic" changes in judicial citation practices resulting from changing research sources.[55] Like our study and unlike Hellyer's, Fronk's methodology relied on Westlaw's "Table of Authorities" feature,[56] and therefore included all unique case citations in majority, concurring, and dissenting opinions.

Fronk found the greatest effect of computerized legal research on judicial citation practices between 1977 and 1987.[57] This conclusion was reached by showing the growth of expository citation over string citation as access to CALR increased.[58] While useful in terms of showing both the quantitative and qualitative changes in judicial citation, the study does not examine changes in how advocates, more broadly, have conducted legal research over time.

Hellyer's study concluded by saying that "CALR's effects on courts cannot be measured by an analysis of citations in court opinions. If this is true, what is the appropriate measurement?"[59] We think we have an answer.

## II. Measuring citation stickiness

Next, we introduce the citation stickiness metric and describe the results of an initial study of the topic, and why it is useful for exploring the concepts of legal information discovery tools and their influence on interpreting law.

54 Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U. Ill. J.L. Tech. & Pol'y 51, 53 (2010).

55 *Id.* at 53, 67.

56 *Id.* at 67–68.

57 *Id.* at 78. Fronk describes the result of a 1976 study of "actual federal court research methods" that showed that federal appellate law clerks used CALR systems from 0.26 to 7.33 hours per month, and that monthly usage by district court law clerks was less than half that. *Id.* at 61 (summarizing Alan M. Sager, An Evaluation of Computer Assisted Legal Research Systems for Federal Court Applications 77 tbl.25 (1977)).

58 *Id.* at 76.

59 Hellyer, *supra* note 49, at 298.

Essentially, the citation stickiness metric allows us to examine the work of both practicing attorneys and judges in the adversarial system.[60] And in the context of our question, it allows us to study the level of agreement between each party and the court about what cases are relevant enough to cite when litigating and resolving a dispute.

Interestingly, Berring highlighted the importance of using court opinions and briefs to study the meaning of a court's decision.[61] And the original citation stickiness article concluded that "the variety of research tools and methods" may explain differences in rates of citation stickiness.[62] It seems, then, that our metric might expose data better able to tell us about the structure of legal information, legal research, and the law's development than those used to do so in the past.

### A. About citation stickiness

A citation is "sticky" if it appears in a court opinion and at least one party's brief.[63] Sticky citations show how often a court cites the same authorities as at least one of the litigants.

Endogenous citations are citations that appear for the first time in an opinion, springing from the court itself.[64] These citations, necessarily, are included as a result of independent research by courts.

Super-sticky citations are citations cited in both parties' briefs and then again in the court's opinion.[65] These are cases that all involved—the adversarial parties and the court—think are important to resolving the dispute.

### B. Our methodology

As much as possible, we followed the same methodology as the original citation stickiness study.

For our dataset, we selected Fourth Circuit cases from 1957 for a few reasons. First, and most importantly, we had access to historical Fourth Circuit briefs in our home institution's law library collection. Second, we wanted to be able to compare our data to 2017 data from the original

60 Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. App. Prac. & Process 61, 67 (2019) ("[C]itation stickiness is worth studying because it provides a window into judicial decisionmaking. Judges often lament the quality of attorneys' briefs. Attorneys often lament the quality of judges' decisions, especially when the opinions explaining those decisions veer away from the issues set forth in the briefs.").

61 Berring, *Search for Cognitive Authority*, *supra* note 6, at 1703–04 ("The typical decision contains the reasoning of a judge or judges, answering problems raised in the briefs of parties on appeal. . . . The considerable work done by appellate attorneys does not travel with the case. Nor do links to the various sources the attorneys used.").

62 Bennardo & Chew, *supra* note 60, at 108.

63 *Id.* at 64.

64 *Id.*

65 *Id.* at 84.

citation stickiness study. Finally, for the year, we wanted to choose a time definitively in the pre-CALR era.

We began our search for a sample in Westlaw's cases database. We narrowed to Fourth Circuit cases and then ran a plain language query of "1957" to ensure that all cases had at least that string of numbers within the document. We then filtered the results by date for 01/01/1957–12/31/1957 to ensure our 1957 cases were indeed decided in 1957. This gave us 181 total cases.

Then, we eliminated cases where there would not be a full opinion or where there might be confounding "noise" from briefing by nonparties. So within our results we searched for "curiam OR amicus OR amici" and eliminated any cases returned. There were 74 cases matching, so we subtracted those from our total, leaving us with 107 cases.

We also had to figure out how to get citations from the parties' briefs reliably. Since briefs from 1957 are not available on Westlaw, we relied on the print collection of Fourth Circuit briefs at the University of North Carolina's Kathrine R. Everett Law Library. These briefs were conveniently located at our institution and could be scanned on-site for data collection. Local court rules also required that parties create tables of authorities cited and include them with their filings.[66] Like the original study, we excluded cases in which there were supplemental briefs or amicus briefs in order to capture cases progressing along the traditional pathway of appellant brief, appellee brief, and (when included) appellant's reply brief.[67] One case was also excluded as one of its briefs cited no cases.[68]

We verified that the briefing in each case met our criteria. We also excluded cases from 1957 if all briefs were not available in typeset format in the print collection. The title page of each brief was scanned as was the table of authorities cited. The unique citations from the tables of authorities were entered into our spreadsheets.

To collect the 1987 dataset, we followed the same procedure as for the 1957 dataset except to substitute 1987 for 1957 in the Westlaw searches and filters. Like the 1957 briefs, the 1987 briefs are not on Westlaw but are in our institution's print collection. An in-depth description of data collection from the 2017 cases can be found in the original citation stickiness publication.[69] The main difference among the dataset collections, however, is that unpublished opinions also needed to be removed from the samples in 1987 and 2017.

66 Revised Rules of the United States Court of Appeals for the Fourth Circuit, Rule 10 §§ 2(a), 4(a), 5 (1952).

67 Bennardo & Chew, *supra* note 60, at 79.

68 Brief of Appellee, *United States v. One 1955 Model Ford Convertible Auto.*, 241 F.2d 86 (4th Cir. 1957).

69 Bennardo & Chew, *supra* note 60, at 78–81.

At first, we planned to select the first 25 cases from each year 1957 and 1987 because the original study used 25 cases from each circuit, including the Fourth. That sampling method was chosen to ensure diversity of subject matter and a practically (but not perfectly) random sample. That said, then as now—the number of citations, not the number of cases—is the relevant sample size. After beginning our data analysis and realizing that each case's opinion had far fewer citations in 1957 and 1987 than in 2017, we increased the number of cases we reviewed so that the sample size of citations would be closer to the 2017 sample sizes.

Now, for the size of our samples. The 25 cases from 2017 contained 436 unique citations to decisional authority.[70] The briefs in those cases contained 2,002 unique citations to decisional authority. The 28 cases from 1987 contained 236 unique citations to decisional authority. The briefs in those cases contained 1,018 unique citations to decisional authority. The 27 cases from 1957 contained 309 unique citations to decisional authority. The briefs in those cases contained 1,057 unique citations to decisional authority. As in the original citation stickiness study, the relevant sample sizes are the numbers of unique citations in judicial opinions and the number of unique citations in briefs. The sample sizes were large enough to show significant differences in the stickiness rates as measured by confidence intervals.[71]

## III. Results

The results of our citation study surprised us. We hypothesized that we would see a higher rate of citation stickiness in pre-CALR opinions based on the more coherent nature of case-finding done using the digests and with a more limited set of published authorities to draw from. In fact, we found that the opposite was true. The rate of citation stickiness was lower in the earlier cases, and higher in the post-CALR opinions. For the 1987 cases, decided right in the middle of 1957 and 2017, the rate of stickiness was also in the middle.

**70** Decisional authorities result from decisions made by judges and similar decisionmakers. *See* Bennardo & Chew, *supra* note 60, at 81 n.77; *see also* William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 Law Libr. J. 267, 267–68 (2002). The Manz study included citations to judicial opinions and administrative decisions, but excluded citations to constitutions, statutes, and regulations. Manz, *supra* note 70, at 268.

**71** As in the original *Citation Stickiness* article, we calculated 95% confidence intervals using the Exact test in Stata. *See* Bennardo & Chew, *supra* note 60, at 83. As the original article explained, "A confidence interval expresses the percentage probability that data lies between two limits." *Id.* at 83 n.80 (citing Alan R. Jones, Probability, Statistics and other Frightening Stuff 102 (2019)).

### A. Some specifics

In the U.S. Court of Appeals for the Fourth Circuit cases sampled from 2017, 55% of citations in the opinion were sticky, meaning they were cited in at least one party's brief. In 1957 cases sampled from the same circuit, only 44% of citations in the opinions were sticky. This is a significant difference.[72] In 1987 cases from the Fourth Circuit, 48% of citations in the opinions were sticky. This is not a significant difference from the 55% stickiness rate in the 2017 cases or the 44% stickiness rate in the 1957 cases.[73]

What this means is that the court in 1957, before the advent of computer-assisted legal research, introduced cases to its opinions without those cases having been raised in either party's brief 56% of the time. In 1987, the court did this 52% of the time. And in 2017, the court did this only 45% of the time. The court, then, was more likely to identify relevant authority on its own—endogenously—when the universe of case finding tools was more unified and the number of available cases was smaller.

When looking at "super sticky" citations, our findings show a similar trend of disagreement over relevant decisional authority and, perhaps, incoherence in legal doctrine in pre-CALR cases when compared with post-CALR cases. In 2017, unique cases cited in court opinions appeared in both parties' briefs 28% of the time. In 1987, unique cases cited in court opinions appeared in both parties' briefs 22% of the time. And in 1957, unique cases cited in court opinions appeared in both parties' briefs only 15% of the time. In other words, nearly 3 out of every 10 cases cited by a court were also cited by both parties in 2017, whereas in 1957, that happened about 3 out of every *20* times—or half as often.

Put yet another way, imagine that, after the attorneys for both sides of a case thoroughly researched and argued their sides to the Fourth Circuit in 1957, both attorneys sat down together to read the court's opinion. Our results show that 8.5 times out of 10, at least one of the attorneys might think, why didn't *I* cite that case?

**72** The 95% confidence intervals do not overlap for these two sets of citations:
1957: 38.71%–50.07%
2017: 50.24%–59.78%

**73** The 95% confidence intervals do overlap for the other pairs of citations:
1957: 38.71%–50.07%
1987: 41.36%–54.46%
2017: 50.24%–59.78%

Note that the confidence interval is much tighter for 2017 than for the earlier years; this is a function of the sample size (436 case citations in the opinions) being about 50% larger than the sample size of the earlier years (309 for 1957 and 236 for 1987).

| | 1957 | 1987 | 2017 |
|---|---|---|---|
| Unique citations | 1,229 | 1,141 | 2,198 |
| Sticky citations: appeared in opinion and at least one brief | 44% | 48% | 55% |
| Super sticky citations: appeared in opinion and both briefs | 15% | 22% | 28% |
| Citations in briefs that appeared in opinions | 13% | 11% | 12% |
| Average number of cases cited per opinion | 11 | 9.4 | 17.4 |
| Average number of cases cited by parties | 37.8 | 40.7 | 80.1 |
| Average number of sticky cites per opinion | 4.9 | 4.5 | 9.6 |
| Average number of endogenous cites per opinion | 6.1 | 4.9 | 7.8 |

### B. Some interpretations and wild speculation

Our results show how often the Fourth Circuit cited to the same authorities as the parties at three moments in time.[74] Over our sixty-year study period, we observed that stickiness increased from 1957 to 1987 to 2017. This at least means that, pre-CALR, there was less coherence or agreement between advocates and courts than previously believed. This is counter to much of the commentary.

We think this is an interesting finding on its own, but inquiring minds want to know why citation stickiness increased over this period, even though the dominant theory predicted that citation stickiness would decrease as CALR exploded the cozy universe of thinkable thoughts. We have some ideas, which you can read once you finish this paragraph. But first, a few things are probably *not* causing the upward trend.[75] We can probably eliminate some causes based on prior research: Per Fronk, changes in judicial style, workload, and so on are unlikely drivers of citation stickiness.[76] Other unlikely drivers include individual judge characteristics, such as experience, party affiliation, or judicial role, per the original citation stickiness study.[77] Now, on to the causes that have more potential.

First, researchers might be converging on the same cases because tools measuring depth of treatment were easily available in 2017. Hanson argued that a big problem with the digests is that there was "no evaluative

74 *See* Bennardo & Chew, *supra* note 60, at 105.

75 For our thoughts on what could be causing the upward trend, see *infra* section III.C.

76 Fronk, *supra* note 54, at 79.

77 *Id.* at 110–11.

component" with the case-finding tool that would "help the researcher separate the important [cases] from the vast majority that merely mentioned the relevant point of law without making a notable contribution to it."[78] Now, on Westlaw for example, word searches, citators, and tables of authority all produce lists of cases with an icon indicating depth of treatment. The "atleast" connector also makes it easy for researchers to limit results to cases that use a particular word many times, a rough proxy for depth of treatment in the word search context.

Second, stickiness might have risen in the Fourth Circuit over the past 60 years because of the increasing rigor in research and writing instruction during law school.[79] This rigor has become more uniform across law schools in the past 30 years, which might lead to attorneys and judges using similar methods for locating relevant precedent, which leads to similar research results and thus cited cases. For example, more attorneys and judges would have learned how to use depth of treatment tools during law school, both because these tools exist now and because research instruction has increased.

Third, perhaps because of reasons one and two, lawyers might be better now at finding cases that judges agree are relevant enough to include in their written decisions. The average number of sticky cites per opinion doubled from 1957 to 2017, going from 4.9 sticky cites per opinion to 9.6. This increase tracks the increase in the average number of cases that the parties cite, which has also doubled from 1957 to 2017, going from 37.8 cases to 80.1. However, the average number of citations in opinions did not increase at the same rate: the 2017 opinions had about 1.6 times the number of citations as the 1957 cases. So, by doubling the number of cases cited in briefs, parties have doubled the number of sticky cases in those briefs, even though the percentage of sticky cases cited in the briefs has stayed the same.

Fourth, Fronk's documented decrease in string cite usage as a percentage of overall opinion cites could increase stickiness by limiting the number of new cases that a court introduces by string cite.[80] Fronk also reasoned that the increase in expository citation suggested that judges were spending more research energy per cite, despite a "caseload explosion" of 630% from 1955 to 2005.[81] If Fronk is correct that the

78 Hanson, *supra* note 14, at 569.

79 The Fourth Circuit does not track exactly with the results of Marvell's citation stickiness study from the early 1970s, which found a citation stickiness rate of 55% for 30 Sixth Circuit civil opinions issued in 1971 and 1972. *See* Thomas B. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversarial System 134–36 (1978).

80 *See* Fronk, *supra* note 54, at 69.

81 *Id.* at 79.

research cost per cite has increased over time, then the cost of finding and adding endogenous citations to an opinion would likely be higher than the cost of adding sticky citations that have already been vetted and described by the parties. However, this explanation seems less convincing given the increase in number of endogenous cites in opinions has increased (although not by much) from 6.1 in 1957 to 7.8 in 2017.

Fifth, it is also possible that CALR algorithms have changed to push advocates and courts closer to one another. Having adjusted to the wilds of text searching, research scholarship has turned to how research platforms' algorithms influence research results. While search algorithms rank results differently across platforms,[82] perhaps *within* a platform, like Westlaw, the results of case law searches are more uniform than the results generated using a print digest.[83] In simple terms, attorneys and judges in 2017 might have been seeing more of the same cases in their research of a topic than technology had allowed before, by virtue of improved (or at least more consistent) search algorithms on the same platform. This is a fertile and growing area of scholarship in legal information, and more study is needed to determine the degree of algorithmic influence on legal citation practices.

Finally, judges in 2017 might have been purposefully limiting endogenous citations as part of an overall trend towards judicial minimalism. Judicial minimalism, nicely summarized by Lauren Cyphers in her student note, "is a case-by-case approach that looks only to the specific set of facts before it and crafts a decision narrowly tailored to those unique facts."[84] Delgado and Stefancic raised this possibility in 2007, concluding that electronic searching can "lead to judicial minimalism—narrow, fact-based decision making that ignores emerging legal theories and decides cases on the narrowest possible grounds."[85] Their reasoning was that CALR was better at finding concrete examples than abstract patterns, and thus fact-based searching "can easily cause you to miss [a new legal theory] that is emerging in another jurisdiction."[86] This reasoning aligns

**82** Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 Law Libr. J. 387 (2017).

**83** However, research into the use of natural language processing posits that algorithms using the technology "ground [themselves] in the forms and functions of cognitive authority of the past—perhaps such as giving cognizance to most-cited cases, adhering to jurisdictions, performing citation analysis, building on West's Topic and Key Number System, emphasizing cases annotated in *American Law Reports*, or any number of a hundred factors that make up the current terrain of the legal information environment." Paul D. Callister, *Law, Artificial Intelligence, and Natural Language Processing: A Funny Thing Happened on the Way to My Search Results*, 112 Law Libr. J. 161, 167 (2020).

**84** Lauren Cyphers, Note, *Maximalist Decision Making: When Maximalism Is Appropriate for Appellate Courts*, 123 W. Va. L. Rev. 611, 612 (2020) (citing Cass R. Sunstein, One Case at a Time ix–x (1999)); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 Mich. L. Rev. 1951, 1952 (2005)).

**85** Delgado & Stefancic, *supra* note 20, at 323–24 (suggesting Margaret J. Radin & Frank Michelman, *Pragmatist and Post-structural Critical Legal Practice*, 139 U. Pa. L. Rev. 1019 (1991), to learn more about the philosophy of legal minimalism).

**86** *Id.* at 324.

with Krieger and Kuh's study results from a few years later, that electronic researchers used fact-based searching far more than paper researchers.

### C. Wild speculation about creating a coherence measurement

It appears that we cannot yet use our results to show that stickiness means a shared sense of relevance, that is, whether the parties and court share a cozy universe of legal authorities. Yet we also wonder why stickiness wouldn't mean exactly that? Wouldn't a focus on appellate matters studied show more of the "legal concepts" than the facts?

For example, imagine a new metric called "party stickiness" or "party coherence" that looked at the number of times both parties cited a case, and whether the court also cited it. The number of times both parties cited a case would be the numerator of our new metric, but the denominator could be several things: the number of unique cases cited in the briefs, the number of unique cases cited in the briefs and opinion, or even the number of unique cases cited in the opinions. We did those calculations with our data, but we are still thinking about what they might mean, if anything. They are in the table below.

| | All | 1957 | 1987 | 2017 |
|---|---|---|---|---|
| Cases cited by both parties | 637 | 130 | 169 | 338 |
| Cases cited by both parties and opinion | 222 | 45 | 51 | 126 |
| Cases cited by both parties but not the opinion | 415 | 85 | 118 | 212 |
| Percent of cases cited by both parties out of all brief cites | 16% | 12% | 17% | 17% |
| Percent of cases cited by both parties but not in the opinion | 10% | 8% | 12% | 11% |
| Percent of cases cited by both parties compared to number of opinion cites | 65% | 42% | 72% | 78% |

To see whether citation stickiness could measure coherence will likely require looking at how courts *use* the sticky citations in their opinions, not just counting them. Both this study and the original citation stickiness study shied away from studying use because it is so time consuming. However, Brian N. Larson set out to do just that in two ambitious papers: *Precedent as Rational Persuasion*[87] and *Endogenous & Dangerous*.[88] Larson's studies analyzed federal district court opinions addressing

87 Brian N. Larson, *Precedent as Rational Persuasion*, 25 Legal Writing 135 (2021).

88 Brian N. Larson, *Endogenous & Dangerous*, 22 Nev. L.J. ___ (forthcoming 2022).

dispositive motions, with the specific legal issue studied being the affirmative defense of fair use to copyright infringement.[89] Although these first two studies used federal district court opinions, Larson is following these matters through appeal (if any), and the results of that stage of his study could help refine a coherence measurement, particularly because Larson expressly engages with the literature on citation stickiness and endogeneity.[90]

## D. So many ideas for future study

This article asks a narrow question and does its best to answer that narrow question. However, it has generated many other questions that might be answerable with our dataset.

We describe some of those future research questions below and intend to broaden the scope of our project to address them in a longer article. For the richness of these questions, we are particularly grateful to the participants of the Little Boulder Conference with whom we workshopped this paper, to Brian Larson and the faculties at Texas A&M University School of Law and Drexel University Thomas R. Kline School of Law who workshopped this paper with us, and to the attendees and organizers of the Yale Virtual Symposium on Citation and the Law.

### 1. Increase our sample size for 1957 and 1987

The sample sizes for this symposium paper are uneven, and we would like to increase the sample sizes for 1957 and 1987 to be closer to the sample size for 2017. Doing so would require adding about 1,000 more opinion citations for each of 1957 and 1987. Gathering the opinion citations itself is not that difficult because they are available on Westlaw. But gathering the parties' citations for each of those opinions must be done by hand, using paper copies of the briefs that are archived at our university. Although the stickiness percentages for 1957 and 2017 are significant when considering 95% confidence intervals, larger sample sizes should improve the precision of our stickiness calculations.

### 2. Figure out that coherence measurement

We recognize that our analysis of a stickiness-based coherence measurement is incomplete. With some more thinking, we hope to complete the analysis and identify a useful measure of coherence.

89 *Id.* at ___.

90 Another recent citation study does analyze how judges use citations in their opinions, but it does not engage with either Larson's work or Bennardo & Chew's. *See* Mark Cooney, *What Judges Cite: A Study of Three Appellate Courts*, 50 Stetson L. Rev. 1 (2020).

**3. Test whether endogenous cites support procedural rules**

Since the first presentation on the initial data of the first citation stickiness paper, the most-asked question is how many of the endogenous cites are cases that support procedural rules like the standard of review. Because attorneys and chambers can have stock language that they use to describe procedural rules, one set of cases used to describe the 12(b)(6) standard could be entirely different from another set of cases used to describe the same standard in basically the same way. Differences in stock procedural language would lead to lower stickiness without a difference in meaning, or even meaningful research.

Since the original stickiness paper was published, Brian Larson has created a coding system for categorizing how courts use each statement of law and citation in a judicial opinion. We can use Larson's system to code our Fourth Circuit data set to look for procedural rules and their uses. This would help answer the most frequently asked question and tie our study more closely with Larson's ongoing study of endogenous citations.

With this later analysis in mind, we did a small pilot study using the ten opinions with the most endogenous citations in them from 1957, 1987, and 2017. These opinions yielded 128 endogenous citations in 1957, 95 in 1987, and 136 in 2017. We asked our research assistant to go through those thirty opinions and identify endogenous citations that obviously supported an appellate standard of review. We asked him to look for the "obvious" ones because sometimes reasonable minds can disagree as to whether a statement of law is "procedural" or "substantive." The results of this informal pilot showed an increase in endogenous procedural citations over time: 3% of endogenous cites in 1957, 14% in 1987, and 18% in 2017.

The 95% confidence interval for the 2017 percentage is 12.3%–25.9%, which suggests that procedural "boilerplate" accounted for a chunk of the endogenous cites in the original 2017 study. By contrast, the confidence interval for the 1957 percentage dips down to nearly zero. Because so few endogenous cites in 1957 were procedural, these initial results suggest that the increase in stickiness is not related to procedural citations. If nothing else, this pilot suggests a notable change in the way courts cite cases to support the standard of review from 1957 to 2017.

**4. Analyze the weight of the endogenous authorities**

Another frequently asked question is what courts the endogenous citations come from. This question is also one that is commonly addressed in citation studies but that neither this study nor the original citation stickiness study sought to answer. Answering this question for our data set would again both sate the curious minds of our audience and also tie our study in with other citation studies, particularly Larson's.

Our small pilot study described just above included identifying each endogenous citation's issuing court. Our initial results are summarized in the table below and show an increase in endogenous cites to other Fourth Circuit cases and a decrease to other circuit cases. The other court categories don't suggest a pattern.

| Cited Court | 1957 | 1987 | 2017 |
|---|---|---|---|
| U.S. Supreme Court | 20% | 34% | 16% |
| Fourth Circuit | 10% | 22% | 36% |
| Other federal circuit | 33% | 26% | 10% |
| Federal district court | 12% | 12% | 15% |
| State high court | 15% | 4% | 13% |
| State intermediate appellate court | 1% | 0% | 4% |

**5. Analyze the frequency of endogenous citations in string citations**

Given Fronk's findings, string citations could be a large source of endogenous citations in judicial samples. His study suggests that the percentage of opinion cites that exist only in string cites would be highest in the 1957 cases, much lower in the 1987 cases, and lower still in the 2017 cases. That Fronk's study also used years ending in seven is particularly fortuitous for comparing his results and ours.

Our small pilot study included this string cite analysis. Our initial results track Fronk's findings and are summarized in the table below. In addition to string citations, we counted endogenous citations that appeared only as citing or quoting parentheticals or only as part of a quotation. One observation is that the 1957 opinions included 21 endogenous citations in footnotes, which decreased to 9 in 1987 and only 1 in 2017. Some of these footnoted citations were also string citations.

| | 1957 | 1987 | 2017 |
|---|---|---|---|
| Only in a string citation | 58% | 49% | 21% |
| Only in a citing parenthetical | 0% | 1% | 4% |
| Only in a quoting parenthetical | 0% | 1% | 7% |
| Only in a quotation | 8% | 2% | 0% |
| Only in subsequent history | < 1% | 0% | < 1% |
| Only in footnote | 16% | 9% | < 1% |

### 6. Analyze Judge Widener's use of endogenous citations

Fronk's study analyzed the individual citation practices of two long-serving circuit court judges, including one from the Fourth Circuit, Judge H. Emory Widener Jr.[91] Judge Widener served on the Fourth Circuit from 1972 to 2008, and Fronk analyzed 397 of Judge Widener's majority opinions, which had 4,393 unique case citations.[92] Fronk found that Judge Widener's citation patterns changed across time, closely matching the aggregate data that Fronk collected.[93] For example, his use of string citation steadily declined from over 21 percent in 1972–1977 to under 9 percent three decades later.[94] One of Fronk's takeaways from his longitudinal looks at two judges' citation practices is that CALR might have had a "conforming" effect on judges' citation practices.[95]

Again, because our dataset overlaps with Fronk's, we could add on to his longitudinal study of Judge Widener's citation patterns by calculating the stickiness of his opinions over that same time period. This might tell us something about the connection between the changes in judicial citation practices that Fronk observed and courts' independent research.

### 7. Look at historical research instruction practices

One potential reason that citation stickiness has increased over time is a change in legal research instruction to be more uniform. And with respect to coherence, more uniform research instruction seems more likely to result in greater coherence. This study did not look at historical research instruction practices to see if they match that theory, but a future study could.

### 8. Look at historical court rules for citation

Current federal court rules require parties to substantiate their arguments with citations to relevant legal authorities. But Fronk's study shows that the ways judges cited legal authorities changed across time. Studying historical court rules could lend insight into the ways that *parties* cite legal authorities.

### 9. Study opinions with novel legal theories

A recurring concern with both print-era research methods and CALR is that they stifle innovative legal theories and, specifically, innovative jurisprudence.[96] If so, judicial opinions that advance novel legal theories

91 Fronk, *supra* note 54, at 80.

92 *Id.*

93 *Id.* at 84.

94 *Id.*

95 *Id.* at 87.

96 *See generally* Nicholas Mignanelli, *Critical Legal Research: Who Needs It?*, 112 L. Libr. J. 327 (2020).

should have more endogenous citations. But if innovative jurisprudence grows from advocates' efforts, the judicial opinions should have fewer endogenous citations. A future study could, then, focus on opinions that advance novel legal theories, perhaps as noted by legal scholars, including student notes and recent developments. This would show whether the cites that advance that novel theory are sticky or endogenous.

**10. Repeat the study in 2037**

By the time we finish with future studies 1 through 9 above, it will probably be time to add another 20-year block to our study!

## Conclusion

In this study, we sought to bring together several strands of legal scholarship: theory about the effect of CALR on legal research, studies of research and citation practice by courts, studies of research practice by attorneys and law students, and studies directly comparing court citations and party citations in the same matter. Our primary empirical question was straightforward: during the print era, did courts cite the same cases as the parties more often than during the digital era, as posited by the universe of thinkable thoughts theory? The answer was similarly straightforward: No. The results show that, pre-CALR, there was less agreement between advocates and courts than previously believed by many commentators. If a limited universe of thinkable thoughts existed in the print era, it was not cozy enough for the attorneys and judges to cite the same cases during the appellate process.

ARTICLE

# Dimensions of Being and the Limits of Logic

## The Myth of Empirical Reasoning

By Kenneth Chestek*

When I went to law school, I had a rather naïve idea of how the legal system worked. I saw "the law" as a black box. A lawyer loaded a set of facts into the intake gate of the black box, something "legal" happened inside the box, and an answer (a verdict, a finding of liability or not) eventually got pushed out through the output gate of the box. I thought that lawyers were inside of that box, doing something magical, and I wanted to learn how the inside of the box worked. Once I had mastered the inner workings of the black box, I could play a role in the creation of justice and the resolution of disputes, surely a worthy life goal.

It didn't take me long, as a first-year law student, to see that I had oversimplified things terribly. On the input side, I quickly discovered that "the law" was not inside the box at all. "The law" was amorphous, fluid, constantly changing. The inside of the box was legal reasoning: logic and other tools for processing the law and the facts. Importantly, both the law and the facts needed to come into the box through the input gate. A lawyer therefore needed to not only load the facts into the box, but the law itself had to be researched, analyzed, processed, interpreted, and fed into the box too. Once the law and the facts had been loaded into the box, the box did its thing (legal reasoning) and spit out an "answer," sometimes in the form of a verdict or finding of liability, but other types of answers as well.

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As I moved through my three years of law school, I began to realize that even this modified version of the process was sometimes unsatisfactory. Sometimes the "answer" that came through the output gate didn't look much like "justice." Two examples (one mundane and one not so mundane):

**Example 1:**

**Rules:** (a) An action upon breach of contract must be initiated within four years of the breach. (b) A lawsuit must be served on a defendant within one year after the complaint is filed; if service is completed, the date the suit was filed will relate back to the date of filing the complaint, not the date of service.

**Facts:** Debtor fails to pay for goods purchased on credit. Creditor files lawsuit within four years of the breach, but the debtor is absent from the jurisdiction and successfully manages to avoid getting served with process by taking active measures to hide his whereabouts.

**Answer:** Case dismissed with prejudice for failing to achieve service of process within time allowed by the statute of limitations.

So one way of legally stealing from another is to buy goods on credit, fail to pay for them, then duck service of process when the creditor sues you? That seemed like some sort of perverse game, not "justice."

**Example 2:**

**Rule:** It is legal for a school district to create separate schools for black children and for white children, so long as the schools are equal.

**Facts:** Eight-year-old Linda Brown is black. All of her neighbors and playmates go to the school in the neighborhood, which has been designated for white children. There is another school much farther from her house that has been designated for black children, and which is considered "equal" to the whites-only school.

**Answer:** Linda Brown may not attend the school in her neighborhood that all of her playmates attend.

Example two is, of course, the essential facts of the landmark case *Brown v. Board of Education of Topeka*.[1] When Linda first applied to attend her neighborhood whites-only school in 1951, the law of the land was *Plessy v. Ferguson*,[2] which famously held that separate public accommodations for the races are perfectly okay so long as they are "equal." Given a finding in the *Brown v. Board* case that the two schools (the whites-only neighborhood school and the more distant black school) were "substantially equal," the only logical, empirical outcome was that Linda Brown had to attend the more distant school.

1 347 U.S. 483 (1954).

2 163 U.S. 537 (1896).

How could *that* result be "just?"

It turns out that purely logical, or "empirical," reasoning is not the end of the judicial process.[3] Sometimes, as in the two examples given above, pure empirical reasoning leads to an unsatisfactory result, a result that strikes almost every reader as "unjust" or "unfair." So if the highest goal of the legal system really is to promote "justice," that necessitates, at least sometimes, a process other than logical, empirical reasoning.[4]

It isn't just first-year law students who misapprehend the importance of strict, logical, binary rules to provide "right" or "wrong" answers to legal questions.[5] Approximately one hundred years ago, most legal scholars thought of the law as "a coherent, gapless, autonomous, and comprehensive system of conceptual propositions"[6] which could be scientifically studied and dispassionately applied. This view, which came to be known as "formalism," came under attack by legal academics in the 1920s and 1930s. The academy soon came to embrace a "realist" view of the law, in which the law was viewed as "instrumental, practical, contextual, constructed, and adaptive."[7] While the legal academy today almost universally accepts the realist view of the law,[8] public perception of the legal system still tends to view formalism as the ideal; anything short of that is viewed skeptically, as "political" or "activist" judging.[9] Even some influential judges

**3** Or any decisionmaking process, for that matter. Kathryn Janeway, captain of the Federation starship Voyager, once had to reprimand her Vulcan second officer Lieutenant Tuvok for disobeying one of Captain Janeway's orders, telling him, "You can use logic to justify almost anything. That's its power—and its flaw."

To which Lieutenant Tuvok responded, in his calm, Vulcan manner, "My logic was not in error; but I was." *Star Trek: Voyager*, season 1, episode 10 (UPN television broadcast Mar. 20, 1995), quotations reported at https://www.imdb.com/title/tt0708948/quotes/?ref_=tt_trv_qu (last visited Feb. 4, 2022).

**4** That is, of course, how my two examples got resolved in satisfactory ways. In the case of the debtor ducking service, the courts worked out exceptions or special rules (allowing constructive service by publication, or by tolling the statute during any period where the defendant is actively avoiding service). In the case of Linda Brown, the court took the extraordinary step of overruling the controlling precedent and creating a new rule that better served justice.

**5** For an excellent discussion about how the 1L curriculum misleads students into thinking that the legal system is all about rules and logic, see generally Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 Va. L. Rev. Online 72 (2022).

**6** Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 Iowa L. Rev. 195, 199 (2009).

**7** *Id.*

**8** *Id.* at 207 ("[Realism] has remained, along with the residues of formalism, an enduring tacit understanding of law throughout the twentieth century.").

**9** A related problem is the frequent criticism by political actors that any decision they don't like must be made by an "activist judge" who substitutes his or her own judgment for that of Congress or some other legislative body. *See, e.g.,* Tal Axelrod, *Meadows, Cotton Introduce Bill to Prevent District Judges from Blocking Federal Policy Changes*, The Hill, Sept. 11, 2019, 4:40 PM ET, https://thehill.com/regulation/court-battles/460975-meadows-cotton-introduce-bill-to-prevent-district-judges-from/; *On Capitol Hill*, Judicial Watch Report, July 1997, 18 No. 7 Jud./Legis. Watch Rep. 3 ("The fight against activist judges is growing on Capitol Hill. In addition to Senate Judiciary Chairman Hatch's barring the ABA from any official role in the confirmation of federal judges, several Senators have signed on to what has become known as the 'Hatch Pledge' which says: 'Those nominees who are or will be judicial activists should not be nominated by the President or confirmed by the Senate, and I personally will do my best to see to it that they are not.'"); Letter to the Editor, *Activist Judges*, 47 Fla. B. News 2 (Apr. 2020) ("Recently, published letters highlight hopefully-rare situations where activist judges issue orders and rulings based on ideology, and not on the law. Judges are not elected to revise laws, or to legislate from the bench. It is not

and theories of jurisprudence still insist on viewing the act of judging as a purely formalist exercise.[10]

My claim in this article is that formalism, which depends heavily on what I call "empirical reasoning," is little more than a myth. While some judges may still claim to be engaging in nothing more than formal application of neutral principles to objectively found facts, such claims must be viewed skeptically. There are many types of legal conflicts, which I describe below, which simply cannot be adequately resolved through empirical, or logical, analysis. In order to decide those types of cases, judges must resort to other forms of reasoning. Good judges engage in "narrative reasoning," even if they don't admit or acknowledge it.

By "empirical reasoning," I mean relying upon legal rules that produce a binary answer (true or false, guilty or innocent, liable or not) through application of formal logic—essentially, syllogistic reasoning. While the rule being applied (whether enacted or judge-made) certainly incorporates values, the values are built into the rule and are not up to the individual judge to determine. "Narrative reasoning," on the other hand, requires a judge or a jury to rely more heavily on values other than pure logic. Frequently these values are defined through stories (narratives). Prof. Linda Edwards writes that "[n]arrative reasoning evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode."[11] Importantly, that evaluation occurs at the time the fact-finder (judge or jury) is applying the rule, not at the time the rule is created.

Empirical reasoning of the nature I describe is what legal formalists strive for. The late Justice Antonin Scalia and Bryan Garner wrote that "persuasion is possible only because all human beings are born with a

their job to advance a political, social, or even personal, agenda by putting even a finger on the scales of justice. We elect judges to interpret laws, and apply laws to facts without bias, and in accordance with well-established principles."); John E. Jones, *Our Constitution's Intelligent Design*, 33 Litig. 3 (2007) (reflections by the trial judge who presided over *Kitzmiller v. Dover Area School District*, a case challenging a school board's rejection of "intelligent design" as a valid curricular theory in a science class: "The public at large, including many segments of the media, has no real grasp of how judges operate. Worse, I also discovered that many pundits deliberately misrepresent the way that precedent guides judges in their work. This allows them to vilify individual judges for rendering decisions that are legally correct but with which individual commentators may disagree. It also leads to the frequent use of that pejorative sobriquet 'activist judge.' This term lamentably is now an all-purpose designation for any judge who has rendered a holding with which the user of the designation disagrees. It is therefore misused far more than it is properly applied.").

**10** The late Supreme Court Justice Antonin Scalia was frequently described as a "legal positivist" (a term virtually synonymous with "legal formalist"). *See, e.g.,* Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 La. L. Rev. 623, 623–25 (1991). The justice himself, however, admitted that in rare cases he might be described as a "faint-hearted" originalist. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989). "Originalism" and "textualism" are fonts of legal formalism. *See, e.g.,* Thomas B. Nachbar, *Twenty-first Century Formalism*, 75 U. Miami L. Rev. 113, 117 (2020).

**11** Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Legal Stud. F. 7, 11 (1996).

capacity for logical thought. It is something we all have in common. The most rigorous form of logic, and therefore the most persuasive, is the syllogism."[12] Lawyers might argue about what the major premise (the applicable rule of law) is, or what the minor premise (the facts upon which that rule may act) might be, but once the premises are settled, the syllogism always works to "inevitably" provide the "correct" answer.[13] And it is a binary choice: true or false, guilty or not.[14]

The quote in the previous paragraph is actually a misleading quote, taken out of context. The sentence actually begins, "Leaving aside emotional appeals, persuasion is possible only because . . . ."[15] The authors' backhanded dismissal of emotional appeals is telling. Many judges, whether they are formalists or not, still want to be thought of as logic machines, or umpires who just call balls and strikes.[16] They want logic-based reasoning because it is easy, "objective" and hard to disagree with. But what if a legal rule creates a *standard*, rather than a rule that can be applied through a syllogism? If the legal rule for deciding child custody disputes is to award custody to serve "the best interests of the child," no syllogism will provide a clear answer because the standard requires an individual judge to resort to *post hoc* value judgments about the specific parties to the dispute in order to resolve the question.

My premise is that courts, as human institutions, must often account for the entire range of human emotions and interests.[17] Humans are complex and multi-layered; they have varying interests in various dimensions of their lives, all of which are valid and important to each individual. If courts are to serve the full range of human needs and interests, and render decisions that respect those interests and serve those needs, courts must understand the different ways in which humans engage with the world, and make meaning in their own lives. In short, the judicial

12 Antonin Scalia & Bryan Garner, Making Your Case: The Art of Persuading Judges 41 (2008); *see also* Ruggero Aldisert et al., *Logic for Law Students: How to Think Like a Lawyer*, 69 U. Pitt L. Rev. 1, 1 (2007) ("Logic is the lifeblood of American law. . . . What is thinking like a lawyer? It means employing logic to construct arguments.").

13 *Id.* at 42.

14 Of course, many scholars reject the notion that law is all about the syllogism, instead recognizing that law and legal reasoning frequently require value judgments. *See, e.g.,* Susan Tanner, *Rhetorical Use of the Enthymeme in Supreme Court Opinions*, 20 W. Mich. U. Cooley J. Prac. & Clinical L. 169, 169–70 (2019). Others take a middle ground. For example, Prof. Wilson Huhn argues that judicial reasoning is "syllogistic in form, [but] in substance it is evaluative." Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 Santa Clara L. Rev. 813, 813–17 (2002). Still others try to reconcile syllogistic reasoning with narrative reasoning. *See* Timothy R. Zinnecker, *Syllogisms, Enthymemes and Fallacies: Mastering Secured Transactions Through Deductive Reasoning*, 26 Wayne L. Rev. 1581, 1585 (2010) ("[N]arrative analysis can be expressed as deductive syllogisms, and deductive syllogisms can be the foundation for enhanced narrative analysis.").

15 Scalia and Garner, *supra* note 12, at 41.

16 *Excerpts of Chief Justice Roberts Statement*, United States Courts, https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (last visited Feb. 27, 2022).

17 *Accord* Keene & McMahon, *supra* note 5, at 77.

system needs to understand and honor the ways in which humans experience their world. Without such an understanding, a court's decision runs a high risk of rendering a result unsatisfactory to the litigants, and others similarly situated. More importantly, since a court derives its authority only from rendering decisions that strike most people as "fair" or "just," a court that consistently returns results that are seen as "unfair" or "unjust" will quickly lose its authority. Many cases require forms of reasoning other than pure logic in order to produce results that are based on widely-shared human values rather than personal favor for, animosity toward, or subjective opinions about, the specific litigants before the court.

Understanding about the dimensions of being human in the world (conditions I will refer to sometimes as "dimensions of being") leads to a fundamental shift in the processes inside my "black box." I graduated from law school still thinking that the black box was all about "thinking like a lawyer": applying the rules of logic to predetermined rules of law and the facts of the case. Long live the syllogism! It only took a year or two of actual practice of law to realize that there is so much more going on inside of that black box. And that the "so much more" is essential for the judicial system to reach results that meet the needs of the litigants, and society in general.

The popular notion that the law can be reduced to a series of empirical decisions or binary choices in order to become "objective" or "fair" or "neutral" is a myth (in the technical sense of what a myth is, which this article will explore in section II.E below). Empirical reasoning is not the only legitimate form of legal reasoning. Sometimes, in the pursuit of "justice," narrative reasoning (storytelling) is the only way to resolve a given case. Many, if not most, courts today do engage in such reasoning when doing so is necessary to reach a fair decision; they should not pretend otherwise.

## I. The dimensions of being

### A. Overview

As Linda Brown's story makes abundantly clear, binary rules and logic sometimes do not lead to "justice." Stated another way, if the goal of the judicial system is really to "seek justice," sometimes tools other than rules and logic are necessary.

That may sound like a radical claim, but in reality the legal system has long taken this necessity into account. There are many well-settled instances where the legal system resorts to narrative reasoning—where the law actually *requires* narrative reasoning—in order to serve justice. I define "justice" as a legal resolution that not only serves the needs of the

litigants, but also produces a result that is generally considered "fair" by disinterested, outside observers.

Justice Oliver Wendell Holmes was on to something like this with his notion of "can't helps":

> As I probably have said many times before, all I mean by truth is what I can't help believing—I don't know why I should assume except for practical purposes of conduct that [my] can't help has more cosmic worth than any others—I can't help preferring port to ditch-water, but I see no ground for supposing that the cosmos shares my weakness . . . . [I] demand . . . of my philosophy simply to show that I am not a fool for putting my heart into my job.[18]

Commenting on this concept, Prof. Albert Alschuler added:

> Holmes observed that "moral and aesthetic preferences" are "more or less arbitrary. . . . Do you like sugar in your coffee or don't you? . . . So as to truth." He said on another occasion, "Our tastes are finalities."[19]

Holmes' allusions to "moral and aesthetic preferences" suggest some new ways of deciding what is important, and therefore what judges must take into consideration in deciding specific cases. Unfortunately, there is no definitive list of Holmes' "can't helps," or how they can inform judicial decisionmaking.

A few decades after Holmes mused about "can't helps," another Supreme Court justice struggled with the same issue. Benjamin Cardozo wrote,

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions.[20]

18 Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 Pepp. L. Rev. 491, 499 (2009) (quoting a Letter from Oliver Wendell Holmes Jr. to John Chipman Gray (Sept. 3, 1905).

19 *Id.* (citations omitted).

20 Benjamin N. Cardozo, The Nature of the Judicial Process 10 (1922).

While Cardozo was well aware of the issue, and of the probability that some of the instincts that would guide him in his work were subconscious, he held "little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others." Instead, he hoped to use a form of "quantitative analysis" to help understand the judicial process.[21]

Since Justices Holmes and Cardozo were both legal formalists, their desire to reduce judicial reasoning to quantifiable, objective rules is understandable.[22] But I suggest it is not entirely possible. The law is—actually needs to be—as complex as are human affairs generally. It is art more than science.[23] Rules, while necessary, are in many cases difficult to clearly articulate, because they must have soft edges in order to be useful.

Deciding when to abandon strict adherence to the rigor of empirical reasoning and engage in other means of deciding is, as Justice Cardozo seems to acknowledge, extremely difficult. I suggest that one way of making this determination is to examine the very human interests that are at stake in the litigation. People are complex; at any given moment, they may have different, even sometimes conflicting, needs and desires. They encounter the world in a variety of roles, with a variety of interests. In short, people have a variety of ways of experiencing the world and determining from time to time what is important to them. Those ways overlap, and even shift from moment to moment. The "dimensions of being" I describe below are created or constructed by each individual through the different cultural or social norms in which the individual grows up. This article is an attempt to categorize the different interests, or "dimensions of being" human, that people may have, and then to examine how those dimensions of being appropriately influence judicial thinking.

Cognitive psychologist Jordan Peterson suggests that there are two separate, independent ways that humans encounter the world: the world can be a place to be objectively described, measured, and explained according to the laws of physics and science, or it can be a place for action. These two ways of encountering the world are not mutually exclusive, but

21 *Id.*

22 Others have attempted similar projects. For example, Prof. Wilson Huhn has attempted to quantify and categorize the various types of legal arguments that are available to an advocate. Wilson Huhn, The Five Types of Legal Argument (2d ed. 2008). The five types of arguments he catalogs (those based on text, intent, precedent, tradition, or policy analysis) are useful tools for the advocate, but they describe something different than what I am proposing here. *Id.* at 13. Prof. Huhn is describing different ways of *arguing*. I am exploring the deeper question about different ways people have of *evaluating* the world, and thereby making judgments about that world.

23 *Id.* at 818–19 ("During the nineteenth century, law was equated with science, and legal reasoning was thought to be a species of deductive logic . . . . Over the last century, however, legal scholars have rejected the identification of law with science . . . . [W]hile science is based upon and must be reconciled with objective observations of nature, law arises from value judgments.").

they are entirely different things. In short, they are two different ways of measuring what is "true."[24]

Native American traditions embrace a similar concept. In some traditions, Native science views the world as including both an "explicate" order (what one can see, measure and document, akin to Jordan's "world as a place to be described") and an "implicate" order. The implicate order is contextual; nothing exists independent of any other thing. "To take rocks, trees, planets, or stars as the primary reality would be like assuming that the vortices in a river exist in their own right and are totally independent of the flowing river itself."[25]

Peterson's dichotomy between understanding the world as a "place of action" versus a "place to be described" seems useful, but incomplete. I would describe his understanding of the world as a "place to be described" objectively as an empirical way of evaluating the world. But his concept of the world as a "place of action" seems to sweep too broadly. Specifically, *what sort of action* is contemplated? I think there are many different types of actions that are important to people, and that it is useful to categorize them. Myth, for example, is a way of experiencing the world that is meaningful for many people but is very different from other dimensions of being that might belong to Peterson's "world as a place of action" concept.

The simplest way to understand this is to attempt to categorize both the various dimensions of being human, and the metrics that individuals use to make decisions about that interest. Consider the following chart:

**Fig. 1: Dimensions of being**

| Dimension of Being Human | Standard for Evaluating[26] |
|---|---|
| Empirical | True / False |
| Aesthetic | Beautiful / Ugly |
| Emotional | Pleasing / Hurtful |
| Spiritual | Righteous or Sacred / Sinful or Profane |
| Moral or Ethical | Just or Right / Unjust or Wrong |
| Mythical | Significant / Insignificant |

This list is likely incomplete. Some of the categories overlap; in particular, the last three items on the list may be related to each other.

24 Jordan P. Peterson, Maps of Meaning: The Architecture of Belief 8 (1999) (emphasis in original).

25 David F. Peat, Blackfoot Physics: A Journey into the Native American Universe 140 (1994), *quoted in* Paula Gunn Allen, Pocahontas: Medicine Woman, Spy, Entrepreneur, Diplomat 113 (HarperOne 2004).

26 All of these metrics (other than the empirical "true/false" standard) should be viewed as continua, or spectrums, not as binary choices.

The list is simply my own attempt to categorize the different but very important ways in which people encounter the world.[27] The key insight here is that, for every dimension of being in the world, the individual evaluates that interest (and makes decisions based on their individual tastes) using different metrics. The metrics are keyed to the type of interest being evaluated. And, importantly, only the empirical dimension can be considered "objective;"[28] all of the others must be determined subjectively. What is beautiful or ugly, pleasing or hurtful, just or unjust, will vary from individual to individual.

In this chart, "empirical" interests refer to what might be called "scientific" or "objective" phenomena. It relates to things that can be measured or evaluated upon a set of standards that we all agree to in advance. We have objective, agreed-to standards about what distance comprises an "inch" or a "yard" or a "mile." We have agreed-upon standards for the gravitational force that is exerted by a "pound" or a "ton." We have discovered many of the laws of physics, and can employ them predictably and objectively to build things that work. Empirical knowledge can be tested against those standards and found to be "true" or "false": such-and-such distance is 5.4 inches (true) or not (false).

But empirical principles can be applied to abstractions as well. Mathematics, for example, is an abstract idea that can be evaluated according to neutral, pre-agreed standards. Once we agree to use a base-10 numbering system, we can all agree that two plus two always equals four. If instead we agree to use a base-three system, two plus two would always equal 11.

Less obviously, rules of logic might be considered "empirical," since they result in a finding of "true" or "false." Ideally, a properly constructed syllogism should render a "true" or "false" finding: once the rule (major premise) and the facts (minor premise) are determined, a conclusion that everybody can objectively agree upon should follow. Rhetors may argue about what both premises truly are, but once the premises are determined, only one logical result (true or false) should emerge.

**27** Psychologist Milton Rokeach has attempted to categorize different human values in his Rokeach Value Survey. He identifies two broad categories of values, including eighteen "terminal values" (desirable goals that humans may have, such as "true friendship," "mature love," "happiness," "pleasure," and similar goals) and eighteen "instrumental values" (means to achieve those goals, including "cheerfulness," "self-control," "courage," and "logic"). Milton Rokeach, The Nature of Human Values 1–10 (1973). My listing in this chart serves a different function from what Rokeach was attempting, however. I am trying to categorize different types of values that humans embrace and which provide meaning in their lives, each seeking one or more of the "terminal values" that Rokeach identifies. *Id.*

**28** Of course, the claim that "logical" or "empirical" decisions are "objective" is contestable. My point here is simply that the empirical dimension of being is the only one that makes a claim to being objective.

## B. Dimensions of being and the law

By these standards, much of what courts do appears to fall into the category of "empirical" evaluation. Or, at least, it aspires to. In theory, the law can be identified using empirical, true/false tests. Was the statute properly enacted by a legislative body that had jurisdiction over the conduct in question? Was the applicable precedent decided by a majority of duly appointed or elected judges in the relevant jurisdiction? Is the language of the case law mandatory authority, *obiter dicta*, or merely persuasive authority for some other reason? What do the words of the rule (legislative or court-made) mean? Lawyers in any case may, and frequently do, argue about whether these tests are "true" or "false," but by and large those arguments proceed according to established rules of statutory interpretation, stare decisis, and other decisional rules.[29]

Likewise, a determination of the facts to which the rules will be applied proceeds using purportedly empirical rules, primarily the applicable rules of evidence. Once again, there are nearly always arguments between the lawyers as to whether or how those rules apply, but the answer is always rendered in a binary, true/false form: admissible or not.[30] Even the inferences to be drawn from those facts resemble empirical evaluation: given the proven facts that (a) the defendant brought a gun to the scene, (b) had made previous threats against the life of the victim, and (c) hid in the bushes so as to catch the victim by surprise, it is reasonable to infer (i.e. determine that it is "true") that the defendant's act of shooting the victim was premeditated.

Things get more dicey when it comes time to apply the empirically determined law to the proven facts, especially in the case of jury trials. While we might hope that a law-trained judge sitting as a finder of fact might be more dispassionate in applying the law to the facts, using empirical reasoning, that might not always be the case; judges are human, too. And what do we make of the standard jury instruction that jurors may apply their common sense to their deliberations?[31] If "common sense"

**29** I acknowledge that this paragraph presents an idealized view of what judges claim to be doing. In reality, of course, words may mean very different things to different people, and judges and lawyers do frequently argue about the meaning of words, or the applicability of different rules of construction or other interpretive aids. All of those conflicts are ultimately resolved by human beings who are subject to all kinds of biases, implicit or otherwise, rendering even "empirical" reasoning much more subjective than the litigants, or the judges, might prefer.

**30** Of course, many of the rules of evidence use subjective standards that cannot be resolved solely through empirical, or logical, reasoning. *See, e.g.,* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). What is "unfair," "confusing," "misleading," "undue," or "needless" will always be in the subjective opinion of the trial judge.

**31** *See, e.g.,* Pennsylvania Suggested Standard Criminal Jury Instruction 2.03(2) (3d ed. 2019) ("When you judge the credibility and weight of a witness's testimony, you are deciding whether you believe all, part, or none of the witness's testimony and how important that testimony is. *Use your understanding of human nature and your common sense.*

can be construed to include modes of reasoning other than strict logic, it may be hard to classify a jury verdict as having been rendered empirically. But given that the verdict follows a series of empirical processes in determining both of the major inputs to the jury (law and facts), perhaps that is just the price we have to pay to be able to say that justice belongs to the people.

The legal system, quite appropriately, strives to be neutral and objective. We like to claim that we have a "government of laws, not of men."[32] Many legal rules, most importantly the doctrine of stare decisis, are designed to ensure that litigants in similar situations are treated similarly. Thinking of the law in empirical terms, and striving to apply logical thinking, is the principal way we can approach the ideal of the impartial judge applying neutral rules of law in fair and consistent ways.

Isn't that "justice?"

### C. Justice or logic?

Is it justice? Not to the Linda Browns of the world. Sometimes the rules, logically determined as *Plessy v. Ferguson* was (or purported to be), are not fair. Sometimes conditions in the world evolve as humans learn new things and as society changes. The rules of logic and empirical analysis have no safety valve, no override switch, for course correction.

More fundamentally, the end result of an empirical process is not "justice." It is "an answer." The trial court's resolution of *Brown v. Board of Education*, i.e. that Linda was not allowed to attend the all-white school that her playmates attended, was an answer, compelled by the then-existing rules of the law. It was not justice.

Insisting that the law focus solely on binary rules and uniformity would require the legal system to ignore major—maybe even the majority of—human needs. Man does not live by logic alone. As the chart in Figure 1, above, shows, there are many ways in which humans engage the world. All of those ways are important to the human existence. If the law does not take account of those different "dimensions of being" human, the law is not serving the complete humans it was created to serve.

Observe each witness as he or she testifies. Be alert for anything in the witness's own testimony or behavior or for anything in the other evidence that might help you judge the truthfulness, accuracy, and weight of his or her testimony.") (emphasis supplied).

32 This phrase is often attributed to John Adams, writing before and during the Revolutionary War. *See* John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 Mitchell Hamline L.J. Pub. Pol'y & Prac. 1, 69–70, 164–65 (2016). The phrase also appears in the Massachusetts Constitution of 1780, written by a special convention to which John Adams was a delegate and the author of the first draft of the constitution. Const. of the Commonwealth of Mass. art. XXX (stating that the state government was "a government of laws and not of men").

## II. The non-empirical dimensions of being

### A. The aesthetic dimension

A superficial review of the non-empirical dimensions of being identified in Figure 1 might lead one to conclude that the law has no business taking account of those different dimensions. Take the "aesthetic" dimension. It is measured on the scale of "beautiful" or "ugly." It does not yield to empirical, true/false testing. One cannot say that "that dance was true" or "that piece of music was false." One measures beauty by very subjective, individual metrics. What is aesthetically pleasing to one person may be undesirable or unpleasant to another, and the law has no business making judgments about which reaction to a work of art is "right" or "wrong."

The problem is that humans, in all their wonderful diversity, inevitably come in conflict with each other, and it is the job of the courts to resolve those disputes. And when the disputes involve dimensions of being other than empirical ones, the court can (and often is) dragged into conflicts involving other dimensions of being. An example:

**Example 3:**

A local sculptor believes that human sexuality is not only normal but beautiful. He thinks depictions of graphic violence, murder, gore and mayhem on television should be considered "pornographic," not images of human beings engaged in loving, pleasurable, sexual relationships. He therefore places a statue of a naked adult man and an adult woman copulating on his front lawn, which sits on a prominent street corner. His neighbors object.

Resolving this dispute will force the court to confront several questions that reside in the realm of the aesthetic dimension. What is pornography? Is it "I know it when I see it,"[33] or is there some empirical test that can be deployed to reach a more uniform result? What gives a court the power to enforce "contemporary community standards"[34] and overrule an artist's sincerely held belief as to what beauty is? How does a court empirically determine what those "community standards" even are? Which members of the community have a say in that determination?

Of course, this example might be considered an "easy case." But that does not change the fact that in order to resolve the dispute, the court must evaluate claims based on non-empirical dimensions of being.

33 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Potter, J., concurring).

34 Miller v. California, 413 U.S. 15, 15 (1973).

### B. The emotional dimension

Next on my list of dimensions of being is the emotional dimension. While the reaction of some (many?) may be to assert that courts must avoid emotional reasoning and focus entirely on the more dispassionate empirical forms of reasoning, any lawyer practicing in the field of domestic relations will tell you that that is clearly impossible. No judge can resolve a contest in which the guiding legal rule is "the best interest of the child" without diving deep into the emotional content of the case. The family ties that will be directly affected by whatever decision the judge makes are purely emotional; even if the judge successfully keeps his or her own emotional responses out of the decision (a virtual impossibility), the judge must take into account the emotional damage that the decision will inevitably inflict on the family members.

But emotional interests (and emotional reasoning) are not just limited to domestic relations cases. They permeate the law in many ways.

Take any personal injury case, for example. One of the elements of any such case is "injury"; that is, the culpable conduct of the defendant must have injured the plaintiff. In many cases, the injury is either partially or entirely psychic: injury to reputation, to one's sense of self worth or tranquility or safety. Even in cases involving only physical harm, reducing that harm to a monetary value requires reference to non-empirical standards. There is no rational computer, no empirical formula, that can determine the monetary value of any person's "pain and suffering."

Or consider the "reasonable person" standard. This supposedly "objective" standard asks the jury to consider how a fictional reasonable person would react in the situation presented by the evidence. How is a jury to determine what is reasonable? Take a self-defense claim: was the defendant's fear of severe bodily injury or death reasonable so as to justify his use of lethal force? A trier of fact must evaluate their own emotional response of "fear" in order to resolve that question.

Criminal sentencing is another example. As much as we want similar defendants to be treated in similar, unbiased ways, the multiple and sometimes conflicting goals of the criminal justice system render that aspiration a practical impossibility. Courts and scholars have identified at least four possible goals of imposing a sentence: (a) punishment of the offender (a/k/a "retribution"), (b) deterring other individuals from committing the same crime, (c) protecting the public from future crimes that the defendant might be likely to commit, and (d) rehabilitating the defendant so that he does not offend again in the future.[35] How a judge

35 At least this is what I learned in first-year Criminal Law. *See, e.g.,* Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 Emory L. J. 557, 567 (2003). These four objectives are even

weighs these sometimes contradictory goals is exceedingly difficult, and impossible to achieve without reference to emotional dimensions. Has the defendant expressed remorse at his conduct? Does the judge think that expression is sincere? Is this a high-profile case in which there may be public reaction (approving or not) to the sentence imposed? Will a sentence really "send a message" to others who may be tempted to commit the same or similar crimes? How likely is the defendant in front of the judge to re-offend? Can he or she be rehabilitated?

I don't intend this discussion to be a criticism, in any way, of the criminal justice system or sentencing decisions. I don't think referencing emotional dimensions of being, in either the civil or criminal law contexts, is problematic. I think it is necessary and appropriate. If the courts did not embrace this dimension, they would lose a lot of their credibility with the society they exist to serve, because humans are not purely (or even primarily) logical beings. All of the different dimensions of being are important and valid to human beings in their respective realms; a court system that does not take that fact into account is not serving human needs.

### C. The spiritual dimension

Like other dimensions of being, the "spiritual" dimension cannot be measured by deciding which beliefs are true and which are false. There is no logical or empirical way to determine, for example, whether one's soul ascends to heaven after death, or is reincarnated into another body, or does something else. (Or, for that matter, whether any person even has a "soul.") Yet an individual's sincerely held religious beliefs can be of great importance in their lives, and in a perfect world no court should be allowed to dictate to any person what he or she should believe. But this world is anything but perfect, and courts may on occasion find themselves entangled in disputes centered on the spiritual dimension.

**Example 4:**

A radical religious sect, calling itself the Disciples of Joshua, believe that sex workers have disobeyed God's commands and therefore have fallen into God's disfavor. Therefore, just as God commanded Joshua to remove the Canaanites from the Promised Land by force, even by killing them, the Disciples of Joshua believe it is their holy mission to kill sex workers. When a member of the sect is charged with murder, he raises the Biblical story of Joshua and the conquest of Canaan as a justification defense.

codified in the federal sentencing guidelines statute as factors a federal judge must consider in imposing a sentence. 18 U.S.C. § 3553(a)(2). More recent scholarship, however, suggests that retribution (sometimes also referred to as "retributive justice") has gained an upper hand and has emerged as the dominant justification for imposing criminal sentences. *See, e.g.,* Michael T. Cahill, *Retributive Justice in the Real World*, 85 Wash. U. L. Rev. 815 (2007).

This example, of course, will get the court entangled in the spiritual dimension of being. Assuming the defendant sincerely holds the belief that he is doing God's will by ridding the world of sex workers, why must that belief be subordinated to the needs of the wider community to safety?

Here is a non-hypothetical example:

**Example 5:**

> The Native American Church uses peyote, a hallucinogenic drug, for sacramental purposes. Two members of that church were employees of a private drug rehabilitation company. When they were fired from their jobs for ingesting peyote during a religious ceremony, they applied for unemployment compensation. The state denied them unemployment compensation on the grounds that they had committed work-related misconduct.

These are the operative facts of *Department of Human Resources of Oregon v. Smith*.[36] The First Amendment guarantees individuals the right to the free exercise of their religion. But in the secular world of employment law, is the use of drugs which are illegal for everybody else "misconduct" for two workers in a drug rehabilitation program? Which interest prevails? No court can resolve that balancing test without attempting to understand the spiritual dimension of being that motivated the Native American plaintiffs.

Another example where the law must take account of the spiritual dimension of being are the abortion rights cases. Deciding when life begins can only be resolved through an analysis of spiritual beliefs. Science and logic can approximate when a fetus is likely to be "viable" outside of the mother's womb, but that does not attempt to address when the fetus attains a "life" that the law must protect, or at least balance against the rights of the mother.

The spiritual dimension of being is related to, but I think distinct from, the last two ways on my list: the "moral/ethical" dimension, and the "mythical" dimension. Religious principles often relate to morals and ethics, but there are moral and ethical questions that exist outside of the realm of religion. The same is true for myth; while religious texts often rely on myths to make their points, there are myths outside the realm of religion too. I shall therefore treat those dimensions of being separately.

**36** 494 U.S. 872, 872–80 (1990). The Supreme Court ruled that the denial of unemployment compensation was not an infringement of the appellants' First Amendment right to the free exercise of their religion.

## D. The moral/ethical dimension

### 1. Explicit moral standards

Digging deeper into my list of "dimensions of being," we get much closer to dimensions that seem important to the law. Take the "moral/ethical" dimension, for example. While courts are often wary of attempts to "legislate morals,"[37] legislatures and courts often do base laws on notions of moral correctness. To name just a few examples, many jurisdictions expressly include misconduct involving "moral turpitude" as a ground for disbarring lawyers,[38] revoking the licenses of teachers,[39] revoking a physician's license to practice medicine,[40] or suspending a state official who has been charged with a crime involving "moral turpitude."[41] Alabama allows for the impeachment of trial witnesses if the witness has been convicted of a "crime involving moral turpitude."[42] What, exactly, constitutes "moral turpitude" is seldom defined but often litigated.[43] And, of course, many laws exist to require public officials to adhere to certain ethical standards, the violation of which in some cases is a crime[44] and in other cases can result in civil penalties or forfeitures.[45]

In some cases, courts attempt to reduce these decisions back to easily enforced, binary tests. For example, the Fifth Circuit in recent years has been faced with numerous cases trying to determine which immigrants should be allowed to remain residents of the United States in the face of a statute allowing deportation of resident aliens convicted of a "crime involving moral turpitude." Since the statute does not define "moral turpitude," the court has deferred to the Board of Immigration Appeals (the "BIA") as it struggles to enforce that law uniformly:

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**37** *See, e.g.,* Jack Daniel Distillery, Inc. v. Hoffman Distilling Co., 190 F. Supp. 841, 843 (W.D. Ky. 1960) ("It is the continuance of these imitating tactics that the plaintiff seeks to enjoin, but regardless of how disapproving the courts may be of such practices, they cannot legislate the morals of the market place."); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (declaring criminalization of homosexual conduct unconstitutional because "this Court's obligation is to define the liberty of all, not to mandate its own moral code").

**38** *See, e.g.,* W. Va. Code § 30-2-6 (2022) (requiring the revocation or suspension of an attorney's license to practice law upon conviction of a felony "or any other crime involving moral turpitude"); Cal. Bus. & Prof. Code § 6101 (2022).

**39** *See, e.g.,* 24 P.S. § 2070.9b (requiring the state Department of Education to revoke the teaching certificate of any teacher convicted of "a crime involving moral turpitude").

**40** Lorenz v. Bd. of Med. Exam'rs, 298 P.2d 537 (Cal. 1956).

**41** So. Carolina Const. art. VI, § 8.

**42** Ala. Code § 12-21-162 (2022).

**43** *See, e.g.,* Esparza-Rodriguez v. Holder, 699 F.3d 821, 826 (5th Cir. 2012) ("Because the INA does not define the term 'moral turpitude' and legislative history does not clarify which crimes Congress intended to characterize as turpitudinous, we have concluded that 'the interpretation of this provision [was left] to the BIA and interpretation of its application to state and federal laws [was left] to the federal courts.' [citation omitted]").

**44** *See, e.g.,* 18 U.S.C. § 201 (bribery of public officials and witnesses defined as a crime).

**45** *See, e.g.,* 5 U.S.C. § 1505 (violation of the Hatch Act may warrant the removal of a public official from office).

> The BIA has construed "moral turpitude" to refer to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007) (internal quotation marks and citation omitted); *see also Garcia–Maldonado v. Gonzales*, 491 F.3d 284, 288 (5th Cir.2007) ("Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved. . . . .").[46]

But note that even this attempt to "objectify" the test and return it to a predictable, empirical "true/false" test ultimately fails, because the tests all return to the inherently subjective evaluation of "accepted rules of morality" in the eyes of "society in general," or what might "shock the public conscience as being inherently base, vile or depraved." Reference to the subjective moral dimension is inescapable.

### 2. The law of equity

Even where "morals" are not specifically invoked in the legal rule, there is a whole world of cases in which "justice" is the goal and can only be decided by referencing the moral or ethical dimension. What, for example, does one make of the entire field of equity jurisprudence?

Think about this for just a moment. When does "equity" kick in? What is its objective?

The first, and arguably most important, element of an appeal to the equity side of the court is that the plaintiff "has no adequate remedy at law."[47] Remedies at law are generally just money damages, while equitable remedies include a wide range of positive relief such as restitution, injunctive relief, and specific performance.

While the law side of the court is very rule-bound and logical, the equity side is less so.[48] A plaintiff can't even open the door to the court of equity unless he can prove that the law door doesn't get him where he needs to be. Who decides where he "needs to be," though? In whose eyes is a legal remedy "adequate" or not? Many definitions of what an "adequate remedy at law" is refer explicitly to the standard of "justice";[49]

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**46** Cisneros-Guerrerro v. Holder, 774. F.3d 1056 (5th Cir. 2018).

**47** *See, e.g.,* St. Joe Minerals Corp. v. Goddard, 324 A.2d 800, 802 (Pa. Commw. Ct. 1974) ("[T]here can be no adequate remedy at law unless the remedy at law is presently available in terms of both timeliness and in terms of the competency of the tribunal to resolve all of the issues in the case. *In effect, the plaintiff must demonstrate a sense of urgency for his relief before equity will assume jurisdiction where a remedy at law does exist.*").

**48** My Remedies professor at the University of Pittsburgh School of Law, Francis Holahan, once told us that "equity was the free agent of the law, until it came down with a bad case of *stare decisis.*"

**49** *See, e.g.,* Hancock v. Bradshaw, 350 S.W.2d 955, 957 (Tex. Civ. App. 1961) ("[a]dequate remedy at law preventing relief by injunction means a remedy which is plain and complete, and *as practical and efficient to the end of justice* and its prompt administration as a remedy in equity") (emphasis supplied); Royal Peacock Social Club, Inc., v. City of Atlanta, 177 S.E.2d

that is the metric by which one evaluates a claim sounding in the "moral or ethical" dimension of being. Other definitions refer to vague standards like "complete," "beneficial," "efficient" or similar concepts;[50] some courts employ the rather circular definition that a plaintiff lacks an adequate remedy at law when "[money] damages will not adequately compensate the plaintiff for the injury or threatened injury."[51] All of these concepts, however, are entirely subjective; none of these "rules" can be resolved by a simple binary choice between "true" and "false." They require reference to moral or ethical standards to resolve.

The entire goal of equity jurisprudence is to "do justice."[52] Not logic—"justice." It is as if the courts are saying "first, apply the rules of law and logic to see what the empirical result is. If that doesn't resolve the case in a satisfactory way, then you can apply the standards of equity to get to the real goal of justice."

## E. The mythical dimension

The final dimension of being listed in Figure 1 is the "mythical" dimension.

A thorough exploration of this complex topic is beyond the scope of this article. I include it in my list because it is a topic worthy of much greater depth than I can provide here. The basic premise is that many people encounter the world through myths that are significant to them, even though the myths are most likely not grounded in empirical truth. Because myths provide meaning and "significance" to many people, they are important influences on the development of law.

Legal scholars have not yet fully explored the importance of myth in the law. There are some beginnings; Linda Edwards, for example, has

664 (Ga. 1970) (same); Futrell v. Shadoan, 828 S.W.2d 649, 651 (Ky. 1992) (equitable relief is available "only when the situation is so exceptional that there is no other adequate remedy at law to prevent a miscarriage of justice"); Buchanan v. Buchanan, 6 S.E.2d 612, 620 (Va. 1940) ("Equity has jurisdiction in cases of recognized rights, when a plain, adequate and complete remedy cannot be had in the courts of common law. The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for if at law it falls short of what a party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, *it must attain the full end and justice of the case*. It must reach the whole mischief, and secure the whole right of the party in a perfect manner.") (emphasis supplied).

**50** State ex rel. Carter v. Schotten, 637 N.E.2d 306, 308 (Ohio 1994) ("In order for there to be an adequate remedy at law, the remedy must be complete, beneficial, and speedy."); *In re Marriage of Slomka and Lenehan-Slomka*, 922 N.E.2d 36, 42 (Ill. App. 2009) ("An adequate remedy at law must be 'concise, complete, and provide the same practical and efficient resolution as the equitable remedy would provide.'").

**51** City of Kansas City v. New York-Kansas Bldg. Assocs., L.P., 96 S.W.3d 846, 855 (Mo. Ct. App. 2002).

**52** Bank of Haw. v. Davis Radio Sales & Serv., Inc., 727 P.2d 419, 427 (Haw. Ct. App. 1986) ("[e]quity jurisprudence is not bound by strict rules of law, but can mold its decree 'to do justice'"); Tkachik v. Mandeville, 790 N.W.2d 260, 265 (Mich. 2010) ("[e]quity jurisprudence 'mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life'"); Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins. Co., 225 So.3d 780, 783 (Fla. 2017) ("equity favors justice and fairness over formalistic legal rules"); Manning v. Nev. State Bd. of Acct., 673 P.2d 494, 495 (Nev. 1983) ("the overriding goal of equity [is] to achieve justice").

examined the "myth of redemptive violence" and how it has influenced the law of war, specifically the case of *Hamdi v. Rumsfeld*.[53] Other scholars have approached the subject but have not closely examined how myth works in the human psyche, or how it wiggles its way into the law. Thus, while Robert Cover talks about a "nomos" (a "normative universe"), referring on occasion to myths, his work is only adjacent to the systematic study of myth and the law.[54]

A simple Westlaw or Lexis search for law review articles in which the word "myth" appears in the same sentence as "law" reveals that the word "myth" is almost universally being used as a synonym for "misconception," "misunderstanding," "falsehood" or similar concepts.[55] The Oxford English Dictionary seemed to agree, defining "myth" as "a widespread but untrue or erroneous story or belief; a widely held misconception; a misrepresentation of the truth. Also: something existing only in myth; a fictitious or imaginary person or thing."[56] But such treatment does not recognize that myths are a different "dimension" that many people take meaning from, and which have profound impacts on their lives. And myths do, sometimes, influence the law.

Noted psychologist Rollo May argues that myth is not just an important way in which people make meaning; it is essential to their mental well being. May defines myth as "a way of making sense in a senseless world. Myths are narrative patterns that give significance to our existence." He compares myths to the "beams of a house: not exposed to outside view, they are the structure which holds the house together so people can live in it."[57]

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**53** Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools*, 13 Conn. Pub. Int'l. L. J. 43 (2013). In her article, she explores how the Fourth Circuit's decision reflects (perhaps unconscious) application of the Myth of Redemptive Violence, a myth in which the law and legal rules are seen as ineffectual and that only "good" violence, in the nature of a hero acting outside of legal norms, can achieve the "right" result. Hamdi v. Rumsfeld, 316 F.3d. 450, 459–60 (4th Cir. 2003). Ultimately, however, the Supreme Court reversed, being persuaded instead by the story of the American Revolution and freedom. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

**54** Robert M. Cover, Nomos *and Narrative*, 97 Harv. L. Rev. 4 (1983).

**55** The concept of myth is commonly used in critical race theory analysis. *See, e.g.,* Athornia Steele, *The Myth of a Colorblind Nation: An Affirmation of Professor Derrick Bell's Insight into the Permanence of Racism in Society*, 22 Cap. U. L. Rev. 589 (1993); Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of, the Colorblind Equal Protection Clause*, 10 Rutgers Race & L. Rev. 362 (2008); David A. Strauss, *The Myth of Colorblindness*, 1986 Sup. Ct. Rev. 99 (1986); Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 Wis. L. Rev. 579 (1989). But it appears in many other contexts too. *See, e.g.,* John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know about Conflict Resolution from Marc Galanter*, 6 Cardozo J. Conflict Resol. 191 (2005); Hannah Brenner et al., *Bars to Justice: the Impact of Rape Myths on Women in Prison*, 17 Geo. J. Gender & L. 521 (2016). Still, most of these articles tend to throw up their hands, say something like "myth is really hard to define," and proceed to treat myth as simple falsehoods or misconceptions.

**56** *Myth*, Oxford English Dictionary (3d ed. 2000).

**57** Rollo May, The Cry for Myth 15 (1991).

Historian James Oliver Robertson writes that "[m]yths are stories; they are attitudes extracted from stories; they are 'the way things are' as people in a particular society believe them to be; and they are the models people refer to when they try to understand their world and its behavior."[58] He adds that myths help people explain contradictions, conflicts, and "confusing realities" in the world. They are often passed down from generation to generation "by an unconscious, non-rational process" that is resistant to change. And thus, the myths persist.[59]

My own definition of "myth" recognizes that myths are important dimensions of being human, and that they have powerful influences over people. Here is my expanded definition:

> A myth is an often-repeated story that attempts to explain some moral value or to explain something beyond the comprehension of humans. Although the story is not necessarily grounded in historical or scientific fact, it is regarded by a social group as a true statement of the group's moral or other values, or is significant to that group in some important way.[60]

There are different types of myths, too, some of which are more relevant to the legal system than others. For example, religious literature from all faiths is full of myths: origin myths, resurrection myths, etc. These all fit my definition of myth in that while they cannot be empirically proven as "true" or "false," they do present ideas and values that are significant to those who adhere to the myths. Adjudicating the veracity of such myths is far beyond the competence or responsibility of the judicial system; however, courts should be attentive to how such myths may inform or be incorporated into legal rules or decisionmaking processes, even subconsciously.

The legal system has its useful myths too. What are "legal fictions" if not myths? For example, the notion that a corporation is a "person" may not have a well-articulated story behind it, but it is at least a metaphor that attempts to explain something beyond the comprehension of humans. And it has significance in that it allows corporations to accumulate capital, shield investors from personal liability, own property, and do many things useful for our economic lives.[61]

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**58** James Oliver Robertson, American Myth, American Reality xv (1980).

**59** *Id.*

**60** In coming up with this definition, I have borrowed liberally from Chiara Bottici and her book *A Philosophy of Political Myth* (Cambridge U. Press 2007), although I have modified it in some respects based on additional sources, including May's formulation above.

**61** *See* Kenneth Chestek, *Of Metaphors and Magic Wands: Are Corporations Really People?*, 89 Miss. L. J. 1 (2019).

Another type of myth is the "political myth." Prof. Chiara Bottici defines a "political myth" as "the work on a common narrative by which the members of a social group (or society) make significance of their political experiences and deeds."[62] A political myth, she writes, is related to, but distinct from an ideology. Ideologies are "systems of ideas that reveal a universal truth."[63] Essentially, myth can be used as a tool to further a larger ideology. Ideologies, sometimes communicated through political myths, can, and often do, influence the law, most obviously in enacted law but also, in less obvious ways, in decisional law.

Let me provide two brief examples. I have identified what I am calling the "Myth of Divine Right": the notion that God favors one society over all others, with the result that the favored society is entitled to, or maybe even required to, spread its values over all other, less-favored societies. That myth, in my view, derives from the Biblical creation story, in which God created the earth, then humans, and then gave "dominion" over all the earth to the humans.[64] But despite its origins as a religious myth, the marriage of church and state in medieval times transformed it into a political myth. Thus, the Myth of Divine Right led 15th and 16th century kings and emperors to feel entitled to travel to North America and conquer the natives they encountered there, seeking religious blessings for their deeds after the fact from the corrupt popes of the era.[65] These papal pronouncements soon formed the basis of what became known as the Doctrine of Discovery, a Euro-centric notion that the first Christian king to "discover" lands not ruled by any other Christian prince gained certain rights over the natives of that land, and perhaps more importantly the right to exclude other European powers from interfering with those rights.[66] The Doctrine of Discovery eventually led to the idea of Manifest Destiny, the obnoxious idea that Europeans were destined by Providence to "overspread" the entire North American continent, dispossessing the

62 Bottici, *supra* note 60, at 178.

63 *Id.* at 186 (citing R. Aron, The Opium of the Intellectuals (2001)).

64 And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.

So God created man in his own image, in the image of God created he him; male and female created he them.

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

*Genesis* 1:26–28 (King James Version).

65 Pope Alexander VI's bull *Inter Caetera*, one of three bulls issued to sanctify Christopher Columbus' conquest of some Caribbean islands, was issued on May 3, 1493, *after* Columbus returned to Spain from his famous 1492 "Voyage of Discovery." Kirkpatrick Sale, Christopher Columbus and the Conquest of Paradise 124–25 (2006).

66 This is a simplification of a very controversial and complex legal theory. For a fuller explanation of how the Doctrine of Discovery works, see Robert J. Miller, Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny 3–5 (Praeger 2006).

indigenous peoples in the process.[67] Manifest Destiny and the conquest of the American West is, perhaps, the most perfect example of the Myth of Divine Right in American history.

But the larger point here is that the Myth of Divine Right, which led to the Doctrine of Discovery, has found its way into American law. It made its first appearance even prior to the articulation of the concept of Manifest Destiny in the famous case *Johnson v. M'Intosh*,[68] which involved a land dispute between two Euro-Americans. Johnson claimed that he had title to the land based on a deed granted to him by an Indian tribe, while M'Intosh claimed title through a patent issued to him by the U.S. government. Since one of the key tenets of the Doctrine of Discovery is that the European power that first "discovered" the land held the exclusive right to negotiate for the purchase of land from the indigenous population, the title of the United States to the land was based upon the Doctrine of Discovery. The Supreme Court therefore had to resolve what the legal impact of that doctrine was. It upheld M'Intosh's claim of title through the United States, specifically invoking the European doctrine of "discovery."

The Doctrine of Discovery, which *Johnson v. M'Intosh* refers to as "the foundation of title, in European nations,"[69] remains the law of the United States. It has been specifically invoked as recently as 2005 in a majority opinion by Ruth Bader Ginsburg, which held that land originally occupied by the Oneida Indian Nation but which had been sold to the United States in 1805, did not become tax-exempt property as part of the Oneida reservation when the Oneidas re-purchased the land in 1997 and 1998.[70]

Another example of a political myth is what I call the Myth of the Free Market. This myth holds that government regulations only "distort" the market which, if left unregulated, would automatically self-correct to insure maximum freedom for all actors. This myth even uses mystical images of "invisible hands" that ensure this freedom for all of us.[71] This

**67** The phrase "manifest destiny" is commonly attributed to a publisher named John L. O'Sullivan, who wrote an editorial in his newspaper the *United States Magazine and Democratic Review* in July 1845:

> To state the truth at once in its neglected simplicity, our claim [to Oregon] is by the right of our manifest destiny to overspread and possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us.

Will Bagley, So Rugged and Mountainous: Blazing the Trails to Oregon and California, 1812–1848 251 (2010); *see also* Anders Stephanson, Manifest Destiny: American Expansion and the Empire of Right 42 (1995).

**68** 21 U.S. 543 (1823).

**69** *Id.* at 567.

**70** City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005) ("'Under the 'doctrine of discovery,' . . . 'fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.'") (citations omitted).

**71** The image of the "invisible hand" is most often attributed to Scottish philosopher Adam Smith:

> The rich only select from the heap what is most precious and agreeable. . . . [I]n spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands, whom they employ be the gratification of their own vain and insatiable desires, they

myth ignores the fact that markets need rules in order to function at all, and that therefore whoever creates the rules has the power to control the market. Yet legislatures legislate, and judges rule, as if there is such a thing as a "free market."

The key feature of the mythical dimension is not that a myth is a false story that people mistakenly believe. It is that adherents to the myth find "significance" in the myth.[72] German philosopher Hans Blumenberg devotes an entire chapter to the topic of "significance" in his book *Work on Myth*. He rhetorically asks how myth can compete with other ways of looking at the world and concludes that it is the quality of "significance" that gives myth its power. He says that "significance . . . can be explained but cannot, in the strict sense, be defined." He says that "significance" has the "status of reality," which is different from "empirical demonstrability."[73]

Thus, those who believe in the Myth of Divine Right find significance in the supposition that God favors them. Those who believed in Manifest Destiny believed that "Providence" wanted them to have the land they were "overspreading." Those who believe in the Myth of the Free Market are comforted by the idea that they are somehow "free" because of the lack of government intrusions into their private lives.

Because "significance" is so important and so powerful, adherents to specific myths are loathe to give them up easily; moreover, it is easy to see how such myths are easily incorporated into legal doctrines. Legal scholars would do well to undertake a serious study of how myth works, how it embeds itself in the law, and thereby learn how to counteract its often-ill effects on the law, by asking not whether the identified myth is "true," but why it appears to be "significant" to its adherents.

## III. Empirical reasoning vs. narrative reasoning and storytelling

To the partial lists of myths in the previous section, I offer another: the Myth of Empirical Reasoning. This myth seeks to reduce all legal

divide with the poor the produce of all their improvements. *They are led by an invisible hand* to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants; and thus, without intending it, without knowing it, advance the interest of the society.

Adam Smith, The Theory of Moral Sentiments 304 (1759) (emphasis supplied); *see also* Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 Loyola L. Rev. 33 (2010). However, some scholars argue that Smith probably didn't invest much meaning into his metaphor, and that its elevation in the mid-20th century to a high principle of economics is probably unjustified. Gavin Kennedy, *Adam Smith and the Invisible Hand: From Metaphor to Myth*, 6 Econ. J. Watch 239 (2009).

72 Bottici, *supra* note 60, at 123.

73 Hans Blumenberg, Work on Myth 67–68 (1985).

decisionmaking to binary, true/false tests, in an attempt to infuse the law with "certainty" and "objectivity." While most serious legal scholars and lawyers clearly understand that this myth is false, and that few legal decisions can be reduced to binary choices, the myth persists in public discourse. Judges who rely on rules and tests that require *post hoc* application of values (as many legal rules do) are accused of being "activist judges," at least when the accuser disagrees with the result.

My response to such accusations is that, in those cases, the judges are appropriately addressing dimensions of being human that require ways other than empirical reasoning to decide "adequately." Different types of disputes demand different types of reasoning to resolve. While empirical problems might yield to a strict regime of logical analysis and scientific proof, none of the other dimensions of being will. There is no "logical" way a court can decide which parent would make a "better" custodial parent of a minor child, for example. Nor is there a logical way to determine which sentencing goal is more important in a particular case; two defendants convicted of the identical crime might legitimately receive different sentences because of their very different individual attitudes and circumstances.

Empirical reasoning and logic work fine when the case can be confined to the realm of empirical facts—and at least some issues in a surprisingly large number of "easy" cases can be decided on that basis. In every other type of case, the only way to resolve the dispute is through narrative reasoning. Storytelling matters.

A short and incomplete list of the kinds of cases where storytelling is essential to a court's reasoning might include:

1. Equity cases
2. Domestic relations cases (including equitable distribution of property, child custody decisions, and the like)
3. Sentencing decisions in criminal cases
4. Impact litigation, or efforts to change existing law
5. Tort cases seeking relief for psychic injuries
6. Many damage calculations in tort cases (wrongful death damages, pain and suffering calculations, consortium claims, etc.)
7. Any legal rule relying on a balancing test (since the relative weight of one interest over any other is a subjective matter)

Relying on something as subjective and indistinct as "narrative reasoning" will likely feel unsettling to some. It seems to invite bias and judicial hunches and motivated reasoning. It feels unpredictable and unstable, not "neutral" or "unbiased."

It is true that narrative reasoning puts a lot of trust in the judges doing the reasoning. It gives them wide discretion, which leads to power. But is the solution to that problem depriving judges of their discretion and attempting to confine them strictly to cases involving only claims based on empirical disputes? To try to reduce every decision to an objective, true/false binary choice? To do so would lead to great injustice in the many types of cases, described above, that require other forms of reasoning. Elevating hard-edged rules over justice will inevitably lead to injustice at least some of the time.

Narrative reasoning is not wholly untethered from rationality or manageable standards. Trial courts are often said to have wide discretion in many areas, including the types of decisions we have discussed in this article. And their decisions are not unreviewable; the "abuse of discretion" standard of review exists precisely to ensure that large deviations from social norms can be corrected on appeal. And scholars have begun to articulate verbal standards that could be useful in reviewing cases. Chris Rideout, for example, refers to the concept of "narrative fidelity" as a standard that might help a court evaluate a narrative argument. He writes that "narrative fidelity . . . has to do with 'whether or not the stories they experience ring true with the stories they know to be true in their lives.'"[74]

Another way of thinking about "narrative fidelity" is the colloquial expression "does it pass the laugh test?" Take for example a story currently circulating in some social groups that "a group of Satan-worshiping elites who run a child sex ring are trying to control our politics and media."[75] For most Americans, this conspiracy theory does not "pass the laugh test"—it lacks narrative fidelity. It does not ring true with stories we know to be true about our political leaders. But less extreme examples of narrative fidelity come into legal reasoning on a daily basis. Every time a juror evaluates the credibility of a witness, that juror is using (among other things) the metric of narrative fidelity: does the witness's testimony "ring true?"

It is one thing to acknowledge the validity, even the necessity at times, of narrative reasoning in the decisionmaking process. It is quite another to allow space for narrative reasoning to occur in ways that are not perceived by litigants, or the general public, as "biased" judging. There are several ways to accomplish this.

**74** J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Legal Writing 53 (2008).

**75** Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. Times, June 15, 2021, https://www.nytimes.com/article/what-is-qanon.html.

### A. Selection of judges

The first point to be made is that, rather than constrain the judges in how they operate, we need to select good judges, regardless of whether they are elected or appointed. By "good judges," I mean judges who understand the many "dimensions of being" that are important to the human experience, and therefore understand their roles in the judicial system.[76] Judges with good instincts for narrative fidelity.

In 2005, President George W. Bush nominated Judge John G. Roberts to be Chief Justice of the United States Supreme Court. A young Senator from Illinois named Barack Obama voted against that nomination, saying in part:

> [W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy. . . . [I]n those difficult cases, the critical ingredient is supplied by what is in the judge's heart.[77]

In 2009, then-President Obama stirred up a political hornet's nest when he appointed Sonia Sotomayor to the U.S. Supreme Court. Following up on his 2005 remarks upon the confirmation of Chief Justice Roberts, President Obama said that he wanted to appoint a judge who displayed "empathy . . . for people's hopes and struggles."[78] Upon making his nomination, he praised not only Sotomayor's life history of rising from a modest background to getting an Ivy League education and becoming an appellate court judge, but also her "ability to relate to ordinary Americans."[79] Republican Senators immediately objected, complaining

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**76** Former Seventh Circuit Judge Richard Posner suggested that good judges need an "elusive" quality he referred to as "good judgment," which he said is "best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense." Richard A. Posner, How Judges Think 117 (2008). His definition is, I think, entirely compatible with my notion of judges being well-versed in the myriad human ways of being that I describe in this article.

**77** *Remarks of Senator Barack Obama on Confirmation of Judge John Roberts*, ObamaSpeeches.com, http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm.

**78** Janet Hook & Christi Parsons, *Obama Says Empathy Key to Court Pick*, L.A. Times, May 2, 2009, https://www.latimes.com/archives/la-xpm-2009-may-02-na-court-souter2-story.html.

**79** Deborah Tedford, *Obama Chooses Sotomayor for Supreme Court*, Nat'l Pub. Radio, May 26, 2009, https://www.npr.org/templates/story/ story.php?storyId=104530389.

that "empathy" meant she would make decisions based on her personal political preferences and not based on the law.[80] Justice Sotomayor, during her own confirmation hearings, found it necessary to distance herself from President Obama's 2005 remarks.[81]

Former Seventh Circuit Judge Richard Posner might agree with President Obama. He wrote:

> Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgments, including their own political opinions or policy judgments, even their idiosyncrasies . . . . The decision-making freedom that judges have is an *involuntary* freedom. It is the consequence of legalism's inability in many cases to decide the outcome (or decide it tolerably . . .) . . . . That inability . . . create[s] an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by "the law."[82]

What was Judge Posner referring to when he referred to "acceptable" or "tolerable" answers? He seems to be resisting "legalist decision making" because that constraint can lead to bad decisions. I suggest he is acknowledging that decisions reached through purely empirical processes (his notion of "legalism") may not have narrative fidelity with other dimensions of being that are important to human society—the ultimate "consumers" of the court's decisions.

It seems to me that then-Senator Obama and former Judge Posner both have it exactly right. Formal, rigid legal rules cannot provide answers, acceptable or not, to the many types of questions that require metrics other than a binary true or false decision to even understand, let alone resolve acceptably. And despite Justice Sotomayor's attempt during her confirmation hearing to distance herself from President Obama's views on empathic judging, some scholars have argued that she has actually used that approach since joining the bench—and that her ability to "enlighten

**80** Peter Baker & Jeff Zeleny, *Obama Hails Judge as 'Inspiring,'* N.Y. Times, May 26, 2009, https://www.nytimes.com/2009/05/27/us/politics/27court.html.

**81** Manu Raju, *Sotomayor breaks with Obama on empathy*, Politico Now Blog, July 14, 2009, https://www.politico.com/blogs/politico-now/2009/07/sotomayor-breaks-with-obama-on-empathy-019822.

To be fair, what judicial candidates say in Senate confirmation hearings must be taken with a large dose of salt. For example, Former Seventh Circuit Judge Richard Posner has excused Chief Justice Roberts' famous remark, during his confirmation hearing, about judges simply being umpires "calling balls and strikes" as Roberts' simply "trying to navigate the treacherous shoals of a Senate confirmation hearing." Posner, *supra* note 76, at 78.

**82** Posner, *supra* note 76, at 9 (emphasis in original).

her colleagues to other perspectives" has "allowed her to give a voice to the habitually unheard, which inevitably generates fairer decisions."[83]

### B. Diversity on the bench

The second point to be made here is that, even if we are able to select judges who are appropriately attentive to the narrative fidelity of a story, not all judges bring the same understanding of what "narrative fidelity" is to the bench. Nor is it possible to guarantee that the judge's understanding of narrative fidelity will match that of the litigants or other interested observers. What "rings true" for a judge from one background may differ greatly from what "rings true" for another judge.

There are no solutions to this problem, only ways to mitigate it. The principal strategy to mitigate this problem is to have a widely diverse bench, coupled with a strict system of random assignment of cases to judges. On a multi-judge appellate court, this is relatively easy to accomplish, at least in jurisdictions that appoint judges rather than elect them. If the appointing authority commits itself to seek out and appoint judges of varying ethnic backgrounds, races, gender and gender identities, socio-economic backgrounds, partisan affiliations, and other criteria, the appellate bench as a whole would look a lot more like the society it serves.[84] En banc decisions would be informed by all of the diverse worldviews held by the members of the court, hopefully leading to greater understanding of how different possible outcomes would reflect (or not) a shared idea of narrative fidelity. If there is also in place a robust randomized process for assigning cases to appellate panels, panel decisions would also benefit from the diversity of viewpoints likely to be represented on any given panel, as well as reassuring the litigants that any possible bias was the result of a random process. Plus, the prospect of possible en banc review by a fully diverse court would act as a check on possible bias arising from the random selection process (e.g. if the appointment of a panel results randomly in assigning a majority of judges with a particular worldview).

At the trial level, things get a lot trickier, since most cases are decided by single judges. In larger jurisdictions with multiple judges available,

**83** Veronica Couzo, *Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication*, 89 Notre Dame L. Rev. 403, 403 (2013). Many scholars rushed to the defense of empathic judging. *See, e.g.,* Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How it Matters in Judging*, 9 Legal Comm. & Rhetoric 173 (2012); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 Cardozo L. Rev. 133, 136 (2009); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 Minn. L. Rev. 1944 (2012); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 Calif. L. Rev. 629 (2011); Mitchell F. Crusto, *Empathic Dialog: From Formalism to Value Principles*, 65 SMU. L. Rev. 845 (2012).

**84** I am fully aware that I am positing an *ideal* appointment process, not the highly partisan process that has emerged in recent years for federal judges.

the strategy I propose for appellate courts (i.e. seeking diversity among the judges and a strictly randomized case assignment system) could be effective. But in smaller courts (particularly in state court systems where a small county may have only one judge available, elected by the local citizens), the opportunity to have a diverse bench is greatly reduced. The only safeguard available in those cases would appear to be the trial judge's fear of reversal by a more diverse appellate court.

### C. Implicit bias training

The third point to be made is that having a diverse bench and a secure, randomized case assignment system still isn't enough. There will inevitably be situations where a case is assigned to a judge or a panel that one or more of the litigants will suspect has a very different base worldview, and therefore will suspect that "narrative reasoning" is just a cover for imposing the judge's or panel's own personal preferences, rather than basing the ruling on neutral legal principles.

The only feasible solution to this problem is to provide judges (most importantly trial judges) with (a) training on how to spot implicit biases that they may not be aware of, and (b) asking judges to specifically address those possible biases in their written opinions. As much as judges may not like to admit it, a written opinion is a work of persuasive writing. Not only the litigants before the court, but also the public at large, needs to be persuaded that the ruling is correct and unbiased.[85] Any opinion resolving the dispute must therefore clearly lay out not just the legal reasoning, but also any narrative reasoning that the court relied upon, so that it can be evaluated by the interested parties. Just like any other piece of good persuasive writing, it also needs to engage in counteranalysis: the opinion should lay out the best case for the losing side, and then explain carefully why that side was not the "best" result in the eyes of the court. Any implicit biases that the court spotted and addressed in its ruling should also be reported and discussed.

In the end, the courts' authority is derived only from their own credibility. Respect for the rule of law can only be earned by transparent judging—including full transparency about any narrative reasoning that the court necessarily relied upon in reaching its decision.

85 By "unbiased," I mean simply free from pre-judgment, or improper favor or animus toward any of the litigants. Any time a judge must resolve a case based on narrative reasoning, the judge's own experiences and worldview will inform the ultimate decision; the best we can hope for is that the judge's personal feelings toward the litigants are set aside to the extent possible.

## VI. Conclusion

It is commendable for jurists and lawyers to aspire to create and apply neutral rules, clearly articulated and unambiguous, to resolve cases fairly and impartially. And it is understandable why citizens want such certainty in the legal system. But that objective is unattainable. Judge Posner has written that

> [t]he falsest of false dawns is the belief that our system can be placed on the path to reform by a judicial commitment to legalism—to conceiving the judicial roles as exhausted in applying rules laid down by statutes and constitutions or in using analytic methods that enable judges to confine their attention to orthodox legal materials and have no truck with policy.[86]

The legal system itself needs to account for all of the varied ways in which human beings encounter the world. A legal system whose authority depends on public acceptance of the idea of the "rule of law" must meet the public where it lives: in the complicated, emotional, often irrational but very real and deeply felt ways in which humans experience the world.

86 Posner, *supra* note 76, at 15.

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# Reclaiming the Singular They in Legal Writing

Robert Anderson*

## Introduction

Legal writing has a pronoun problem. The problem arises where a sentence calls for a generic pronoun to refer to a third-person singular generic noun. Generic nouns are gender-neutral, and include definite nouns such as "baker," "lawyer," or, as in the following sentence, "plaintiff."[1] "When a plaintiff commences an action by service of process, _____ must also file the complaint with the court." In the twentieth century, legal writers commonly filled the blank with *he*, or, *he or she*. Today, both of those pronouns are disfavored: the first as sexist,[2] the second as awkward.[3]

English speakers and writers commonly fill the blank with *they*, as in "they must also file the complaint with the court" or "Please ask

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1 *See* Dennis Baron, What's Your Pronoun 153 (2020) (referring to a generic noun as a definite noun, and distinguishing definite nouns from indefinite nouns like "everyone" or "someone"); Greg Johnson, *Welcome to Our Gender-Neutral Future*, Vt. B.J., Fall 2016, at 36, 36. ("Generic nouns are those that can refer to either gender, as in, 'A lawyer must always follow court rules when writing his brief.'").

2 Tom Cobb, *Embracing the Singular 'They'*, NW Law., May 2019, at 12, 14 ("Writers who continue to use 'he' in this way risk being seen as sexist, out of touch, or intentionally flouting usage norms to make a political point."); *see* Ann Bodine, *Androcentrism in Prescriptive Grammar: Singular 'They', Sex-Indefinite 'He,' and 'He or She'*, 4 Language in Soc'y 129, 129 (1975) ("[T]hird person pronoun usage will be affected by the current feminist opposition to sex-indefinite 'he.'"); Judith D. Fischer, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. Rev. 473, 481 (2009) ("Studies reported a decline in the use of masculine nouns and pronouns as generics, with one study finding a notable decline in their use in American newspapers in magazines between 1971 and 1979.").

3 H.W. Fowler, A Dictionary of Modern English Usage 391–92 (1926); Cobb, *supra* note 2, at 15.

everyone what they want for lunch."[4] But legal writing does not recognize the existence of singular *they* when used as a singular generic pronoun: legal writing authorities, including textbook and legal writing style guide authors, almost universally label it ungrammatical and therefore not appropriate for formal writing.[5] Thus, legal writing lacks a singular generic third-person pronoun to fill the blank, concluding that there is no solution that is grammatical, simple, and inclusive.[6]

The history of both common English usage and legal usage proves legal writing wrong. The use of the singular *they* predates[7] even the emergence of modern English. But legal writing nevertheless pays homage to a later-created rule labeling the singular *they* as ungrammatical in order to institute the use of the masculine *he*. This effort was sexist at its inception, and for two hundred years succeeded in subordinating females to the role of second-class citizens within their own language. Today, legal writing authorities perpetuate that effort by refusing to acknowledge *they*: the only gender-neutral pronoun that is grammatical, simple, and inclusive.

As section I details, the singular *they* is grammatically correct, as it has been continuously used as a singular generic pronoun since the advent of modern English. Section II reveals that legal writing's rejection of the singular *they* is based on obeisance to a later-instituted rule that was born from an androcentric effort to institute the masculine *he* as a gender-neutral pronoun. Putting aside the motivations of those who attempted to proscribe it, section III demonstrates that *they* functions effectively as a generic singular pronoun because it is not only grammatical, but also a simple and inclusive pronoun alternative to fill the blank. Section IV considers the potential ambiguities that may arise from the use of singular *they*. Such instances of ambiguity are rare, and mostly result not from the

4 *See* Cobb, *supra* note 2, at 14 (employing a similar example, "Please ask each of the witnesses what they want for lunch.").

5 *See* Anne Enquist, Laurel Oates & Jeremy Francis, Just Writing 631 (5th ed. 2017) (proscribing the singular *they* as a generic pronoun on the basis that it is "ungrammatical"); Heidi K. Brown, *Get with the Pronoun*, 17 Legal Comm. & Rhetoric 61, 73–75 (2020) (collecting examples of singular *they* proscriptions in legal writing usage guides and scholarship); Paul Salembier, *Is Bad Grammar Good Policy? Legislative Use of the Singular 'They'*, 36 Statute L. Rev. 175, 176 (2015) ("Among grammarians, however, the use of the singular *they* is generally acknowledged to be incorrect and is considered unacceptable in professional writing."); *see also infra* notes 44–46.

6 This question of how to use the singular *they* as a generic pronoun to refer to a generic noun is analogous to, but not the same as, the question of how to use the singular *they* to refer to a known individual who employs *they* as a personal pronoun, as in the sentence, "Hayden achieved a lifelong ambition when they graduated from law school." This article focuses on the use of singular *they* as a generic pronoun and will explain how generic pronouns and personal pronouns relate to one another. *See infra* section III.

7 This article uses italics when referring to the singular *they* as a concept and uses singular verb forms ("*they* functions") in that context. However, when the singular *they* is employed in common usage as a generic singular pronoun, it is paired with plural verb forms. For example, in *Alice's Adventures in Wonderland*, Lewis Carroll uses the plural "say" rather than the singular "says" when employing the singular *they*: "But how can you talk with a person if they always say the same thing?" *See* Robert D. Eagleson, *A Singular Use of They*, 5 Scribes J. Legal Writing 87, 96 (1994–1995) (quoting Lewis Carroll, Alice's Adventures in Wonderland (1865)).

use of the singular *they* particularly, but of pronouns generally. In those limited instances, non-pronoun alternatives will clarify the writer's intent.

## I. The singular they is as old as English itself

Grammar texts of the nineteenth and twentieth century insisted that English does not possess a third-person singular generic pronoun.[8] But, as Dennis Baron's exhaustive historical scholarship reveals, *they* and its associated pronouns *them* and *their* have functioned both as third-person plural pronouns and as third-person singular generic pronouns for as long as modern English has been spoken and written.[9]

The *Oxford English Dictionary* records the use of singular *they* to refer to a generic singular noun as early as the fourteenth century, in a middle English romance tale entitled *William and the Werewolf*. "'Hastely hiȝed eche . . . þei neyȝþ ed so neiȝh . . . þere william & his worþi lef were liand i-fere.'" Translated to modern English, the sentence reads, "'Each man hurried . . . till they drew near . . . where William and his darling were lying together.'"[10] As exemplars of English from the period are sparse, it is likely that singular *they* had already been in use in middle English for some time prior.[11]

For several centuries, as middle English gave way to modern English, *they* was commonly and continuously used both as a plural and singular pronoun.[12] Examples of the use of *they*, *them*, and *their* as generic singular pronouns are legion. Appendix A catalogs numerous usages, including the following instances.

8 Bodine, *supra* note 2, at 130 ("There is a tradition among some grammarians to lament the fact that English has no sex-indefinite pronoun for third person singular.").

9 *They* appeared as a pronoun in Middle English, having originated in Old Norse, the language of the conquering Vikings. As Dennis Baron describes it, "English speakers must have found the pronoun they really useful or they wouldn't have borrowed it from the language of their enemies." Baron, *supra* note 1, at 151.

10 Dennis Baron, *A Brief History of Singular 'They,'* Oxford English Dictionary (Sept. 4, 2018), https://public.oed.com/blog/a-brief-history-of-singular-they.

11 *Id.* ("Since forms may exist in speech long before they're written down, it's likely that singular they was common even before the late fourteenth century. That makes an old form even older."); Eagleson, *supra* note 7, at 89 ("The entries from the *Oxford English Dictionary* forcefully demonstrate that the use of they to refer to a singular noun is not an innovation of recent decades or even of this century. The earliest citation is from the 14th century, so we know that the practice had been adopted in writing at least by then. There may have been much earlier examples that have been lost, and the practice may well have been established in speech before it found its way into writing. In adopting they with singular reference, we are simply following a long-established convention of the English language.").

12 Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 Women's Rts. L. Rep. 1, 6 (1998) ("Gender neutral pronouns preceded pseudogeneric 'he' and are still common in the English language. Prior to the nineteenth century, English writers widely employed singular 'they' as a gender neutral pronoun.").

- No one in the whole country was brave enough to oppose them, because they were so afraid of them.
  —Three Kings of Cologne (c. 1400) (translated to modern English from Middle English)[13]
- So likewise shall my heavenly Father do also unto you, if ye from your hearts forgive not everyone his brother their trespasses.
  —The Bible (King James Version 1611)[14]
- A person can't help their birth.
  —Vanity Fair by William Thackeray (1848)[15]
- No American should ever live under a cloud of suspicion just because of what they look like.
  —Barack Obama (2012)[16]

"The use of 'they' in speaking of a single individual is not a modern deviation from classical English. It is found in the works of many great writers including Malory, Shakespeare, Swift, Defoe, Shelley, Austen, Scott, Kingsley, Dickens, Ruskin, [and] George Eliot."[17] Jane Austen employed the singular *they* seventy-five times, including this usage in *Pride and Prejudice*: "I always delight in . . . cheating a person of their premeditated contempt."[18]

Thus, while it is a foundational rule of pronominal usage that a pronoun must agree in number with the noun it references, writers and speakers who use *they* as a singular pronoun do not violate the rule because usage established *they* as both a singular and plural pronoun centuries ago.[19]

13 Baron, *supra* note 1, at 150 (quoting the *Oxford English Dictionary*).

14 Eagleson, *supra* note 7, at 96.

15 Baron, *supra* note 1, at 169.

16 Antonio Gidi & Henry Weihofen, Legal Writing Style 30 (3d ed. 2018) (quoting Barack Obama, President, Statement by the President on the Supreme Court's Ruling on Arizona v. the United States (June 25, 2012)).

17 Bergen Evans & Cornelia Evans, A Dictionary of Contemporary American Usage 509 (1957); *see also* Dennis Baron, Grammar and Gender 193 (1986) (noting that English writers Addison, Austen, Fielding, Chesterfield, Ruskin, and Scott employed the singular *they*); Sterling A. Leonard, The Doctrine of Correctness in English Usage 1700–1800, 225 (1929) (noting the use of singular *they* by Austen, Scott, Addison, and Swift, and commenting that British authors of the eighteenth and nineteenth century used the singular *they* more freely than American authors of the period).

18 Baron, *supra* note 1, at 155 (citing Lorraine Berry, *'They': The Singular Pronoun that Could Solve Sexism in English*, The Guardian (May 5, 2016), https://www.theguardian.com/books/booksblog/2016/may/05/they-the-singular-pronoun-that-could-solve-sexism-in-english; Gretchen McCulloch, *This Year Marks a New Language Shift in how English Speakers Use Pronouns*, Quartz (Dec. 21, 2015), https://www.qz.com/578937/this-year-marks-a-new-language-shift-in-how-english-speakers-use-pronouns).

19 Dale Spender, Man Made Language 149 (2d ed. 1985) ("Before the zealous practices of the nineteenth-century prescriptive grammarians, the common usage was to use *they* for sex-indeterminable references."). The practice of gender and number agreement in English pronouns predated any attempt to prescribe grammar. Scholars who began to categorize and systematize English grammar recognized that English speakers and writers observed what one grammarian coined as "the fifth rule of syntax," that a pronoun must agree with its antecedent in gender and number. Baron, *supra* note 17, at 98, 191.

And, the singular *they* has historically been used not only in informal settings, and not only in literature, but also in legal writing. At its inception in the Colonial period, American legal writing took the form of colonial constitutions and statutes, as well as government correspondence and private contracts and corporate documents.[20] Just as speakers and writers generally employed the singular *they* when English was first spoken and written, early American legal writers, including lawyers and legislatures, also employed the singular *they*.

In 1647, within the first codification of laws of the nascent Massachusetts colony, the legislature employed the singular *they* forty-three times, as in this edict: "If any man or woman be a WITCH, that is, hath or consulteth with a familiar spirit, they shall be put to death."[21] Appendix B lists other examples from the period, including the following instances.

- [B]e it further Enacted by the Authority aforesaid, That every Retailer . . . shall also take and have . . . a Permit . . . for which Entry and Permit they shall pay *One Shilling*, and no more.
  —Act of the Pennsylvania Province General Assembly (1719)[22]
- [E]very Member shall . . . meet annually, at the Redwood-Library, at Ten of the Clock in the Forenoon, on every last Wednesday of September; where and when . . . they shall choose eight Directors, a Treasurer, a Secretary, and a Librarian.
  —Laws of the Redwood-Library Company (1765)[23]

Thus, the rule of English grammar that American legal writers first followed approved the singular *they*, and legal readers prior to the nineteenth century recognized the singular *they* as grammatically correct.

While later grammars attempted to institute a rule against singular *they*, and falsely asserted that *they* had always been labeled as incorrect,[24] this proscription is a relatively recent invention. Grammarians began proscribing the singular *they* in the late eighteenth century, asserting that it failed to observe the rule that a pronoun must agree in number with

**20** *See* Appendix B (collecting examples).

**21** The Book of the General Lauues and Libertyes Concerning the Inhabitants of the Massachusets 5 (Cambridge 1648).

**22** *An Act Passed in the General Assembly Held at Philadelphia for the Province of the Pennsylvania the Twenty Fifth Day of April, 1719*, in The Statutes at Large of Pennsylvania 229 (Philadelphia 1719).

**23** Redwood Library Company, Laws of the Redwood-Library Company 4 (Newport, Samuel Hall 1765).

**24** *See* Baron, *supra* note 1, at 24 (referencing an eighteenth-century usage critic who incorrectly asserted that *he* was the only singular pronoun when English was first spoken); Baron, *supra* note 17, at 195 (quoting twentieth-century grammarian Edward D. Johnson, misstating that the singular *they* "annoys writers, who must forego the privileges the masculine pronoun has for millennia enjoyed in English and its root languages").

the noun it references.[25] But at that point *they* had already been a singular pronoun for several hundred years.

And, despite the campaign to defeat it that lasted for close to two hundred years, speakers and writers of English continued to use *they* as a singular pronoun.[26] In 1974, a series of usage tests established that English speakers overwhelmingly favored the singular *they*, particularly in reference to indefinite nouns. In one of the tests, subjects were asked to fill the blank in the sentence, "Somebody showed her the way, didn't _____?" 87% of respondents used *they*. Subsequent tests reached similar results.[27]

### A. Two competing schools of thought agree on one principle: common usage establishes and validates English grammar rules

The singular *they* has been established as grammatical through its historical use since before the advent of modern English, and through its continued use today. And even those who insist that prescribed grammar rules should govern English nevertheless acknowledge that such directives must ultimately yield to contrary long-standing usage.

To put this point in context, there have long existed two schools of thought when it comes to how grammar rules should develop. The writer David Foster Wallace identified the two camps as prescriptivism and descriptivism.[28] Prescriptivists see grammar as a system of rules that is made and enforced by grammarians and usage experts. Descriptivists perceive grammar rules as arising from the way that English is actually spoken and written.[29] In that regard, descriptivists emphasize that the changing nature of English defies any attempt to prescribe it. "[L]anguage changes constantly. . . . Since language changes this much, no one can

**25** *See* Baron, *supra* note 1, at 152; Bodine, *supra* note 2, at 135–36 (tracing the first proscription of the singular *they* to a grammar text published in 1795).

**26** Spender, *supra* note 19, at 149 (quoting Bodine, *supra* note 22, at 131) ("[U]sing they as a singular is still alive and well, 'despite almost two centuries of vigorous attempts to analyze and regulate it out of existence.'"); Baron, *supra* note 10 ("[T]he fight against singular *they* was already lost by the time eighteenth-century critics began objecting to it.").

**27** Eagleson, *supra* note 7, at 90.

**28** David Foster Wallace, *Authority and American Usage*, *in* Consider the Lobster and Other Essays 66, 79 (2005) (crediting *Webster's Third International Dictionary* editor Philip Gove as the source of the terms); *see also* Johnson, *supra* note 1, at 36 ("We think of grammar as being prescriptive—a set of rules we have no choice but to follow. But grammar can also be seen as descriptive—a collective assessment of how we write now.").

**29** A reductive view sees prescriptivism as authoritarian and descriptivism as populist. *See* Wallace, *supra* note 28, at 121 ("The hard-line Descriptivists, for all their calm scientism and avowed preference for fact over value, rely mostly on rhetorical pathos, the visceral emotional Appeal. As mentioned, the relevant emotions here are Sixtiesish in origin and leftist in temperament—an antipathy for conventional Authority and elitist put-downs and uptight restrictions and causistries and androcaucasian bias and snobbery and overt smugness of any sort . . . i.e., for the very attitudes embodied in the prim glare of the grammarians and the languid honk of the Buckley-type elites.").

say how a word 'ought' to be used. The best that anyone can do is to say how it *is* being used."[30] Prescriptivists question whether it is possible to determine what actual usage is at any one time. They also note that the question of what actual usage is only raises further questions, such as, whose usage is considered valid? And, which group's usage determines what is the correct rule?[31]

Both camps concede that there is at least some truth in the other side's position. Descriptivists acknowledge that English relies on the existence of norms of grammar and would be incomprehensible without them. Descriptivists also acknowledge that norms may distinguish educated speakers from uneducated speakers.[32] Thus, descriptivists do not contest the existence of and need for grammar rules but question that any authority can serve as the source for those rules. Instead, descriptivists pose that grammar rules arise from the consensus of English speakers and writers as expressed through their usage. And prescriptivists agree that, whatever rules grammarians may prescribe, those rules are either validated or invalidated by the actual usage of speakers and writers of the language over time.[33]

### B. The example of you demonstrates the principle that usage validates grammar rules

The development of the pronoun *you* demonstrates this agreed-upon principle that grammar rules are ultimately determined by common usage

**30** Evans & Evans, *supra* note 17, at v–vi; *see also* Wallace, *supra* note 28, at 79, (quoting Gove's Webster's Third New International Dictionary) ("A dictionary should have no truck with artificial notions of correctness or superiority. It should be descriptive and not prescriptive."); Levi C.R. Hord, *Bucking the Linguistic Binary: Gender Neutral Language in English, Swedish, French, and German*, 3 Western Papers in Linguistics 4, 8 (2016) ("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.").

**31** Wallace, *supra* note 28, at 84.

**32** Evans & Evans, *supra* note 17, at v ("Respectable English is a much simpler matter. It means the kind of English that is used by the most respected people, the sort of English that will make readers or listeners regard you as an educated person. Doubts about what is respectable English and what is not usually involve questions of grammar. There are some grammatical constructions, such as *that there dog* and *he ain't come yet*, that are perfectly intelligible but are not standard English. Such expressions are used by people who are not interested in 'book learning.' They are not used by educated people and hence are regarded as 'incorrect' and serve as a mark of a class. There is nothing wrong about using them, but in a country such as ours where for a generation almost everybody has had at least a high school education or its equivalent few people are willing to use expressions that are not generally approved as 'correct.'").

**33** "In the end, the actual usage of educated speakers and writers is the overarching criterion for correctness. But while actual usage can trump the other factors, it isn't the only consideration." Bryan A. Garner, A Dictionary of Modern American Usage xi (1998) (detailing "Actual Usage" within a list of "First Principles" to consider in resolving usage questions, following other prescriptivist factors such as "Word-Judging").

over time. In middle English, *you* originally served exclusively as a plural pronoun—"You shall rise, and sing together, 'A Mighty Fortress is Our God.'" Speakers referred to another individual person in the second person either with the formal *thee* or the informal *thou*. Over time, speakers and writers of middle English who had previously only used *you* in the plural began to employ *you* and its related pronoun *your* alongside *thee* as a deferential way to refer to another individual of higher standing, and thus English gained the terms "your highness" and "your majesty." Then, in the seventeenth century, modern English users abandoned both *thee* and *thou* altogether in favor of employing *you* as a singular second-person pronoun in all contexts.[34] The linguist Ann Bodine explained this evolution in usage from formal and informal terms to the all-encompassing *you* as reflecting a transition in the English social structure towards greater egalitarianism.[35]

Grammarians of the day thundered against this new usage. George Fox, the founder of what became the Quakers, wrote a book on the subject. He labeled anyone who would use *you* in reference to an individual as "a Novice, and Unmannerly, and an Ideot, and a Fool."[36] But despite these prescriptivist efforts, the speakers and writers of English continued to use the singular *you*. As a result, prescriptive grammars and dictionaries ultimately acknowledged that *you* had displaced *thee* and *thou*.[37]

While the transition from *thee* and *thou* to the singular *you* within modern English can be traced to the seventeenth century, the singular *they* has existed in modern English since it emerged from middle English, long before the advent of prescriptive grammar. "Given that singular they was common by the late 1300's, and singular you is a much newer form, they should be the model for justifying singular you, and not the other way around."[38]

In 1896, writing in reference to the singular *they*, the librarian at Macon, Georgia's Wesleyan College spoke to the idea that rules of English usage are ultimately determined by its users, not any authority.

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**34** Baron, *supra* note 1, at 152–53, 163; *see also* Wallace, *supra* note 28, at 75; Teresa M. Bejan, *What Quakers Can Teach Us About the Politics of Pronouns*, N.Y. Times (Nov. 16, 2019), https://www.nytimes.com/2019/11/16/opinion/sunday/pronouns-quakers.html; Eagleson, *supra* note 7, at 91–92.

**35** Bodine, *supra* note 2, at 142.

**36** George Fox, A Battle-Door for Teachers and Professors to Learn Singular & Plural 2 (1660); *see also* Baron, *supra* note 10 (describing the ascendance of singular *you*, and noting that Fox was joined by prominent eighteenth-century grammarians Robert Lowth and Lindley Murray in prescribing *thou* as singular and *you* as plural).

**37** Anne Fisher, A Practical New Grammar, with Exercises in Bad English: Or, An Easy Guide to Speaking and Writing the English Language Properly and Correctly 70 (3d ed. 1753) (acknowledging that *you* had come to take the place of *thou* and *thee*, while *your* took the place of *thy*, and *yours* took the place of *thine*). *You* is also not an outlier case in terms of serving as both a singular and plural pronoun. Other pronouns, such as *who*, may be either singular or plural depending on the context. Evans & Evans, *supra* note 17, at 396.

**38** Baron, *supra* note 1, at 153.

> [T]he critics may shout themselves hoarse telling us that . . . the masculine pronoun is to be regarded as including both genders; the language sense of the average English-speaking person will never tolerate its intrusion in such a sentence as this: "Either the husband or the wife will change *his* opinion." Nine people out of ten, nay, ninety-nine out of a hundred, if they haven't the fear of the schoolmaster before their eyes, will say, in such a case, "Either the husband or the wife will change *their* opinion." In fact, this usage is now so common in conversation that it may almost be said to have become a well-established colloquialism. . . . The queen's English must step down from its throne when the sovereign people take it in hand, as must its queen herself, whether she wield the scepter or the ferule, and submit to the law of the multitude. Speech is a born democrat; in its realm the voice of the people is supreme.[39]

And, in fact, just as prescriptivists yielded to the common usage of the singular *you*, grammarians and dictionary editors have conceded what usage had already established from before a time when there were either grammars or dictionaries: *they* is a singular pronoun.[40] The leading unabridged dictionaries—the *Oxford English Dictionary*, *Webster's Third International Dictionary*, and the *Random House Webster's Dictionary*—each ratify the use of *they* as a third-person singular generic pronoun.[41] An *Oxford English Dictionary* blog post referenced by its definition of *they* begins, "Singular *they* has become the pronoun of choice to replace *he* and *she* in cases where the gender of the antecedent—the word the pronoun refers to—is unknown, irrelevant, or nonbinary, or where gender needs to be concealed."[42] Even those grammarians who do not accept singular *they* as grammatically correct nevertheless acknowledge that *they* is and has been commonly used as a singular generic pronoun.[43]

**39** Eliza Frances Andrews, *Some Grammatical Stumbling Blocks*, The Chautauquan: A Weekly Newsmagazine, June 1896, at 340.

**40** Baron, *supra* note 1, at 179 ("[T]he New Oxford American Dictionary calls singular *they* 'generally accepted' with indefinite [nouns], and 'now common but less widely accepted' with definite nouns, especially in formal contexts."); American Heritage Book of English Usage 178 (1996) (describing the singular *they* as "[t]he alternative to the masculine generic with the longest and most distinguished history"); Merriam-Webster's Collegiate Dictionary 1298 (11th ed. 2003) (accepting singular *they* as "well-established in speech and writing, even in literary and formal contexts"); The Cambridge Guide to English Usage 538 (Pam Peters ed., 2004) (referring to the use of singular *they* with indefinite nouns as "unremarkable – an element of common usage," and stating that "[w]riters who use singular they/them/their are not at fault").

**41** Eagleson, *supra* note 7, at 87–88 (detailing *they* entries within the *Oxford English Dictionary*, *Webster's Third International Dictionary*, and the *Random House Webster's Dictionary* that ratify its use as a third-person singular generic pronoun).

**42** Baron, *supra* note 10.

**43** Brad Charles & Thomas Myers, *Evolving They*, Mich. B.J., June 1998, at 38, 39 (noting that Bryan Garner's *Modern English Usage* and *The Chicago Manual of Style* accept singular *they* usage to achieve gender neutrality while cautioning against using it in formal writing because it is "stigmatized"); Salembier, *supra* note 5, at 176 ("The practice of using the singular *they* is usually defended on the ground that *they* is commonly used as a singular pronoun in spoken English. Also cited in support of its use in legislation is the fact that dictionaries sometimes refer to *they* as a singular pronoun, which is not surprising because dictionaries reflect patterns of usage (as distinct from notions of grammatical correctness.").

## II. The campaign to ban the singular they arose from a sexist impulse to decree the pseudo-generic masculine he

While the singular *they* has been commonly and continuously used since the advent of modern English, and while English grammar books and dictionaries now accept the singular *they*, legal writing style guides and textbooks continue to prohibit its use in reference to singular generic nouns.[44] "Ungrammatical—A defendant may claim that their constitutional rights were violated."[45] "Common-Error alert: It is incorrect to use *they* or *their* to refer to a singular antecedent."[46] Why?

"Legal writing is formal writing." As a legal writing teacher, I state that as a truism to my students. Embedded within that statement is the understanding that, as a type of formal writing, legal writing must follow usage rules strictly. As a corollary, legal readers consider a writer's failure to follow usage rules strictly as evidence of illiteracy.[47]

When I and other legal writing teachers forbid the use of the singular *they*, we are following the lead of the legal writing style guides that ban the singular *they* because some grammarians have said that the singular *they* is ungrammatical, full stop. That is to say, legal writing follows grammar rules, and this has been a grammar rule, so legal writing follows it.[48]

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**44** *See* Deborah E. Bouchoux, Aspen Handbook for Legal Writers: A Practical Reference 18–21 (4th ed. 2017) (requiring the use of singular pronouns to refer to indefinite or generic nouns and specifically rejecting the singular *they*); Linda H. Edwards, Legal Writing: Process, Analysis, and Organization 180 (7th ed. 2018) (describing the use of they or their to refer to a singular generic noun as an "error"); Gidi & Weihofen, *supra* note 16, at 30–31 (asserting that the singular *they* "has been considered ungrammatical since the eighteenth century" and thus that "lawyers cannot use it in formal prose"); Tom Goldstein & Jethro K. Lieberman, The Lawyer's Guide to Writing Well 150–51 (6th ed. 2016) (describing the use of the singular *they* in relation to generic singular nouns as a "mismatch" and suggesting several alternatives); Terri LeClercq & Karin Mika, Guide to Legal Writing Style 2–3 (5th ed. 2011) (labeling the use of "they" to refer to "each" as incorrectly mixing plural with singular); Richard C. Wydick & Amy E. Sloan, Plain English for Lawyers 60–61, 68 (6th ed. 2019) (noting that the singular *they* is commonly used colloquially, and encouraging its use as a personal pronoun, but describing it as a "distractor" and "off-putting" in the course of prohibiting its use with singular generic nouns); Brown, *supra* note 5, at 73–75 (collecting examples of singular *they* proscriptions in legal writing usage guides and scholarship); Cobb, *supra* note 2, at 12 ("Most U.S. style guides advise writers to avoid [the singular *they*] whenever possible, if only to escape the wrath of grammatical quibblers; to them it may suggest the writer is uneducated.").

**45** Enquist, Oates & Francis, *supra* note 5, at 631.

**46** Deborah Cupples & Margaret Temple-Smith, Grammar, Punctuation & Style: A Quick Guide for Lawyers and Other Writers 32 (2013).

**47** Conversely, the adherence to usage rules, whatever their actual utility may be, may not only communicate one's education, but may also be a point of pride and personal identity. David Foster Wallace provides an entertaining survey of the personality type sometimes described as "grammar nerd," and which his family called the "SNOOT." Wallace, *supra* note 28, at 69 n.5. The research for this article turned up numerous instances where the authors of legal writing usage guides and articles identified themselves as members of the SNOOT community. *See* Cobb, *supra* note 2, at 15 ("A proud grammar and rhetoric nerd"); Suzanne E. Rowe, *Finessing Gender Pronouns*, Or. St. B. Bull., June 2007 (referring to the author as a "Grammar curmudgeon").

**48** Beverly Ray Burlingame, Note, *Reaction and Distraction: The Pronoun Problem in Legal Persuasion*, 1 Scribes J. Legal Writing 87, 104 (1990) (cautioning against using the singular *they* because the "grammarian" subset of legal readers will view the construction as not grammatical and thus make the writer appear "illiterate").

To be sure, some legal writing teachers have recently rejected this approach, and permit the use of the singular *they* to refer to singular generic nouns. And, in this author's survey of legal writing textbooks and style guides, one textbook gave qualified acceptance to the singular *they*. "The singular they can also be used as a generic, gender-neutral pronoun. Nevertheless, we recognize that in some legal environments, using the singular they will be perceived as incorrect."[49]

But legal writing usage authorities otherwise continue to reject the singular *they*.[50] As the authors of one legal writing style manual put it, "Despite its centuries-old prestigious pedigree going back to Middle English, the singular *they* has been considered ungrammatical since the eighteenth century, and opposition is still strong. As a result, lawyers cannot use it in formal prose, at least not until it becomes accepted as Standard English."[51]

So, then, why did the singular *they*, which had previously been considered grammatically correct in Standard English by legal writers and everyday speakers alike suddenly become ungrammatical beginning in the eighteenth century? And does the basis for that proscription continue to hold weight today, and thus justify legal writing's continued proscription of the singular *they*?

Charting the basis for the proscription against singular *they* reveals three steps: an androcentric campaign led by grammarians to champion the generic masculine as the only acceptable generic third-person pronoun; an accompanying effort to paint the singular *they* as ungrammatical because it stood in the way of instituting male dominance; and a modern reform movement which rejected the generic masculine as androcentric. As this investigation shows, legal writing stubbornly clings to an invented proscription that was justified at its inception by unapologetic sexism.

## A. Grammarians championed the pseudo-generic pronoun he as an assertion of male dominance

English grammar as a system of prescriptions did not emerge until the seventeenth century. English grammar first took the form of Latin grammar. That is, grammarians transferred some of the rules that applied

49 Richard K. Neumann Jr., Ellie Margolis & Kathryn M. Stanchi, Legal Reasoning and Legal Writing 218–19 (9th ed. 2021) (suggesting several non-pronoun alternatives to the "disfavored" *he* for use with generic nouns, including pluralizing or removing the noun, before proposing as a last resort to either use the singular *they* or alternate male and female pronouns).

50 *See supra* notes 44–46.

51 Gidi & Weihofen, *supra* note 16, at 30–31.

to Latin in formulating the emerging rules of English grammar and usage.[52] At their inception in the sixteenth century, these English grammar books did not bar the common and formal usage of singular *they*.[53] And writers, including legal writers, continued using the singular *they* as a singular generic pronoun as they had since the advent of modern English, and even earlier.

However, beginning in the mid-eighteenth century, grammars began arguing that proper usage required the use of the generic masculine—*he, him, his*. They baldly asserted that the generic masculine was the only proper third-person singular generic pronoun despite the widespread use of the singular *they*.[54]

As the linguist Ann Bodine documented, this effort to advance the generic masculine pronoun served as part of a larger effort to institute the use of masculine terms in gender-neutral settings. At the same time as grammarians were championing *he*, they also contended that "man" and "mankind" must be used to represent all people, as in "Manners maketh man." Bodine postulated that the almost all-male body of grammarians who championed the generic masculine was driven by an androcentric, or sexist and male-centered, intent.[55]

Some were more explicit about it than others. "[T]he supreme Being . . . is in all languages Masculine, in as much as the masculine Sex is the superior and more excellent."[56] Or, as one early grammarian declared and

**52** "Throughout the seventeenth and early eighteenth centuries English grammarians were sufficiently influenced by Latin grammar that the discussion of English syntax scarcely went beyond the Latin-derived Three Concords (subject and verb, substantive and adjective, relative pronoun and antecedent)." Bodine, *supra* note 2, at 134; *see* Baron, *supra* note 1, at 23–24 (noting the absence of formalized English grammar prior to the seventeenth century, and the substitution of Latin grammar in its place, followed by a period in the seventeenth and eighteenth century where the first English grammars appeared, modeled on Latin grammar texts).

**53** Bodine, *supra* note 2, at 134–35 (surveying grammar texts and uncovering no proscription of singular *they* prior to 1795).

**54** *See* Fisher, *supra* note 37, at 118; *see also* Bodine, *supra* note 2, at 135–36 (locating the genesis of the generic masculine rule in the mid-eighteenth century, but also noting that a consensus did not form among grammarians until the nineteenth century).

**55** Bodine, *supra* note 2, at 133; *see* Julia P. Stanley, *Sexist Grammar*, 39 College English 800, 800 (1978) ("The history of language, at least what we know of it, is an example of the longevity of male social control and the effects of that control."); *see also* Ursula K. Le Guin, Steering the Craft 17 (2015) ("My use of *their* is socially motivated and, if you like, politically correct: a deliberate response to the socially and politically significant banning of our genderless pronoun by language legislators enforcing the notion that the male sex is the only one that counts. I consistently break a rule I consider to be not only fake but pernicious. I know what I'm doing and why.").

**56** Baron, *supra* note 17, at 3 (quoting James Harris, Hermes, or, a Philosophical Inquiry Concerning Universal Grammar 50 (2d ed. 1765)).

**57** "The Masculine Gender is more worthy than the Feminine, and the Feminine is more worthy than the Neuter." Stanley, *supra* note 55, at 803 (quoting Joshua Poole, The English Accidence 21 (1646)). "[I]n all languages, the masculine gender is considered the most worthy, and is generally employed when both sexes are included under one common term." *Id.* at 804 (quoting Goold Brown, Grammar of English Grammars (1851)). "[T]he worthier is preferred and set before. As a man is sette before a woman." Bodine, *supra* note 2, at 134 (quoting T. Wilson, Arte of rhetorique 234 (1560)); *see also* Spender, *supra* note 19, at 148 (citing John Kirkby, A New English Grammar (1746) for the grammatical rule that the male gender is more comprehensive than the female gender).

others parroted, the masculine gender is "more worthy."[57] Lindley Murray, a prominent grammarian of the late eighteenth century who published the first rule proscribing the singular *they* in 1795, promoted the generic masculine in its stead and employed as an example of incorrect usage a sentence that also voiced a justification for instituting male dominance within grammar rules. "*Each* of the sexes should keep within *its* particular bounds, and content *themselves* with the advantages of *their* particular districts."[58]

James Beattie opposed attempts to overthrow the generic masculine on the ground that it would upset the natural order of the sexes. In that regard, he elevated the question from that of grammar and usage to that of religious dogma. Thus, in his view, failing to use the pseudo generic *he* rendered one not just incorrect but pagan.[59]

Another usage expert recognized the objection that the usage was sexist before demeaning it: "we shall probably persist in refusing women their due here as stubbornly as Englishmen continue to offend the Scots by saving England instead of Britain."[60]

The "worthiness of the genders" position can be more benignly interpreted. The first grammars of English were more precisely grammars of Latin. That is to say, seventeenth-century grammarians were so enamored of the Latin language that gave birth to English that the newer tongue was first analyzed according to the rules of Latin grammar.[61] And, while Latin and English share a number of commonalities, one fundamental difference between the languages concerns gender. Latin employs a grammatical gender system that assigns gender to any number of words whether the words refer to biological sex or not. On the other hand, English is a natural gender language that generally only assigns gender to words based on the natural gender of the word.[62] For example, *boy* refers to a male and *girl* refers to a female, and thus require pronouns that match their gender. But objects like *house* or *leaf* possess no gender assignment and do not require gendered pronouns. By contrast, Latin assigns gender to words whether or not gender is naturally associated with them. For example, in Latin, the names of rivers are male, while types of trees are female.[63] Thus, one can

**58** Lindley Murray, English Grammar, Adapted to the Different Classes of Learners 148 (1805); Bodine, *supra* note 2, at 135–36 (dating Murray's initial proscription against singular *they* to 1795).

**59** Baron, *supra* note 17, at 99 (noting that Beattie was specifically incensed by references to God as female).

**60** Henry Froude, The King's English 67 (2d ed. 1908).

**61** Baron, *supra* note 1, at 23–24.

**62** Fischer, *supra* note 2, at 476 ("Many of the world's languages employ grammatical gender systems. . . . While grammatical gender may have some connection to sex, the two categories are not coextensive, and in some languages gender labels have little connection to sex. In other languages, called 'semantic' or 'natural gender systems,' grammatical gender is determined by the sex of the word's referent. . . . [T]he English language . . . is a natural gender system.").

**63** Charles E. Bennett, New Latin Grammar, pt. II, ch. I, § 15 (2005) (e-book); *see* Baron, *supra* note 1, at 24; Evans & Evans, *supra* note 17, at 195–96.

explain the genesis of the gender masculine rule in English not as a sexist effort to promote male supremacy but rather as an ill-fated attempt to transplant a mismatched grammatical rule from Latin to English.[64]

Whether one concludes that grammarians championed the generic masculine to realize an androcentric intent or to impose Latin grammar rules on English speakers, one thing is certain: the grammarians did not impose the generic masculine because it was grammatically correct. For it was not. The first rule of pronominal usage holds that a pronoun must agree in number and gender with the noun it references. The masculine *he* does not agree in gender with a generic noun that encompasses all genders and no gender.[65] Even in a historical period that did not recognize the non-binary, the masculine *he* disagreed with any generic noun such as "farmer" or "someone" that encompassed both the masculine and feminine genders.

Indeed, some sentences are rendered nonsensical when *he* is used to refer to a generic noun, as in, "Everyone liked the dinner, but he did not care for the dessert,"[66] or "Either the boy or the girl left his book."[67] Other sentences may confuse the reader or appear absurd in context, as in this passage from a letter to *The New York Times Magazine*: "The average American needs the small routines of getting ready for work. As he shaves or blow-dries his hair or pulls on his panty hose, he is easing himself by small stages into the demands of the day."[68] Nevertheless, prescriptivists of the period advocated the ungrammatical generic masculine as the only grammatically correct generic pronoun.

To surmount the obstacle posed by the rule of gender agreement, prescriptive grammarians pronounced that, for purposes of generic nouns and pronouns, the masculine includes the feminine.[69] And, seeking validation for this position, they looked for it not in usage but in legislation. The English language lacks a governing prescriptive body that other languages possess, such as the French Academy. Nevertheless, linguists assign significance to the English Parliament's passage of the

**64** *See* Bodine, *supra* note 2, at 134–35.

**65** Baron, *supra* note 1, at 193.

**66** Baron, *supra* note 17, at 195 (quoting Evans & Evans, *supra* note 17, at 164). A literate English reader will likely conclude that the sentence intends to single out one person rather than the "everyone" to which the "he" pronoun is meant to refer. Other sentences illustrate the same problem: "When I came up, everybody was laughing at me, but I was glad to see him just the same." Bodine, *supra* note 2, at 140; Leonard, *supra* note 17, at 224 n.57.

**67** Evans & Evans, *supra* note 17, at 196.

**68** Cobb, *supra* note 2, at 14; *see also* Le Guin, *supra* note 55, at 17 (noting the absurdity of the generic masculine in the sentence, "If a person needs an abortion, he should be required to tell his parents.").

**69** "The Masculine Person answers to the general Name, which comprehends both Male and Female." Fisher, *supra* note 33, at 118; *see also* Bodine, *supra* note 2, at 135 (uncovering the first instance of the generic masculine rule in 1746).

Interpretation Act of 1850.[70] The act for the first time decreed the canon of legislative construction that references to the masculine includes the feminine, but not vice versa. The United States adopted this canon through the enactment of the Dictionary Act in 1871, and it remains in effect today through subsequent legislation.[71]

### B. Grammarians falsely asserted that the singular they was ungrammatical in order to preserve the hegemony of the generic masculine

All this time, and despite the stamp of authority supplied to grammarians by the then all-male Parliament and all-male United States Congress,[72] writers and speakers of English continued to employ the singular *they*. As one dictionary later explained it, "neither this act, nor all the grammar books in the world can alter the fact that, if we are told *somebody telephoned while you were out*, we say *did they leave a message?*"[73] Nevertheless, the passage of the Interpretation Act marked the beginning of a period from the nineteenth to the twentieth century when grammarians pronounced the generic masculine to be the only grammatically correct third-person singular generic pronoun.

Beginning at that time, as part of the effort to ingrain this new exclusionary rule, grammarians also inveighed against the use of singular *they*.[74] While the proscription against singular *they* was unknown before the late eighteenth century, by the nineteenth century one editor described the singular *they* as a "grammatical monstrosity."[75] Another writer dubbed it "too vulgar to be uttered."[76]

To support the hegemony of the generic masculine and the accompanying proscription against *they*, grammarians invented the fiction that only the illiterate employed the singular *they*. H.W. Fowler, the preeminent

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70 *See* Evans & Evans, *supra* note 17, at 221; Bodine, *supra* note 2, at 136; Ross Carter, *Interpretation Acts—Are They, and (How) Do They Make for, Great Law?*, The Loophole, Nov. 2020, at 2, 16–20. This act of Parliament is also referred to variously as the "Parliament Act," the "Abbreviation Act," or "Lord Brougham's Act," after the noble who championed its passage in the House of Lords. Baron, *supra* note 17, at 139–40; Carter, *supra* note 70, at 5, 16.

71 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the masculine gender include the feminine as well."); *see* Baron, *supra* note 1, at 76–77.

72 Spender, *supra* note 19, at 150 (noting that there were no female members of Parliament in 1850).

73 Evans & Evans, *supra* note 17, at 221.

74 Baron, *supra* note 1, at 152; Bodine, *supra* note 2, at 135–36 (tracing the first proscription of the singular *they* to a grammar text published in 1795).

75 Baron, *supra* note 1, at 160 (citing Frederic H. Balfour, *Wanted—Another Word*, The Globe (London), Apr. 12, 1890, at 3).

76 Baron, *supra* note 1, at 157 (quoting *New Words*, New York Mercury and Weekly Journal of Commerce, Jan. 31, 1839, at 4).

usage expert of the late nineteenth and early twentieth century,[77] famously sneered that the singular *they* "sets the literary man's teeth on edge."[78] He lamented that the *Oxford English Dictionary* acknowledged the singular *they* while offering only the mild warning that it was "'[n]ot favoured by grammarians.'"[79] In response, Fowler predicted that he and his fellow grammarians would "have their way on the point," and offered in support that "few good modern writers would flout the grammarians so conspicuously."[80] But in the same period when Fowler penned those words, writers and speakers of all stripes, including some of the greatest literary lights, continued to employ the singular *they*.

- I know when I like a person directly I see them.
  —*The Voyage Out*, by Virginia Woolf (1915)[81]
- I cut no one, except when I'm afraid of being bored by them.
  —*Told by an Idiot*, by Rose Macaulay (1923)[82]
- Nobody would ever marry if they thought it over.
  —*Village Wooing*, by George Bernard Shaw (1934)[83]

Fowler himself allowed that singular *they* was the "popular solution" as a generic pronoun.[84]

Nevertheless, while grammarians could not oust *they* from common usage by employing the false proclamation that only the uncouth used it, they did unseat it within the classroom. From the mid-nineteenth century to the late twentieth century, several generations of schoolchildren were taught the generic masculine as the one correct rule of third-person singular generic pronoun usage.[85] During that period, Fowler could have crowed that the grammarians did indeed "have their way," at least insofar as they taught a nation of English speakers "to achieve both elegance of

77 David Foster Wallace refers to Fowler's *A Dictionary of Modern English Usage* as "the granddaddy of modern usage guides." Wallace, *supra* note 28, at 73 n.10. During the Battle of Britain, Winston Churchill presented a copy of the dictionary to the Queen of England as a Christmas gift. Erik Larson, The Splendid and the Vile 326 (2020).

78 Fowler, *supra* note 3, at 392.

79 *Id.* at 648 (quoting the *Oxford English Dictionary)*.

80 *Id.*

81 Eagleson, *supra* note 7, at 97.

82 George H. McKnight, Modern English in the Making 529 (1928) (emphasis omitted).

83 Eagleson, *supra* note 7, at 97.

84 Fowler, *supra* note 3, at 392.

85 *See, e.g.*, Bodine, *supra* note 2, at 138–39 (surveying thirty-three school grammars in use in American junior and senior high schools in the 1970s and finding that twenty-eight of them prescribed the generic masculine while proscribing both the singular *they* and the paired pronoun *he or she*); *id.* at 137 (quoting Richard Grant White, Everyday English (1880) ("[H]is the representative pronoun, as mankind includes both men and women.")); Cobb, *supra* note 2, at 15 ("And it was 18th century grammarians who installed 'he' as the default genderless pronoun by influencing grammar school texts."). *But see* Baron, *supra* note 17, at 193 (noting that several nineteenth and twentieth century grammarians endorsed the singular *they* in various contexts).

expression and accuracy by referring to women as 'he.'"[86] By the mid-twentieth century, it was unremarkable when Strunk and White stated unequivocally that the generic *he* "has lost all suggestion of maleness . . . ; it is never incorrect."[87]

### C. The rejection of he

It took a new generation of linguists, writing during the 1960s and 1970s in the wake of second-wave feminism, to first postulate and then demonstrate that people actually do picture a man when they hear the word *he*.[88] While grammarians and legislators insisted that the masculine could encompass the feminine and produce a gender-neutral usage, linguistic studies demonstrated that, in practice, the use of the generic masculine *he* causes readers and listeners to visualize only males, not a generic individual of any gender.[89]

In one such study completed in 1984, linguists read the test subjects a cue sentence and then asked the subjects to tell a story featuring the person described in the sentence. In the stories that the subjects told, the gender of the main character was largely determined by the gender of the pronoun used in the cue sentence, indicating that the subjects envisioned only male characters when the generic masculine was used.[90] In

**86** Bodine, *supra* note 2, at 131 ("[I]nvariably the feminists' demand is viewed as an attempt to alter the English language. In fact, the converse is true. Intentionally or not, the movement against sex-indefinite 'he' is actually a counter-reaction to an attempt by prescriptive grammarians to alter the language. English has always had other linguistic devices for referring to sex-indefinite referents, notably, the use of singular 'they.'").

**87** William Strunk Jr. & E.B. White, The Elements of Style 60 (3d ed. 1979).

**88** Bodine, *supra* note 2, at 129 ("There has always been a tension between the descriptive and prescriptive functions of grammar. Currently, descriptive grammar is dominant among theorists, but prescriptive grammar is taught in the schools and exercises a range of social effects."); *see also* Fischer, *supra* note 2, at 480 ("[A] concerted movement for widespread change arose only in the late 1960s, as the second wave of the women's movement gathered momentum. Feminists in the United States began to promote gender-neutral language as 'trailblazers in both exposing sexist bias and proposing changes.'").

**89** "Many studies [demonstrate] that he does not function generically but instead produces images and ideas of males." Burlingame, *supra* note 48, at 90; *see also* Spender, *supra* note 19, at 152 (citing several effects studies reaching the conclusion that the use of masculine generic pronouns leads readers and listeners to think only of men); Fischer, *supra* note 2, at 483 (citing a study by John Gastil finding that generic masculine pronouns evoked a disproportionate number of male images); Janice Moulton et al., *Sex Bias in Language Use: 'Neutral' Pronouns That Aren't*, 33 Am. Psych. 1032, 1034–36 (1978); Schweikart, *supra* note 12, at 3–4 (collecting studies examining the gender effect of the use of the generic masculine).

**90** Janet Shibley Hyde, *Children's Understanding of Sexist Language*, 20 Developmental Psych., 697, 699–701 (1984). The article discusses research suggesting that sex typing in children consists of learning a set of sex-role schemas. The first step in categorizing gender involves learning labels, e.g., boy, girl, man, woman, mommy, daddy. The critical period for acquiring gender identity coincides with the period of rapid language acquisition, from eighteen to twenty-four months. In order to test the thesis that the use of gender masculine pronouns could encode male dominant sex-role schemas in young children, the author undertook a study that surveyed first graders, third graders, fifth graders, and college students, tasking subjects with creating stories in response to a cue sentence containing, alternatively, "he," "he or she," or "they." Across all age groups, the resulting stories featured females in the following proportions: "he": 12%, "they": 18%, "he or she": 42%. *Id.* at 700. The same subjects also supplied pronouns in a fill-in task. Twenty-eight percent of first-graders and 84% of college students knew the generic masculine rule. Whether or not they knew the rule, the majority of subjects supplied "he" in gender-neutral fill-in sentences. *Id.* at 701. In a second experiment with third and fifth graders, the story test was again employed, but this time adding "she" as a fourth pronoun condition. Under that condition, 77% told stories about females. *Id.* at 702.

a follow-up study, the same linguists invented a fictitious gender-neutral occupation, "wudgemaker," and described a worker in this occupation to the test subjects using repeated references either to "he," "they," "he or she," or "she." Subject ratings of how well women could do the job were significantly affected by the pronoun used to reference it: lowest for "he," intermediate for "they" and "he or she," and highest for "she."[91]

The author concluded that the "wudgemaker" data demonstrated that the use of "he" as a generic pronoun, as compared with other pronouns, affects the formation of gender schemas.[92] As the author of the study put it, "although 'his' may be gender-neutral in a grammatical sense, it is not gender-neutral in a psychological sense."[93] For this reason, some scholars took to referring to *he* as a "pseudo-generic" pronoun.[94]

The grammarians who had propounded the generic masculine rule may have viewed the effect that it produced only images of males as a feature, not a bug. But regardless of their intent, the effect of the generic masculine rule was to make females and other genders invisible, and to safeguard the privileges of males.[95]

As a result of the efforts of feminists and linguists to oppose the generic masculine, modern grammars and usage guides turned away from the use of *he* as a generic pronoun, which is now commonly viewed as sexist.[96]

**91** *Id.* at 704.

**92** *Id.*

**93** *Id.* at 698. The same author discussed an earlier study in which college students were asked to write a short essay given the following study question prompt: "In a large coeducational institution the average student will feel isolated in ____ introductory courses." In general, the study found that males tended to write about males and females about females, but overall, stories were about females in the following proportions depending on the pronoun used to fill the blank: "his": 35%, "their": 46%, "his or her": 56%. *Id.* at 697.

**94** Fischer, *supra* note 2, at 476–77; Schweikart, *supra* note 12, at 6 ("Gender neutral pronouns preceded pseudogeneric 'he' and are still common in the English language.").

**95** Spender, *supra* note 19, at 156–57 (stating that through the use of the generic masculine, women are "eliminated from language, and consequently from thought and reality"); Fischer, *supra* note 2, at 477 ("[U]se of the masculine pronoun is inaccurate for the legal field, which is now composed of about one-third women, and it illustrates how pseudo-generic terms treat the masculine as the norm by omitting express reference to the feminine.").

**96** Cobb, *supra* note 2, at 14 ("Writers who continue to use 'he' in this way risk being seen as sexist, out of touch, or intentionally flouting usage norms to make a political point."); Fischer, *supra* note 2, at 481 ("Studies reported a decline in the use of masculine nouns and pronouns as generics, with one study finding a notable decline in their use in American newspapers and magazines between 1971 and 1979."); *see* Bodine, *supra* note 2, at 129 ("[T]hird person pronoun usage will be affected by the current feminist opposition to sex-indefinite 'he' – particularly since the well-established alternative, singular 'they', has remained widespread in spoken English throughout the two and a half centuries of its 'official' proscription."). Feminists encouraged other changes in language that were subsequently validated by common usage, such as the adoption of "Ms." Johnson, *supra* note 1, at 37 ("We experienced something of a cultural revolution in the 1970s and 1980s with the gradual acceptance of Ms. instead of Miss or Mrs. I say gradual because there was opposition. Although Ms. first appeared in 1901, the *New York Times* did not adopt it until 1986."); Jennifer Finney Boylan, *That's What Ze Said*, N.Y. Times, Jan. 9, 2018, https://nytimes.com/2018/01/09/opinion/ze-xem-gender-pronouns.html. Predictably, the transition away from the generic masculine faced resistance. One lawmaker expressed outrage at a 1987 proposal to depart from the generic masculine as part of a broader proposal to make legislative rules more gender neutral. Speaking to the lawmaker who submitted the proposal, Representative John Monks said, "Men ought to be proud they're men and stand up for them. I'm going to stand up as an individual, Carolyn, and say I don't want you to make no pantywaist out of me." Burlingame, *supra* note 48, at 98

And legal writing followed the lead of these modern prescriptions against the generic masculine: legal writing usage manuals now teach writers to avoid using *he* as a generic pronoun.[97] And, subsequent usage studies showed that legal writers have transitioned away from the use of generic *he*. One such study examined appellate court decisions and found a dramatic increase in the use of gender-neutral language, including the substitution of the paired pronoun *he or she* for the generic masculine, during the period from 1965 to 2006.[98]

Yet, while legal writing acknowledges that the androcentric effort to advance the generic masculine pronoun has been discredited, it nevertheless continues to consume the fruit of that poisonous tree in the form of the androcentric proscription against the singular *they*.[99] Indeed, legal writing usage constitutes one of the last bastions of singular *they* prescriptivism.

## III. The singular they is the grammatical, simple, and inclusive solution to legal writing's pronoun problem

This tendency towards prescriptivism may be natural in a field that is itself founded on creating and observing rules and prescriptions. "Lawyers and judges are notoriously late adopters, especially when it comes to linguistic change. Really, it's not our fault. We're trained to follow precedent, to do things the way they've always been done."[100]

But it is not just that legal writing follows rules to follow rules. More fundamentally, legal writing follows grammar rules in order to maintain credibility with its audience. That is to say, even though *they* is singular, as

(quoting *Gender Neutral Rules Threaten Lawmaker's Manhood*, United Press Int'l Newswire, Feb. 3, 1987). Supreme Court Justice Antonin Scalia offered perhaps the best defense of the generic masculine, arguing that gender-neutral language generally requires a sacrifice to the "second-best circumlocution." Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 119 (2008).

**97** *See, e.g.*, Bryan A. Garner, The Redbook 204 (4th ed. 2018) ("It is no longer customary to use a masculine form as a gender-neutral inclusive."); Gidi & Weihofen, *supra* note 16, at 23 ("Contemporary legal writing style . . . avoids male-centric language. . . . [A]ny reader would now cringe to read a text that consistently uses words like *man* or *he* to refer generally to men and women."); Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, Writing and Analysis in the Law 241 (6th ed. 2013); *see also* Burlingame, *supra* note 48, at 87 ("Legal-writing experts have suggested various alternatives to the generic masculine, now widely considered inherently sexist."); Johnson, *supra* note 1, at 37 (tracing the gradual movement of legal writing style guides from permitting to omitting sexist language); Kathleen Dillon Narko, *They and Ze, The Power of Pronouns*, 31 CBA Rec. 48, 51 (2017) ("In the 1970s and '80s, the collective 'he' became unacceptable as a pronoun representing both men and women. . . . Today, when 50% of law school classes are women, the collective 'he' is not inclusive. To avoid sexism, 'he' became 'he or she.'").

**98** Fischer, *supra* note 2, at 502–04.

**99** *Supra* note 5.

**100** Susie Salmon, *The Legal Word: Them!*, Ariz. Att'y, Oct. 2018, at 10.

validated through usage—both historical and current—some legal readers perceive that the singular *they* is grammatically incorrect. And, as with other usage questions, legal writing style guides counsel conservatism in order to preserve credibility with those readers. The legal writer who painstakingly observes grammar rules seeks to establish a bond with the reader through a shared identity as educated rule followers. The writer thus seeks to persuade through an "ethos" appeal based on the writer's credibility with the reader to complement the logic of the writer's argument.[101]

Conversely, appearing to be illiterate destroys one's credibility not only as a writer but also as an advocate. The tendency towards prescriptivism in legal writing therefore constitutes a conservative impulse to avoid any stylistic choice that could be perceived as an error and thus distract the reader from the argument or thesis.[102] For the legal reader who views the singular *they* as ungrammatical, whether or not that view is correct, reading *they* when used as a singular generic pronoun will cause the reader to trip over the usage, if only momentarily, and thus distract the reader.[103]

The schism that exists between common usage and legal writing usage with respect to this concern for maintaining credibility with the audience may be personified by Bryan Garner, who serves as an authority in both worlds. Garner has written a dictionary of common usage, and has also edited *Black's Law Dictionary*. He writes a well-respected common usage guide, as well as *The Redbook* of legal usage. He describes the use of the singular they as "becoming commonplace" and "what promises to be the ultimate solution to the problem" of the sexist generic masculine pronoun.[104] Nevertheless, in formal writing generally, and legal writing particularly, he forbids it. "Many people substitute the plural *they* and *their*

**101** *See* Wallace, *supra* note 28, at 97–98; Cobb, *supra* note 2, at 15 (noting that clients count on their lawyers to maintain credibility with their audience in order to persuade).

**102** Burlingame, *supra* note 48, at 109 ("Language abounds with latent traps that can dramatically crush the persuasiveness of a legal writer. . . . Avoiding these snares requires skill in writing and sensitivity to the views of readers. . . . If the writer succeeds, readers are largely unaware that the dangers even exist. Instead, their central focus remains on the lawyer's argument. If the writer fails, however, the minds of readers haphazardly stray to myriad diversions concerning pronouns, language, sexism, and society."); *see also* Narko, *supra* note 97, at 51 ("I counsel attorneys and students 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 a judge's reading of the brief."). Even readers who do not perceive a particular deviation as an error may nevertheless be distracted from the argument by an unconventional usage, and with respect to the singular *they* specifically may see it as a statement on gender or gender identity. *See* Garner, *supra* note 97, at 202 ("The constructions with *they*, *them*, *their*, and *themselves* aren't uncontroversial . . . so please understand that any visible choice you make is likely to bother some number of readers. Anything apart from invisible gender-neutrality will be seen by some as a political statement.").

**103** David Foster Wallace observes that even when one can understand a sentence that fails to follow a usage rule, that understanding requires some extra parsing that would not be necessary if the rules were followed. "[M]any of these solecisims—or even just clunky redundancies like 'The door was rectangular in shape'—require at least a couple extra nanoseconds of cognitive effort, a kind of rapid sift-and-discard process, before the recipient gets it. Extra work." Wallace, *supra* note 28, at 93.

**104** Garner, *supra* note 33, at 595.

for the singular *he* or *she*. Although *they* and *their* have become common in informal usage, neither is considered acceptable in formal writing."[105]

Yet, Garner recognizes the principle that what constitutes correct usage is a moving target that is ultimately validated by actual usage.[106] Seemingly with that understanding in mind, Garner now avoids offering a blanket proscription against singular *they* in legal writing, but instead cautions that a legal writer who uses singular *they* may offend certain audience members.

> While this usage is increasingly accepted in speech and informal writing, it has only recently gained ground in more formal writing—including a few U.S. Supreme Court opinions. Yet despite the official approval in some style manuals of the singular *they*, a 2018 poll found that half of American readers consider it objectionable. So be forewarned.[107]

Garner's thoughts reflect a larger consensus within legal writing usage guides: one that recognizes that the singular *they* is gaining in acceptance and likely will continue to do so. Indeed, several legal writing experts explicitly acknowledge that legal writing will one day recognize the singular *they*, as Suzanne Rowe did in 2007. "While [the singular *they*] will sound fine to most people in informal speech, it would likely raise a number of eyebrows in a formal legal document. I'll still mark it wrong on student papers, but I suspect that in 10 years I won't."[108] A leading style manual echoed this conclusion in 2018. "The singular *they* . . . will eventually be acceptable in formal writing. The trend, considered irreversible at the end of the twentieth century, is now stronger than ever."[109] And another prominent legal writing style guide echoed this sentiment

**105** Baron, *supra* note 1, at 175 (quoting Bryan Garner's article in The Chicago Manual of Style (2010)).

**106** "Although the notion of linguistic correctness may seem absolute—right or wrong—it is mutable. Words change over time: they grow new meanings and shed old ones. Usually these changes are extremely gradual. Our language remains relatively stable, each generation understanding the language of those who came before. Occasionally, however, change is abrupt. Today, the progress of technology, especially communications technology, has stepped up the pace. New words—and new meanings for old words—now spring up almost overnight. But that doesn't mean we should abandon the idea of correctness in word usage. What is 'correct' (some prefer to say 'appropriate') is a word choice that, in a given age, has two characteristics: (1) it is consistent with historical usage, especially that of the immediate past, and (2) it preserves valuable distinctions that careful writers have cultivated over time. By meeting these standards, the legal writer achieves a greater degree of credibility with an educated readership." Garner, *supra* note 97, at 245 (contained within a section on "Troublesome Words," and specifically discussing "Correctness.").

**107** Garner, *supra* note 97, at 204. "If you're comfortable doing so, if no imprecision results, and if you're willing to risk a raised eyebrow from some readers, use they as a gender-neutral singular." *Id.* at 375. *Compare* Gidi & Weihofen, *supra* note 16, at 27 (suggesting the singular *they* as a possible generic singular pronoun solution, but with the qualifier that it is controversial, and stating more generally that English lacks a gender-neutral third-person singular pronoun).

**108** Rowe, *supra* note 47; *see also* Enquist, Oates & Francis, *supra* note 5, at 631; Narko, *supra* note 97, at 52 ("My advice may be different in the not-too-distant future. A generational change is afoot. All of us should consider changes in how we use pronouns.").

**109** Gidi & Weihofen, *supra* note 16, at 31.

in 2016, counseling that the singular *they* would likely be accepted within legal writing in a "few years."[110]

This sense of fatalism is common not only to legal writing teachers but to usage experts generally. "Long ago, *they*, like *you*, took on the dual role of singular and plural, and singular *they* has been so well established, for so many centuries, that at this point resistance is futile."[111]

And putting aside the descriptivist argument that legal writing must inevitably accept the singular *they* because it is ever more commonly used, even when viewed through a prescriptive lens, the singular *they* is the best solution when compared to other generic pronoun solutions because it is grammatical, simple, and inclusive.

Even before the generic masculine fell into disfavor, many alternative pronouns were suggested as a singular generic pronoun. The generic feminine—*she, her, hers*—has been forwarded as a kind of affirmative action corrective to the generic masculine.[112] But used exclusively, it lacks inclusion for the same reasons as the generic masculine. That is, *she* fails the gender agreement rule to the same degree that *he* does.[113] Some suggest alternating generic masculine and generic feminine,[114] but that may confuse the reader.[115]

Feminists advocated for the paired pronoun, *he or she*, to replace the generic masculine. But the paired pronoun is almost universally derided. Critics call it "awkward" and "so clumsy as to be ridiculous except when explicitness is urgent, & it usually sounds like a bit of pedantic humor."[116] The seemingly visceral dislike of the paired pronoun may spring from the

110 Goldstein & Lieberman, *supra* note 44, at 151.

111 Baron, *supra* note 1, at 152.

112 Marilyn Schwartz & the Task Force on Bias-Free Language of the Ass'n of Am. Univ. Presses, Guidelines for Bias-Free Writing 20–21 (1995); *see* Johnson, *supra* note 1, at 36. Dr. Benjamin Spock switched the generic pronouns from masculine to feminine in later editions of his best-selling *Dr. Spock's Baby and Child Care*. *See* Baron, *supra* note 1, at 28–29.

113 Johnson, *supra* note 1, at 36.

114 Garner, *supra* note 97, at 375 (noting its use by some writers). Supreme Court Justice Ruth Bader Ginsburg commonly employed this tactic by alternating between using the generic masculine and the generic feminine within the same opinion. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 895 (2008) ("[A] nonparty is bound by a judgment if she 'assume[d] control' over the litigation. . . . Because such a person has had 'the opportunity to present proofs and argument,' he has already 'had his day in court' even though he was not a formal party to the litigation."). Justice John Paul Stevens also alternated generic pronouns. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 638 (2001) (Stevens, J., concurring). Some observers recommend alternating pronouns selectively by, for instance, making particular generic characters male and others female. Rowe, *supra* note 47. Alternatively, in criminal cases, the writer may make all of the generic pronouns match the defendant's gender, so that in a case where the defendant is female the writer exclusively employs the generic feminine. Interview with Elizabeth L. Harris, Judge, Colorado Court of Appeals, Denver, Colo. (Dec. 12, 2020).

115 Johnson, *supra* note 1, at 36.

116 Fowler, *supra* note 3, at 392; Salmon, *supra* note 100, at 10; *see also* Garner, *supra* note 97, at 375 ("This is a last-resort option because the phrase usually sounds stilted. Used in excess, it becomes obnoxious."); H.L. Mencken, The American Language 210 (1919) (ebook), (calling the paired pronoun "intolerably clumsy"); Strunk & White, *supra* note 87, at 60 (labeling the paired pronoun "boring or silly").

fact that it negates the primary value of pronouns, simplicity, by using two terms in the place of a single noun.[117] Thus, as one writer put it, the paired pronoun is "painfully grammatical."[118]

But it is not even that. For the paired pronoun fails to observe the same grammatical rule of gender agreement that also renders the generic masculine or generic feminine pronouns ungrammatical. Just as the generic masculine pronoun rendered women invisible, and the generic feminine renders men invisible, the paired pronoun renders non-binary individuals invisible, as it lacks gender agreement with individuals who do not identify as cisgender.[119]

In a bid to solve the inclusion problem, many attempts have been made to coin a new generic third-person singular pronoun. Dennis Baron has catalogued over two hundred such instances, including *thon*, *hir*, and *ze*.[120]

Many of these neologisms share the virtue of clarity and simplicity. But they also illustrate the foundational rule that English grammar is validated by usage. None of these hundreds of neologisms has gained the kind of widespread acceptance and everyday usage that would make it a practical solution to legal writing's pronoun problem. As Baron puts it after having exhaustively compiled them, the neologisms fall into the category of "failed" pronouns, along with the sexist *he* and the clumsy *he or she*.[121]

Singular *they* solves all of the problems of the failed pronouns as it is grammatical, simple, and inclusive. While the generic masculine and paired pronouns fail the grammatical test of gender agreement, *they* is grammatical as it is both gender-neutral and has functioned as a singular pronoun since the advent of modern English.[122] The argument that *they* is

**117** Gidi & Weihofen, *supra* note 16, at 26 ("[*H*]*e or she* is not conducive to good writing style: it's wordy, it's long, it's weak, it's slow.").

**118** Baron, *supra* note 1, at 171 (quoting *We*, Nashville Daily Am., Feb. 28, 1886, at 2).

**119** Baron, *supra* note 1, at 28; Salmon, *supra* note 100, at 10. One solution to the inclusion problem with *he or she* is to transform the "paired pronoun" into a "triplet pronoun": *he, she, or they*. To be truly inclusive, the writer needs to employ the "quadruplet pronoun": *he, she, it, or they*. But by solving the inclusion problem the quadruplet pronoun doubles down on the complexity problem created by the paired pronoun. Pronouns exist to give speakers and writers a simple means of referring to people, places, or things without having to repeat the noun over and over, and these alternatives negate that advantage.

**120** Baron, *supra* note 1, at 111, 185–245. One category of neologisms consists of efforts to weld the masculine and feminine generics into one another, as in *he/she*, *s/he*, *(s)he*, and *he(she)*. These constructions have suffered not just rejection but scorn. Francine Wattman Frank & Paula A.Treichler, Language, Gender, and Professional Writing 161 (1989) (noting a study indicating that slash neologisms are not widely accepted). Writers observe that such a creation, most generously, "does not have a clear counterpart in the spoken language," or, more plainly, is "literally unspeakable." *Id.*; William Safire, I Stand Corrected: More on Language 179 (1986).

**121** Baron, *supra* note 1, at 111.

**122** Cobb, *supra* note 2, at 15 ("More radically, maybe the singular 'they' isn't even ungrammatical. The singular generic 'they' certainly isn't new. You can find examples in classics like Chaucer, Shakespeare, and the Bible, and in prestigious modern literature and scholarship as well. The *Washington Law Review* has endorsed it. Even style guides have begun to change with the times. And the entire U.K. is OK with the singular 'they.'").

ungrammatical rests on a foundation of androcentrism, as well as the lie that only the illiterate employ the singular *they*. In continuing to follow this proscription, legal writing perpetuates that lie.[123]

The neologisms have failed because they are not used, but *they* has been used as a singular generic pronoun for as long as English has been written and spoken. Indeed, while none of the neologisms have ever gained wide use, *they* not only has been used widely, but has continued to be used despite a two hundred year prescriptivist campaign to eradicate it.[124]

*They* is simple. *They* is also precise because it is gender-neutral. By way of contrast, the use of the gender masculine lacks precision and introduces ambiguity with respect to the gender it references.[125] In that regard, the legislation of the "masculine includes the feminine" canon only added ambiguity concerning exactly when *he* is intended to refer to all genders and when it is intended to refer only to the male gender. "A New York judicial committee observed that gender-biased language often sacrifices clarity. When certain words sometimes mean males, sometimes mean females, and sometimes include both sexes, confusion may result."[126] In one instance, a court reversed a woman's second-degree

**123** *See id.* ("I can't help giving legal *readers* some friendly advice, too. Stop being so finicky! It's normal for language to change in response to social changes or even to just drift. Over time, the plural 'you' came to replace the singular 'thou.' . . . And it was 18th century grammarians who installed 'he' as the default genderless pronoun by influencing grammar school texts. . . . Given this push and pull, and stronger and stronger consensus about the singular 'they,' it's no longer fair to infer that writers who embrace the singular 'they' lack basic education, grammatical knowledge, or professionalism."); Salmon, *supra* note 100, at 10 ("They is now a singular, gender-neutral pronoun. Maybe we should accept it and move on with our lives.").

**124** Bodine, *supra* note 2, at 131 ("This usage came under attack by prescriptive grammarians. However, despite almost two centuries of vigorous attempts to analyze and regulate it out of existence, singular 'they' is alive and well. Its survival is all the more remarkable considering that the weight of virtually the entire educational and publishing establishment has been behind the attempt to eradicate it."); *see also* Baron, *supra* note 1, at 180 ("[P]ronouns are political, and as they once called attention to women's rights, today coined pronouns call attention as well to the rights of nonbinary and trans persons.").

**125** The legislative canon that the masculine includes the feminine has oftentimes been selectively applied when it would create an obligation that applies equally to females, and not applied when it would extend a privilege to females. Baron, *supra* note 1, at 76–77 ("[L]egislating the meaning of pronouns through broad measures like the 1850 Act of Interpretation in Britain or the 1871 Dictionary Act in the United States, which are still in force today . . . failed to make the masculine pronoun generic in the law."); Baron, *supra* note 17, at 139 ("'[T]he word "man" always includes "woman" when there is a penalty to be incurred, and never includes "woman" when there is a privilege to be conferred.'"). For example, in the case of *State v. James*, 114 A. 553, 555 (N.J. 1921), a court rejected application of the canon when it held that a statute describing jury qualifications which used the masculine pronoun *he* limited jury service to males only. *See* Fischer, *supra* note 2, at 488. Conversely, male legislators fretted that they had opened up a Pandora's Box by introducing the "masculine includes the feminine" canon because it might be used to argue for the extension of male-only privileges to women. For that reason, the Interpretation Act itself came under attack just one year after its passage. Backers of a repeal effort within the House of Commons feared that the "masculine includes the feminine" canon might be employed to include females when it came to the right to vote. Baron, *supra* note 17, at 139–40. The repeal effort was turned back largely on the strength of the argument that it was implausible that the canon would ever be construed to extend suffrage to women. Carter, *supra* note 70, at 49–50. As one observer noted with respect to a later effort to employ the canon in this manner, "The fact that the exclusion of the sex from political life has hitherto been secured by the simple use of the masculine pronoun, without any special legislation, illustrates how absolutely inconceivable and unnatural the idea of Women's Suffrage has hitherto seemed. If it were ever to be realized, we should have to . . . watch our pronouns." Baron, *supra* note 1, at 39–40. This argument laid bare the legislative intent that the generic masculine was intended to reinforce male dominance.

**126** Fischer, *supra* note 2, at 487.

murder conviction because a self-defense jury instruction used only the pronoun *he*. The jury surmised that the five-foot four-inch woman, who was on crutches, must be judged according to the reasonableness standard that would be applied to a larger, stronger man because the masculine pronoun appeared to require it.[127] As one observer noted, the "masculine includes the feminine" canon creates confusion because legislators, officials, and experienced legal practitioners lose sight of it and thus apply it inconsistently.[128] *They* cures that confusion because it is unambiguously gender-neutral.

Also, *they* is the most precise, least ambiguous solution when attempting to hide the identity of the subject.[129] In 2018, the *New York Times* published an op-ed by a high-level White House official regarding the efforts of White House insiders to curb the President's tendency to act impulsively. Discussing the need to cloak the writer's identity, editor James Deo said, "It was clear early on that the writer wanted anonymity, but we didn't grant anything until we read it and were confident that *they* were who *they* said *they* were."[130]

*They* is inclusive. By definition, *they* applies equally to the cisgender masculine, the cisgender feminine, the nonbinary or to individuals without gender or whose gender is concealed.[131] Because it is not defined by cisgender categories, *they* also serves non-binary individuals as a personal pronoun. The distinction between generic pronouns and personal pronouns is that the former refer to an unknown individual or a representative of a class, e.g., "someone," while the latter refer to a particular individual, as in the sentence, "When Hayden graduated from law school, they achieved a lifelong ambition."[132]

The use of singular *they* as a personal pronoun has quickly gained widespread attention and acceptance, so much so that the American

**127** *Id.* at 488.

**128** Carter, *supra* note 70, at 46 (referencing the remarks of Geoff Lawn at the inaugural George Tanner Memorial Address at the 2014 Australasian Parliamentary Counsel's Committee's Conference).

**129** Dennis Baron, *Gender Conceal: Did You Know that Pronouns Can Also Hide Someone's Gender?*, The Web of Language (Nov. 9, 2019, 4:15 PM), https://blogs.illinois.edu/view/25/804302 (discussing the use of the singular *they* to refer to someone whose gender needs to be concealed as part of an effort to hide the individual's identity, using the example of journalistic references to whistleblowers).

**130** Michael M. Grynbaum, *Anonymous Op-Ed in New York Times Causes a Stir Online and in the White House*, N.Y. Times (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/business/media/new-york-times-trump-anonymous.html (emphasis added).

**131** Baron, *supra* note 129 (discussing the use of the singular *they* to refer to someone whose gender needs to be concealed, e.g., a whistleblower).

**132** *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 957 (2019) ("Most transgender people, including many who identify as nonbinary, use gendered pronouns such as he and she. However, 29% of transgender respondents to the [United States Transgender Survey] stated that they use 'they/them' pronouns.").

Dialect Society, a leading group of grammarians, named singular *they* used as a personal pronoun its Word of the Year for 2015.[133]

And, while the emergence of singular *they* as a personal pronoun used by nonbinary individuals constitutes a separate development from its use as a generic pronoun, the uses of singular *they* as both a personal and generic pronoun are mutually supportive. Indeed, Ann Bodine's thesis that changes in social conditions spur changes in pronomial usage suggests the reason why the use of singular *they* as a personal pronoun is in ascendance. It also portends the ultimate acceptance of singular *they* as a generic pronoun in legal writing as it has been accepted in other forms. While her argument in 1975 spoke directly to the feminist effort to displace the hegemony of the generic masculine that rendered females invisible, it carries equal weight today where the focus has shifted to recognizing the identity of non-binary individuals.

> Personal reference, including personal pronouns, is one of the most socially significant aspects of language. . . . With the increase of opposition to sex-based hierarchy, the structure of English third person pronouns may be expected to change to reflect the new ideology and social practices, as second person pronouns did before them.[134]

## IV. Legal writers can and should employ non-pronoun alternatives when the singular they produces ambiguity

Yet, legal writing still has a pronoun problem. Even though *they* is grammatically correct as a singular pronoun, *they* may still be incorrect for legal writing where its use creates ambiguity.

In legal writing, precision is paramount. In particular, legislation and contracts must be clear.[135] Rules and contractual provisions written at one time by one author must be comprehensible at another time by those who are obligated to enforce or follow those rules and provisions. Where ambiguities arise, rules become subject to differing interpretations and fail to function.[136]

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133 Charles & Meyers, *supra* note 43, at 39.

134 Bodine, *supra* note 2, at 144.

135 Garner, *supra* note 97, at 591 ("As with almost all other writing, legislative drafting has as its touchstones clarity, accuracy, and brevity—clarity being foremost.").

136 *Id.* at 561 ("On the one hand, a contract should be readable so that the parties will understand their rights and duties. On the other hand, it must be unmistakable in its meaning, since whenever a disagreement arises each party will interpret the contract in its own favor. Unlike most other documents, contracts can be subjected to willful perversions of meaning. So the wordings must be so clear that they foreclose frivolous positions about what they mean.").

"Pronouns are ambiguous, especially gender pronouns, especially in the law."[137] In most instances, it's not that *they* specifically is ambiguous. But rather, pronouns generally may create ambiguity.

Fundamentally, pronouns simplify language, rescuing the speaker from having to repeat nouns, while aiding the listener's comprehension by providing references to those nouns.[138] And simplicity produces clarity, according with modern legal writing's primary aim of communicating precisely in plain English.[139]

However, in certain instances, simplicity and clarity are at odds with each other. That is, clarity may require explanation, making writing less simple. Thus, while pronouns generally simplify writing and promote clarity, pronouns can also cause ambiguity and defeat clarity.[140]

The problems of ambiguity that occur with pronoun usage are generally not a problem with *they* specifically, but with pronouns as they are used in particular instances. Take the example of multiple antecedents. If a pronoun is preceded by more than one noun in the same sentence, confusion can arise concerning which noun the pronoun refers to, as in the sentence, "Paul was speaking to Robert on the phone when his cell signal dropped out." It is unclear whether the pronoun refers to the first individual or the second individual.

One study analyzed more than eighty cases in which the authors reported that the use of singular *they* had produced ambiguity. In all of the examples that the study elaborated, the ambiguity arose in instances when *they* was used in reference to multiple antecedents. After surveying the cases, the authors concluded, "In short, ambiguity lurks when *they* follows two or more people or things."[141]

But that confusion would be the same even if a different pronoun was used, for instance, when a seller and buyer complete a real estate transaction, he or she is responsible for recording the deed.[142] Thus, the ambiguity arises from sentences with multiple antecedents, here the

**137** Dennis Baron, *There Are No Pronouns in the Nineteenth Amendment*, The Web of Language (Aug. 12, 2020, 12:00 PM), https://blogs.illinois.edu/view/25/309444150.

**138** "One of the main functions of pronouns" is to "attract as little attention as possible while pointing to an antecedent." Burlingame, *supra* note 48, at 99 ("Pronouns are defined as words that are used in the place of nouns."); Garner, *supra* note 97, at 200 ("A pronoun is a word that stands in for a noun.").

**139** The 1850 Interpretation Act included numerous other provisions aimed at simplifying and shortening legislative language while making it more uniform and consistent. It has been periodically re-enacted and expanded, and its form has been replicated in other countries. Carter, *supra* note 70, at 11–13, 16–18, 32–35. Modern interpretation acts generally avoid creating canons of construction that apply only to a particular gender out of a concern for creating ambiguity. *Id.* at 50.

**140** Fowler, *supra* note 3, at 464 ("Pronouns & pronomial adjectives are rather tricky than difficult.").

**141** Charles & Meyers, *supra* note 43, at 39.

**142** *See* Eagleson, *supra* note 7, at 93 (demonstrating that utilizing singular pronouns other than *they* does not solve the multiple antecedent problem).

"seller" and "buyer," not with the choice of pronoun. As Garner counsels, the best course is to reword the sentence to avoid multiple antecedents.[143] Likewise, the author of the case study did not conclude that the singular *they* should not be used, but rather that writers should take care when using it and either repeat the noun or otherwise reconstruct a sentence containing multiple antecedents.[144]

Paul Salembier points out the particular problem that arises in the multiple antecedent context when one of the antecedents is singular and the other plural. "Where an applicant notifies the other residents, they must lodge a section 12 notice within 14 days."[145] There he insists that the problem is with the singular *they*. That is, if *they* was considered only a plural pronoun, then it would eliminate the ambiguity.[146] But, as centuries of usage has proven, *they* is not only a plural pronoun, just as *you* is not only a plural pronoun. Salembier seems to suggest that if all English speakers will simply agree that *they* can only be used as a plural pronoun, then it will cure the potential for ambiguity in this narrow instance. But English usage crossed that bridge centuries ago when speakers and writers employed *they* both as a singular and plural pronoun. To be sure, using *they* in the sentence Salembier describes will cause ambiguity because the reader will not know whether it refers to the singular "applicant" or the plural "residents." But, again, the same ambiguity would arise if any pronoun were used in the same place. The problem occurs with pronouns generally, not *they* specifically. In such limited instances, a non-pronoun alternative will promote clarity.

But legal writing style guides take that view to its extreme by teaching writers to abandon the use of generic singular third-person pronouns in *all* instances.[147] Several alternatives to pronouns are proposed, among them the following.

**143** Garner, *supra* note 97, at 205.

**144** Charles & Meyers, *supra* note 43, at 39; *see* LeClercq & Mika, *supra* note 44, at 28 (counseling writers to replace pronouns with nouns in instances of multiple pronoun antecedents).

**145** Salembier, *supra* note 5, at 178 (quoting Eagleson, *supra* note 7, at 93).

**146** *Id.*

**147** Garner, *supra* note 97, at 202 (counseling the use of non-pronoun alternatives to generic pronouns as a means to avoid distracting the reader with pronouns that may be seen as sexist, clumsy, or grammatically incorrect).

| Non-pronoun alternative to use of generic pronoun | Example Sentence |
|---|---|
| **Pluralizing the noun**[148] | When plaintiffs commence an action by service of process, they must also file the complaint with the court. |
| **Repeating the noun**[149] | When a plaintiff commences an action by service of process, the plaintiff must also file the complaint with the court. |
| **Omitting the pronoun through the use of the "to be" verb form**[150] | When a plaintiff commences an action by service of process, there must also be a filing of the complaint with the court. |
| **Employing passive voice**[151] | When a plaintiff commences an action by service of process, the complaint must also be filed with the court. |

Of these alternatives, repeating the noun has a lot of fans, and is well suited to fix the problem of multiple antecedents.[152] Pluralizing the noun is also seen as a solution that works for many sentences.[153]

The alternatives generally share the virtue of avoiding ambiguity. But each has its problems.[154] Each of them frustrates the writer's effort to write simply, which at bottom is the service that pronouns provide.[155] The very fact that the writer must employ an alternative ensures that the resulting sentence is necessarily second best.[156]

**148** *Id.* at 374–75; Shapo, *supra* note 97, at 241; Johnson, *supra* note 1, at 36.

**149** Cupples & Temple-Smith, *supra* note 46, at 33 ("Writers who prioritize precision over style (e.g., legal, technical, or scientific writers) should consider repeating the antecedent."); Garner, *supra* note 97, at 375; Johnson, *supra* note 1, at 36.

**150** Johnson, *supra* note 1, at 36; Rowe, *supra* note 47 (noting that in the case of the possessive pronoun a generic gender pronoun can oftentimes be replaced with "the," as in "the attorney" for "his attorney").

**151** Shapo, *supra* note 97, at 242 ("When all else fails, try the passive voice.").

**152** Rowe, *supra* note 47 ("This solution is especially effective if there's a gap of several words between the noun and the pronoun.").

**153** *Id.* ("Often a sentence will be just as clear if the singular noun is changed to a plural noun.").

**154** "No clear path from the labyrinth has emerged." Burlingame, *supra* note 48, at 109 (discussing advantages and disadvantages of pronoun and non-pronoun alternatives to the generic masculine).

**155** *Id.* at 99 ("[O]ne of the main functions of pronouns [is] to attract as little attention as possible while pointing to an antecedent."); Fischer, *supra* note 2, at 492 (recommending repeating the noun among other options, while also noting that it may be "repetitive and wordy"); Johnson, *supra* note 1, at 36 (advocating for omitting the pronoun or repeating the noun as the least bad alternatives, but also urging the use of singular *they* when any alternative is awkward).

**156** Johnson, *supra* note 1, at 36 (acknowledging that alternatives such as omitting the pronoun or repeating the noun achieve gender neutrality, but nevertheless urging adoption of a generic pronoun to employ when any alternative is awkward). Bryan Garner cautions that legal writers have "overlearned the lesson" that pronouns may in certain cases cause ambiguity, leading some to dispense with pronouns entirely. This election results in stiff, unnatural sentences that "read as if they have been translated from the German by someone who barely knows English." Bryan A. Garner, Garner's Dictionary of Legal Usage 718 (3d ed. 2011).

Outside of the multiple antecedent case where not just *they* but any pronoun should be avoided in order to avoid ambiguity, forcing the writer to give up a pronoun option defeats simplicity and thus diminishes clarity. "[T]he number of times that sentences with this potential ambiguity [of multiple antecedents] actually arise in legislation and legal documents is relatively rare. We should not allow exceptions to frustrate us from using a valuable device and force us into a cumbersome one."[157]

In many instances, *they* is the simplest and thus the clearest alternative. Even readers who perceive the use of singular *they* as incorrect are not confused by it. Consider the following sentence: "Before a lawyer begins to practice, he must sit for and pass the Bar exam." In reading that sentence, the reader perceives the subject to be a male, and for that reason the canon of construction may be applied such that *he* could refer to a person of any gender. Or, perhaps the canon does not apply and the legislation intends a gender limitation.[158] The meaning is ambiguous. By contrast, consider this change: "Before a lawyer begins to practice, they must sit for and pass the Bar exam." Even the reader who considers this sentence ungrammatical comprehends that *they* unambiguously refers to the "lawyer" as a singular generic person who may be cisgender or nonbinary. It is no surprise that readers easily comprehend this usage since *they* has been used as a singular pronoun for centuries. As compared to non-pronoun alternatives such as employing passive voice ("the Bar exam must be taken and passed"), *they* is just as unambiguous, if not more unambiguous by explicitly including individuals of any gender or no gender.

Nevertheless, as Dennis Baron points out, "It's true that having the same pronoun for both singular and plural can be ambiguous."[159] But context generally clarifies whether *they* is meant to refer to the singular or the plural, just as context indicates whether *you* refers to an individual or a group.

And, the reader's comprehension of *they* as both singular and plural can be compared to the reader's implicit understanding of a generic noun as possibly both singular and plural. Consider the following sentence. "A surgeon must don a mask before they begin a procedure." In reading the rule, the reader implicitly understands that, in a particular instance, there could be more than one surgeon who participates in the surgery, and that the rule would apply equally to both the singular surgeon and the plural surgeons. Indeed, pluralizing the noun is one of the most common alternatives to the use of a singular generic pronoun—"Surgeons must

157 Eagleson, *supra* note 7, at 94 (suggesting repeating the noun as a solution to the multiple antecedent problem).

158 *See supra* note 119 regarding inconsistent application of the "masculine includes the feminine" canon.

159 Baron, *supra* note 1, at 165.

don masks before they begin a procedure"—and it relies on the reader's implicit understanding when it comes to generic nouns that the singular includes the plural and the plural includes the singular.[160] For the same reason, *they* functions effectively as a generic pronoun: the reader understands implicitly that *they* can refer either to a singular or plural noun.

## Conclusion

Thus, the singular *they* exists not as the only acceptable usage when a singular generic pronoun is called for, but as one of the available alternatives when a legal writer seeks simplicity and clarity.[161] Legal writing should abandon the proscription against the singular *they* that was founded on androcentrism, and instead promote this grammatical, simple, and inclusive solution to fill the blank.

## Appendix A – Example usages of they as a singular third-person generic pronoun through history in common usage and literary works[162]

- Each man hurried . . . till they drew near . . . where William and his darling were lying together.
  —William and the Werewolf (1375) (translated to modern English from Middle English)[163]
- No one in the whole country was brave enough to oppose them, because they were so afraid of them.
  —Three Kings of Cologne (c. 1400) (translated to modern English from Middle English)[164]
- There's not a man I meet but doth salute me as if I were their well-acquainted friend.
  —William Shakespeare, A Comedy of Errors (1594)[165]

160 *See* Salembier, *supra* note 5, at 183 ("Though, as a practice, most legislative provisions are drafted in the singular, the Interpretation Acts of most jurisdictions provide that the singular includes the plural and vice versa."); *see also* Schweikart, *supra* note 12, at 2 (noting that the "plural includes the singular" canon of statutory construction implies that, even if *they* is taken as plural, it may be used as a generic pronoun to include the singular).

161 Eagleson, *supra* note 7, at 94–95 ("Just because the rules of grammar say that we may substitute pronouns for nouns does not mean that we should always do so. So it is with they. Writers may—and should—use it in the contexts we recommend because it promotes a smoother, less cumbersome text, but writers need to exercise care with it, as with every other item of language, to avoid any ambiguity or trace of confusion.").

162 After the chronological list this appendix groups references from McKnight, *supra* note 82 and Eagleson, *supra* note 7, two scholars who made a point of aggregating these examples in their work.

163 Baron, *supra* note 10.

164 Baron, *supra* note 1, at 150 (quoting the *Oxford English Dictionary*).

165 *Id.* at 155.

- The jury, passing on the prisoner's life/May in the sworn twelve have a thief or two/Guiltier than him they try.
  —William Shakespeare, Measure for Measure (1604)[166]
- So likewise shall my heavenly Father do also unto you, if ye from your hearts forgive not everyone his brother their trespasses.
  —The Bible (King James Version 1611)[167]
- I always delight in . . . cheating a person of their premeditated contempt.
  —Jane Austen, Pride & Prejudice (1813)[168]
- To be sure, you knew no actual good of me—but nobody thinks of that when they fall in love.
  —Jane Austen, Pride & Prejudice (1813)[169]
- I cannot pretend to be sorry . . . that he or that any man should not be estimated beyond their deserts.
  —Jane Austen, Pride & Prejudice (1813)[170]
- [H]ave everybody marry if they can.
  —Jane Austen, Mansfield Park (1814)[171]
- [N]obody put themselves out of the way.
  —Jane Austen, Mansfield Park (1814)[172]
- Who makes you their confidant?
  —Jane Austen, Emma (1816)[173]
- The person, whoever it was, had come in so suddenly and with so little noise, that Mr. Pickwick had had no time to call out, or oppose their entrance.
  —Charles Dickens, The Pickwick Papers (1837)[174]
- A person can't help their birth.
  —William Makepeace Thackeray, Vanity Fair (1848)[175]
- But how can you talk with a person if they always say the same thing?
  —Lewis Carroll, Alice's Adventures in Wonderland (1865)[176]

166 William Shakespeare, Measure for Measure 39 (ebook).

167 Eagleson, *supra* note 7, at 96.

168 Baron, *supra* note 1, at 155 (citing Berry, *supra* note 18).

169 Berry, *supra* note 172; McCulloch, *supra* note 18.

170 McCulloch, *supra* note 18.

171 McKnight, *supra* note 82, at 528 (emphasis omitted).

172 *Id.* (emphasis omitted).

173 Baron, *supra* note 1, at 169.

174 *Id.* at 118.

175 *Id.* at 169.

176 Eagleson, *supra* note 7, at 96.

- I never refuse to help anybody, if they've a mind to do themselves justice.
  —George Eliot, The Mill on the Floss (1867)[177]
- Some people say that if you are very fond of a person you always think them handsome.
  —Henry James, Confidence (1879) [178]
- Unless a person takes a deal of exercise, they may soon eat more than does them good.
  —Herbert Spencer, Autobiography (1904)[179]
- As for a doctor . . . what use were they except to tell you what you already knew?
  —John Galsworthy, The Country House (1907)[180]
- [E]ach person stretched backwards covering themselves.
  —James Stephens, The Demi-Gods (1914)[181]
- [B]ut every body must act exactly as they are able to act.
  —James Stephens, The Demi-Gods (1914)[182]
- I know when I like a person directly I see them.
  —Virginia Woolf, The Voyage Out (1915)[183]
- [E]veryone always puts their boots on in the kitchen.
  —E. S. Wilkinson, Blackwood's, Living Age (1919)[184]
- [E]ach generation of people begins by thinking they've got it.
  —Rose Macaulay, Told by an Idiot (1923)[185]
- I cut no one, except when I'm afraid of being bored by them.
  —Rose Macaulay, Told by an Idiot (1923)[186]
- If he fought anybody he'd kill them.
  —Margaret Kennedy, The Constant Nymph (1924)[187]
- Let no voter abdicate their sovereign right of self-government at the election on Tuesday by failing to vote.
  —Calvin Coolidge (1926)[188]
- It is fatal for anyone who writes to think of their sex.
  —Virginia Woolf, A Room of One's Own (1929)[189]

177 Baron, *supra* note 1, at 169.

178 Henry James, The Complete Works of Henry James 760 (2018).

179 Baron, *supra* note 1, at 169.

180 *Id.* at 170.

181 McKnight, *supra* note 82, at 530 (emphasis omitted).

182 *Id.* (emphasis omitted).

183 Eagleson, *supra* note 7, at 97.

184 McKnight, *supra* note 82, at 529 (emphasis omitted).

185 *Id.* (emphasis omitted).

186 *Id.* (emphasis omitted).

187 *Id.* at 530 (emphasis omitted).

188 Baron, *supra* note 1, at 118.

189 *Id.* at 155.

- Nobody would ever marry if they thought it over.
  —George Bernard Shaw, Village Wooing (1934)[190]
- And if anyone doubts that democracy is alive and well, let them come to New Hampshire.
  —Ronald Reagan (1985)[191]
- If anyone tells you that America's best days are behind her, they're looking the wrong way.
  —George H.W. Bush (1991)[192]
- No American should ever live under a cloud of suspicion just because of what they look like.
  —Barack Obama (2012)[193]
- [E]very man went to their lodging.
  —Lord Berners, Transl. of Froissart (1523–25)[194]
- Every servant in their maysters lyverey.
  —Lord Berners, Transl. of Froissart (1523–25)[195]
- [E]very one prepared themselves.
  —A Petite Pallace of Pettie His Pleasures (1908)[196]
- [E]very horse had been groomed with as much rigour as if they belonged to a private gentleman.
  —Thomas De Quincey, English Mail Coach (1849)[197]
- [T]he majority of mankind . . . quite consistent with their being.
  —Matthew Arnold, Literature and Science (1882)[198]
- [H]is great concern being to make every one at their ease.
  —Cardinal Newman, Knowledge Viewed in Relation to Religious Duty (1852)[199]
- [E]verybody made good use of their liberty.
  —Gilbert Cannan, Transl. of Jean Christophe (1910–1913)[200]
- [N]o one is ever safe . . . unless they always remember.
  —Anne Douglas Sedgwick, Adrienne Toner (1922)[201]

**190** Eagleson, *supra* note 7, at 97.

**191** Gidi & Weihofen, *supra* note 16, at 30 (quoting Ronald Reagan, President, Remarks to Citizens in Concord, New Hampshire (Sept. 18, 1985)).

**192** *Id.* (quoting George H.W. Bush, President, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 1991)).

**193** *Id.* (quoting Barack Obama, President, Statement by the President on the Supreme Court's Ruling on Arizona v. the United States (June 25, 2012)).

**194** McKnight, *supra* note 82, at 528 (emphasis omitted).

**195** *Id.* (emphasis omitted).

**196** *Id.* (emphasis omitted).

**197** *Id.* at 529 (emphasis omitted).

**198** *Id.* (emphasis omitted).

**199** *Id.* (emphasis omitted).

**200** *Id.* (emphasis omitted).

**201** *Id.* (emphasis omitted).

- [T]each anyone how to arrange their lives.
  —Sheila Kaye-Smith, The End of the House of Alard (1923)[202]
- [E]verybody has to take their chance.
  —James Stephens, The Crock of Gold (1912)[203]
- [E]veryone of those belong to the Middle Ages.
  —George Moore, Hail and Farewell (1911)[204]
- [E]verybody ought to look where they are going.
  —Frank Swinnerton, Nocturne (1917)[205]
- I have never known any one myself who achieved style in their first piece of work.
  —Lord Dunsany, Literary Review (1921)[206]
- Every one's got to decide for themselves.
  —Rose Macaulay, Potterism (1920)[207]
- Every one in this age sought . . . justification of their own activities.
  —A. E., The Interpreters (1922)[208]
- Little did I think . . . to make a . . . complaint against a person very dear to you, but don't let them be so proud . . . not to care how they affront everybody else.
  —Samuel Richardson[209]
- Everybody fell a laughing, as how could they help it?
  —Henry Fielding[210]
- Some people say that if you are very fond of a person you always think them handsome.
  —Henry Jones[211]
- Everyone was absorbed in their own business.
  —Andrew Motion[212]
- Nobody stopped to stare, everyone has themselves to think about.
  —Susan Hill[213]

**202** *Id.* (emphasis omitted).
**203** *Id.* (emphasis omitted).
**204** *Id.* (emphasis omitted).
**205** *Id.* (emphasis omitted).
**206** *Id.* (emphasis omitted).
**207** *Id.* at 530 (emphasis omitted).
**208** *Id.* (emphasis omitted).
**209** Eagleson, *supra* note 7, at 96.
**210** *Id.*
**211** *Id.*
**212** *Id.* at 97.
**213** *Id.*

- His own family were occupied, each with their particular guests.
  —Evelyn Waugh[214]
- You just ask anybody for Gordon Skerrett and they'll point him out to you.
  —F. Scott Fitzgerald[215]
- "There's a bus waiting outside the terminal to take everybody to their hotels," said Linda.
  —David Lodge[216]
- Why does everybody think they can write?
  —Ernest Hemingway[217]

## Appendix B – Example usages of they as a singular third-person generic pronoun before 1800 in American legal writing

- If any man or woman be a WITCH, that is, hath or consulteth with a familiar spirit, they shall be put to death.
  —Laws of the Massachusets colony (1647)[218]
- [O]ne or two able persons annually chosen by each towne, who shall be sworn at the next county Court . . . unto the faithfull discharge of his or their office.
  —Laws of the Massachusets colony (1647)[219]
- If any man or woman shall LYE WITH ANY BEAST . . . they shall surely be put to death.
  —Laws of the Massachusets colony (1647)[220]
- [T]he same Court of Magistrate shall appoint a Committee of discreet and indifferent men to view such incumbrance, and . . . they shall require them to appear at the next Court.
  —Laws of the Massachusets colony (1647)[221]
- [A]ny Merchant or Master of any ship, belonging to any place not in . . . the State of *England*, or our selves, so as they depart again . . . and behave themselves.
  —Laws of the Massachusets colony (1647)[222]

214 *Id.*

215 *Id.*

216 *Id.*

217 Evans & Evans, *supra* note 17, at 196.

218 The Book of the General Lauues and Libertyes, *supra* note 21, at 5.

219 *Id.* at 3.

220 *Id.* at 5.

221 *Id.* at 25.

222 *Id.* at 26.

- [T]hat no Indian shall at any time powaw, or performe outward worship to their false gods: or to the devil in any part of our Jurisdiction; whether they be such as shall dwell heer, or shall come hither.

  —Laws of the Massachusets colony (1647)[223]

- [I]f any servant shall flee from the tyrannie and cruelties of his, or her Master to the house of any Freeman of the same town, they shall be protected and sustained till due order be taken for their relief.

  —Laws of the Massachusets colony (1647)[224]

- [T]hat in the times of danger the watches & wards shall be set by the militarie Officer, in such place as they shall judge most convenient.

  —Laws of the Massachusets colony (1647)[225]

- [T]hat the Watch . . . shall examin all persons that they shall meet withal within the compasse of their Watch or Round: and all such as they suspect they shall carry to the Court of Guard . . . and before they be dismissed they shall carrie them to their chief Officers.

  —Laws of the Massachusets colony (1647)[226]

- That when any Ship is to be built within this Jurisdiction, or any vessel above thirty tuns, the Owner, or builder in his absence shall before they begin to plank, repair to the Governour.

  —Laws of the Massachusets colony (1647)[227]

- [T]he Court, both for the time and expenses, which they shall Judg to have been expended . . . as the merit of the cause shall require, but if they find the defendant in fault, they shall impose the just charges upon such defendant.

  —Laws of the Massachusets colony (1649)[228]

- [A]ny Court . . . may discharge any such person from imprisonment if they be unable to make satisfaction.

  —Laws of the Massachusets colony (1649)[229]

223 *Id.* at 29.

224 *Id.* at 39.

225 *Id.* at 42.

226 *Id.* at 41.

227 *Id.* at 48.

228 The Book of the General Lavves and Libertyes Concerning the Inhabitants of the Massachusets, May 1649 2 (Cambridge 1660).

229 *Id.* at 31.

- [E]very such person upon examination and legal conviction before the Court . . . shall be committed to close prison, for one Month, and then unless they choose voluntarily to depart . . . .

  —Laws of the Massachusets colony (1649)[230]

- And every person found Drunken . . . being Lawfully convict thereof, and for want of payment they shall be in prisoned till they pay . . . .

  —Laws of the Massachusets colony (1649)[231]

- And if any person offend in drunkenness, excessive or long drinking, the second time, they shall pay double fines. And if they fall into the same offence a third time, they shall pay treble fines.

  —Laws of the Massachusets colony (1649)[232]

- It is Ordered, that the Clerk of the Writs in the several Towns, shall Record all Births & Deaths of persons in their Towns, and for every Birth and Death they Record, they shall be allowed Three-pence.

  —Laws of the Massachusets colony (1649)[233]

- [T]hat no Man shall be forced to Receive any corne, wood, or boards, (except as they Agree thereonto).

  —Laws of the Massachusets colony (1649)[234]

- And it is further Ordered, that where any town shall increase the number of one hundred miles . . . they shall let up.

  —Laws of the Massachusets colony (1649)[235]

- That if it shall so happen that none shall appear to bid for the aforesaid Excise in any of the Cities, Towns or Countries, on the days appointed, and on which they are to be let.

  —Laws of the Colony of New York (1709)[236]

- And that the said Meeting be careful in the Choice of their . . . Grand-jury men, that they Choose men of known Abilities, Integrity and good Resolution.

  —A Proclamation by the Governour of Connecticut (1715)[237]

**230** *Id.* at 36.

**231** *Id.* at 44.

**232** *Id.* at 45.

**233** *Id.* at 68.

**234** *Id.* at 80.

**235** *Id.* at 71.

**236** *An Act for Laying an Excise on All Liquors Retail'd in this Colony*, in Laws of the Colony of New York 1 (New York 1709).

**237** Gurdon Saltonstall, By the Governour, a proclamation 1 (New London 1715).

- That every Captain within this Province, already appointed, or that shall hereafter be appointed . . . within the Districts or Division of which they are Captain.

  —Acts Passed by the General Assembly of the Province of New Jersey (1718)[238]

- And be it further Enacted by the Authority aforesaid, That every Retailer . . . shall also take and have . . . a Permit . . . for which Entry and Permit they shall pay *One Shilling*, and no more.

  —Act of the Pennsylvania Province General Assembly (1719)[239]

- [F]or had we not come to an agreement with Spain, their attempt upon Jamaica was not a chimerical one. They had felt the disadvantage to them of that island being in our hands, from whence the Squadron was supported, that blockt up their galeoons, and that they have long had an eye upon it appears from Monsr.

  —Charles Delafaye, After Treaty of Seville (1729)[240]

- [A]nd the Court, may upon Presentment of the Grand-Jury, if they think fit, oblige the Party presented, to answer such Presentment without any formal indictment.

  —Laws of Maryland (1730)[241]

- That no Person or Persons whatsoever, shall transfer or make over to another Person or Persons, any Tobacco-Plants, which he, she, or they shall have growing on his, her, or their Plantation.

  —Laws of Maryland (1730)[242]

- [W]hich Jury, upon their Oath, . . . shall enquire, assess, and return what Demonstrated Recompence they shall think fit.

  —Laws of Maryland (1730)[243]

- It seems as if the Assembly are of the opinion, that if the S.S. Company did not carry on the Assiento Contract, they should have a very great trade with the Spanish settlements. It is to

238 Acts Passed by the General Assembly of the Province of New-Jersey 107 (New York City 1720).

239 The Statutes at Large of Pennsylvania, *supra* note 22, at 229.

240 Charles Delafaye, *After Treaty of Seville*, in 36 The Calendar of State Papers, Colonial: North American and the West Indies 1574–1739 579–81 (1729).

241 Maryland, Laws of Maryland, 1730 8 (Annapolis, William Parks 1730).

242 *Id.* at 8.

243 *Id.* at 28.

be feared not so great as they have now. The Company have brought a trade to Jamaica with the server parts of New Spain, they have not deprived the inhabitants of any branch.

—William Wood, Observations on the Assiento Contract (1732)[244]

- The Company are unjustly treated by being charged with bringing a loss to the island of 1200 seamen, and near 200 vessels employed in the Bays of Campeachy and Honduras. They had no hand in depriving any of H.M. subjects . . . and what vessels they may licence to trade thither, they are warranted to do.

  —William Wood, Observations on the Assiento Contract (1732)[245]

- [E]very member shall . . . meet annually, at the Redwood-Library, at Ten of the Clock in the Forenoon, on every last Wednesday of September; where and when . . . they shall choose eight Directors, a Treasurer, a Secretary, and a Librarian.

  —Laws of the Redwood-Library Company (1765)[246]

244 William Wood, *Observations on the Assiento Contract*, in 39 The Calendar of State Papers, Colonial: North American and the West Indies 1574–1739 187–89 (1732).

245 *Id.*

246 Redwood Library Company, *supra* note 23, at 4.

ARTICLE

# The Problems, and Positives, of Passives

## Exploring Why Controlling Passive Voice and Nominalizations Is About More Than Preference and Style

Jacob M. Carpenter*

## Introduction

Passive voice and nominalizations are "among the worst writing weaknesses."[1] Passages written with passive voice and nominalizations, compared to the same passages rewritten in the active voice, are often slower to read, harder to read, harder to comprehend, harder to remember, less concise, less familiar feeling, and less engaging.[2] When writing briefs, attorneys strive to explain legal analysis as clearly, effectively, and persuasively as possible. Yet attorneys commonly impede the reader by using passive voice and nominalizations excessively in their briefs.[3]

Though many textbooks, bar-journal articles, and professional-development speakers advise attorneys to prefer active voice over passive voice and to avoid nominalizations, the topic typically receives only a

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1 Lloyd R. Bostian, *Dysfunctional Pseudo-Elegance: Why Passive and Nominal Writing Fails*, 65 J. Applied Commc'ns 32, 32 (1982).

2 See section II, *infra*, for a discussion of studies that have demonstrated these impediments.

3 Peter M. Tiersma, Legal Language 75, 206 (1999). Tiersma states that "[l]egal language is often excoriated for overreliance on passive constructions." *Id.* at 75 (citing Edward Finegan, *Form and Function in Testament Language*, *in* Linguistics and the Professions 113, 118 (Robert J. DiPietro ed., 1982)); Risto Hiltunen, Chapters on Legal English: Aspects Past and Present of the Language of the Law 76 (1990) (noting that the passive is very common in legal English). Professor Linda Edwards stated that "most legal writing . . . relies far too much on verbs in the passive voice." Linda H. Edwards, Legal Writing and Analysis 283 (4th ed. 2015). Edwards noted that because so many cases students read are "infected" with passive voice, students "will have to struggle against developing the habit" themselves. *Id.*

few paragraphs of quick, surface-level attention.[4] Many attorneys remain oblivious to their own excessive use of passive voice and nominalizations. It seems that attorneys forget what passive voice and nominalizations are,[5] are not convinced that avoiding them matters, or are unable to identify them in their writing.[6]

On the other hand, advice to "never use passive voice" is potentially harmful for writers. When used strategically, passive voice can create cohesion, shift emphasis, imply objectivity, and make readers feel more distant, less connected, and less emotional about an event.[7] Thus, mastery of passive voice can be a valuable rhetorical tool. The problem with passive voice isn't that it is always bad.[8] The problem is that many attorneys use it indiscriminately, unknowingly, and excessively, amplifying its negative effects while blunting its potential value.

To help legal writers realize how much passive voice and nominalizations can affect their readers, this article explores passive voice and nominalizations in a depth that style guides, textbooks, and speakers have not. For foundation, section I explains passive voice and nominalizations, including quick, simple ways for busy practitioners to spot each in their briefs. Then, section II explores these linguistic constructions more deeply, relaying the results of interdisciplinary studies that show how passive voice and nominalizations can indeed impede readers and weaken writing. These studies provide professors with substantive support to show that the advice they give legal writers is not just an arbitrary style

4 Though nearly every legal writing textbook could be cited, here is just a short list of examples from recent, excellent legal writing textbooks: Charles R. Calleros & Kimberly Holst, Legal Method and Writing I 206–08 (8th ed. 2018); Camille Lamar Campbell & Olympia R. Duhart, Persuasive Legal Writing 127–28, 214–15 (2017); Joan M. Rocklin et al., An Advocate Persuades 204, 295 (2016); Heidi Brown, The Mindful Legal Writer 206 (2016); Edwards, *supra* note 3, at 282–85; Tracy Turner, Legal Writing from the Ground Up 215–17 (2015); Jill Barton & Rachel H. Smith, The Handbook for the New Legal Writer 104, 114 (2d ed. 2014); Daniel L. Barnett, Putting Skills Into Practice 122 (2014); Kristen E. Murray & Jessica Lynn Wherry, The Legal Writing Companion 150 (2d ed. 2019). Specific to nominalizations, Bryan Garner has stated, "Though long neglected in books about writing, [nominalizations] ought to be a sworn enemy of every serious writer." Bryan A. Garner, Garner's Modern American Usage 121 (2009). Garner refers to nominalizations as "buried verbs." *Id.* at 120.

5 This mirrors the observation made in a *New York Times* bestseller about writing: "Passive voice is one of those things many people believe they should avoid, but fewer people can define." Mignon Fogarty, Grammar Girl's Quick and Dirty Tips for Better Writing 171 (2008).

6 Bryan A. Garner, Legal Writing in Plain English 25 (2001) (stating that "less than 50% of lawyers can spot passive voice reliably"). Lawyers are not alone in this. Passive voice is a hallmark of scientific writing. In an article examining overuse of passive voice in scientific writing, the author noted that while advice to avoid passive voice is common, "[i]t is far less clear whether scientists and researchers themselves are aware of these effects and whether they make careful decisions about the use of [passive voice]." Leong Ping Alvin, *The Passive Voice in Scientific Writing. The Current Norm in Science Journals*, 13 J. Sci. Commc'n 1, 4 (2014). Leong doubts whether the scientists and researchers are even able to recognize passive voice or know when passive may be appropriate. *Id.*

7 *See* section III, *infra*.

8 "In any type of writing, the active voice is usually more precise and less wordy than is the passive voice. [But] [t]his is not always true; if it were, we would have an Eleventh Commandment: 'The passive voice should never be used.'" Leong, *supra* note 6, at 10 (italics omitted) (quoting R.A. Day & B. Gastel, How to Write and Publish a Scientific Paper (7th ed. 2012)).

preference.[9] Finally, to flesh out the nuance of passive voice, section III examines the other side of the coin—if used carefully, how passive voice can create flow and focus readers in important, helpful ways.

Even though attorneys are "professional writers,"[10] many do not understand or have command of passive voice and nominalizations. Yet these constructions are common in every brief, for better or worse. Attorneys can become more effective advocates when they learn to control passive voice and nominalizations in their legal writing.

## I. Understanding passive voice and nominalizations

Though not the same construction, passive voice and nominalizations often go hand-in-hand. Both can make writing bloated, dull, and harder to understand, and writers who overuse one typically overuse the other as well. Both lengthen briefs without adding substance, making writing feel limp and lifeless.[11] Being able to spot and reduce passive voice and nominalizations can bring legal writers' text back to robust life.

### A. Explanation of passive voice

The concept of passive voice is easy to remember by analogizing it to passive people.[12] Active people do things; passive people have things done to them. The same concept applies to the grammatical subject of a sentence. If a sentence is written in active voice, the subject of the sentence does something:[13] *The attorney filed a complaint*. The subject of the sentence, *the attorney*, actively did something—she filed a complaint. On the other hand, if a sentence is written in passive voice, the grammatical subject of the sentence has something done to it.[14] For example, that same sentence written in passive voice reads as follows: *The complaint was filed*

9 This may be especially important for law students, who see so much passive voice in the cases they are reading and thus begin to associate passive voice with legal writing style and emulate it in their own writing.

10 "Usually, there's a lot riding on your writing: your client's money, your client's rights and, in the criminal setting, your client's liberty or even life. . . . Grasping the complex subject matter and writing about it effectively are the hallmarks of a professional writer—a lawyer." Wayne Schiess, *Lawyers are Professional Writers*, Austin Law., Nov. 2012, at 11; *see also* Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 Mercer L. Rev. 709, 711 (1998) ("Law is a profession of language and writing; lawyers get paid for drafting persuasive documents and speaking for clients. Lawyers have no choice but to write.").

11 Stephen V. Armstrong & Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing 222 (2d ed. 2003) ("[With passive voice,] the actor disappears into the sentence's interior and verbs become limp and hollow."); Noah A. Messing, The Art of Advocacy 247–48 (2013) (stating that nominalizations "drain vitality from prose").

12 The description in this paragraph mirrors Bryan Garner's description. *See* Garner, *supra* note 6, at 24–25.

13 Tiersma, *supra* note 3, at 75.

14 *Id.*

*by the attorney*. Both sentences are grammatically correct, but one is an active sentence while the other is a passive sentence, based on whether the subject is acting or being acted upon.

The subject of a sentence is typically a noun (a person, place, or thing)[15] and is followed by a verb.[16] Verbs that denote action can be transitive or intransitive.[17] Transitive verbs act on something (*The judge grabbed his gavel.*). Intransitive verbs do not (*The victim cried.*).[18] With transitive verbs, what receives the action is the "direct object."[19] In the transitive example, the gavel is the direct object (it is what received the action—what the judge grabbed).[20] Only transitive verbs can be made passive.[21]

When a transitive sentence is written in active voice, the actor is the grammatical subject and comes before the action: *I will review the file*.[22] But in a passive sentence, the direct object is the grammatical subject and comes before the action, and the actor may be omitted entirely: *The file will be reviewed*.[23] The difference between an active and a passive sentence can be shown graphically:

- **Active sentence**: Actor → Action → Object.[24]
- **Passive sentence**: Object → Action → Actor (when present).[25]

Readers typically expect to receive information in the Actor → Action → Object order.[26] Readers "tend to anticipate that whenever a noun occurs at the beginning of the sentence, it will be . . . the actor."[27]

15 James A.W. Heffernan & John E. Lincoln, Writing: A Concise Handbook 59 (1997).

16 *Id.* at 60. Some verbs express action, while some do not.

17 *Id.* at 61.

18 *Id.* at 60–61.

19 *Id.* at 61.

20 *Id.*

21 If the verb is intransitive, then there would be no direct object.

22 *Id.* at 49–50.

23 *Id.* With active sentences, the subject and the object are distinct from each other, and the object is placed *after* the verb. On the other hand, with passive sentences, the subject and the object are the same and are placed *before* the verb, as in this example: *The door was punched by Sheila*. In that passive sentence, the *door* is the grammatical subject of the sentence, as it precedes the verb *was punched*. The *door* is also the direct object, because it is what received the action—it is what got punched.

24 The graphical concept is addressed using different labels in *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*. Armstrong & Terrell, *supra* note 11, at 226. For an active sentence, Armstrong and Terrell use the labels Subject → Verb → Object, and Agent → Action → Recipient. *Id.*

25 Another simple way to think of it is to ask, "Who did what?" If the *who* comes before the *what*, then the sentence is active. Determining whether a sentence is active or passive is as simple as identifying (1) what the action is, (2) who the actor is, and (3) whether the actor is placed before or after the action. *See id.* (suggesting writers ask, "who did what to whom (or what)?").

26 Peter Herriot, *The Comprehension of Sentences as a Function of Grammatical Depth and Order*, J. Verbal Learning & Verbal Behav. 938, 940 (1968); Jennifer E. Mack et al., *Neural Correlates of Processing Passive Sentences*, 3 Brain Sci. 1198, 1200 (2013).

27 Tiersma, *supra* note 3, at 75.

So "[r]eaders comprehend a sentence in the active [voice] more quickly because it follows the way they normally process information. They do not have to search through the sentence looking for the actor."[28] Passive voice makes it "harder for readers to process the information" because "the passive subverts the normal word order for an English sentence."[29]

Some sentences are not entirely active or entirely passive. Sentences often involve multiple clauses.[30] In the same sentence, some clauses may be active while others may be passive. Consider this example: *John rode in a car that was driven by Mike*. The first clause is active (*John rode in a car*) while the second clause is passive (*that was driven by Mike*).[31]

### B. Explanation of nominalizations

A nominalization is a verb (an act) that the writer turned into a noun (a thing).[32] For example, a writer could use the verb investigate: *The police will investigate the theft*. Or, a writer can turn the verb *investigate* into a noun (a thing—*an investigation*).[33] The writer would then have to word the sentence as follows: *The police will conduct an investigation of the theft*. Because all complete sentences need a verb, the writer had to add a new verb (*conduct*) for the sentence to be grammatically complete.

Nominalizations are not the same as passive voice, but both state the action in less direct, more boring ways:[34] passive voice has the grammatical subject of the sentence receiving the action, rather than actively doing the action; a nominalization replaces an action verb with a noun. The true action (the police *investigate*) is instead expressed as a thing (*an investigation*) that must receive some action (the police are conducting *an investigation*). Attorneys often bloat a sentence by using both a

28 Deborah E. Bouchouz, Aspen Handbook for Legal Writers: A Practical Reference 87 (2005); Mack et al., *supra* note 26, at 1200 ("Some studies have found longer reaction times for passive as compared to active sentences, which may be due to the processing costs of thematic reanalysis," *i.e.*, reanalyzing who the actor is and what the object is in a sentence.).

29 Garner, *supra* note 4, at 613.

30 Heffernan & Lincoln, *supra* note 15, at 65–72.

31 Interestingly, some research has indicated that location of passive voice in a sentence affects comprehension, with passive voice located in subordinate clauses hurting comprehension more than when passive voice is located in a sentence's main clause. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Analysis of Jury Instructions*, 79 Colum. L. Rev. 1306, 1325–26, 1337 (1979).

32 Tiersma, *supra* note 3, at 77; Charrow & Charrow, *supra* note at 31, at 1321.

33 As in the example of "investigation," most nominalizations end with the letters *-ion*. However, not every word that ends in *-ion* is a nominalization. Further, nominalizations may end in other ways, such as *-al* ("the removal of" rather than "we removed") and *-ment* ("made an acknowledgement" rather than "acknowledged"). Charrow & Charrow, *supra* note 31, at 1321.

34 "Active voice stresses the activity of the subject and helps make a sentence more direct, concise, and vigorous." Heffernan & Lincoln, *supra* note 15, at 49; Messing, *supra* note 11, at 247–48 (stating that nominalizations "drain vitality from prose").

nominalization and passive voice: *An investigation of the theft will be conducted by the police.*

Like passive voice, nominalizations are not grammatically wrong. But overusing them creates a dull,[35] wordy, more-abstract writing style that is more difficult for the reader to process.[36] "[B]y denominalizing, writers . . . construct clearer and more[-]direct sentences, more[-]concrete verbs, fewer abstract nouns, and ultimately less intimidating sentences."[37] Thus, when there is action in a sentence, strong writers strive to (1) use active voice so the grammatical subject does the action (rather than receives it), and (2) use action verbs to express the action (rather than nouns as nominalizations).

### C. Why passives and nominalizations both bloat and dull writing

Passive voice and nominalizations inflate sentences with unneeded words and are normally less dynamic ways to say things. That is why experts advise speech writers to "avoid the use of the passive voice at every opportunity [because it] robs the writing of force, pep, and punch—the passive voice certainly makes the writing inactive, literally and figuratively."[38] Similar advice is that writers "will convey [their] meaning more forcefully and usually clearly when [they] use verbs in the active voice."[39]

The types of words passive voice attracts contribute to the loss of this "force, pep, and punch." Linguists call words "that make reference to the real world, those for which synonyms can be easily found," *content words*.[40] They are typically nouns, action verbs, and descriptive adjectives and adverbs.[41] Content words could also be called substantive words, as they carry substance and real-world meaning. *Function words*, on the other hand, "serve a grammatical function"; they have neither substance nor real-world meaning, "little, if any, connotative meaning," and, it would

35 Bostian, *supra* note 1, at 32 ("Nominal prose is dull because it substitutes nouns for verbs, and the few remaining verbs are mostly weak ones or forms of 'to be.'").

36 "Anything that makes a verb less verb-like and more noun-like creates abstraction." Charrow & Charrow, *supra* note 31, at 1321 (citing James D. McCawley, *Where Do Noun Phrases Come From? in* Readings In English Transformational Grammar 166 (R. Jacobs & P. Rosenbaum eds. 1970); Robert B. Lees, The Grammar of English Nominalizations (1968)). "[Nominalizations], like passive constructions, also can have the effect of . . . obscuring the identity of the actor." Tiersma, *supra* note 3, at 77.

37 Jan H. Spyridakis & Carol S. Isakson, *Nominalizations vs. Denominalizations: Do They Influence What Readers Recall?*, 28 J. Tech. Writing & Commc'n 185 (1998).

38 Joseph A. DeVito, *Some Psycholinguistic Aspects of Active and Passive Sentences*, 55 Q. J. Speech 401, 401 (1969) (quoting James J. Welsh, The Speech Writing Guide: Professional Techniques for Regular and Occasional Speakers 40 (1968)).

39 *Id.* at 401 (quoting John F. Wilson & Carroll C. Arnold, Public Speaking as a Liberal Art 295 (2d ed. 1968)).

40 *Id.* at 405 n.15.

41 *Id.*

follow, few synonyms.[42] Examples of function words are linking verbs, like forms of "to be": is, are, was, were, be, being, been, and am.[43] Thus, in the sentence *John ran home*, all three words are content words because all have real-world meaning. But, in the sentence *John is a fast runner*, the verb *is* and the article *a* are just function words. They do not carry meaning—they just complete the sentence grammatically. The content words are *John*, *fast*, and *runner*.

"By their very nature, active sentences contain a higher percentage of content words but a lower percentage of function words than do passive sentences."[44] Nominalizations likewise often increase the number of function words. Because they provide no substance, function words are dull. The higher the percentage of function words a passage has—words not providing meaning—the more it drags. Content words, on the other hand, deliver impact—meaning, knowledge, information—to the reader. The higher the percentage of content words a passage has, the leaner, more engaging, and more forward moving the text typically feels.

Because passive voice or nominalizations necessarily involve more function words than active voice and active verbs do, a cumulative effect develops over the course of a writer's long sentence, or paragraph, or brief, making the writing feel dense, tangled, or cumbersome. Consider the following three sets of sentences (the function words are in italics).

| **Active form** | **Passive form** |
|---|---|
| Jurors took *a* lunch break. | *A* lunch break *was* taken *by* jurors. |
| Clients dread phone calls | Phone calls *are* dreaded *by* clients. |
| Victims always want justice. | Justice *is* always wanted *by* victims. |
| **Original** | **Nominalization** |
| *The* D.A. investigated. | *The* D.A. conducted *an* investigation. |
| *The* judge inferred intent. | *The* judge made *an* inference *of* intent. |
| *The* victim called *the* judge. | *The* victim made *a* phonecall *to the* judge. |
| **Original** | **Passive plus nominalization** |
| *The* plaintiff appealed. | *An* appeal *was* filed *by the* plaintiff. |
| *The* judge *will* decide. | *A* decision *will be* made *by the* judge. |
| *The* defendant chose *to* object. | *The* choice *was* made *by the* defendant to state *an* objection. |

These sentences demonstrate why unnecessarily using passive voice and nominalizations makes writing feel considerably more dense and

42 *Id.*

43 Rather than express action, linking verbs connect the subject to a word or clause that identifies, classifies, or describes the subject (e.g., John is tall; John is mad). Heffernan & Lincoln, *supra* note 15, at 61.

44 DeVito, *supra* note 38, at 405.

slow moving. The sentences in the left column contain 37 words: 27 are content words and 10 are function words. Thus, 73% of the words carry meaning, while 27% are functional. Compare these to the sentences in the right column, which contain 65 words: 35 are content words and 30 are function words. Only 54% of the words carry meaning, while 46% of the words are just functional. In the active sentences, nearly three-fourths of the words carry meaning, but when passive voice and nominalizations are used, only about half of the words carry meaning.

Moreover, when active voice was converted to passive voice and nominalizations, the number of function words tripled (from 10 to 30). The sentences on the left totaled 37 words. The sentences on the right totaled 60 words. The active sentences used nearly 40% fewer words to express the same information.[45]

Few would dispute that a considerably shorter brief, with no loss of substance, is usually a dramatic improvement. As United States Supreme Court Chief Justice John Roberts stated, "I have yet to put down a brief and say, 'I wish that had been longer.' . . . [T]here isn't a judge alive who won't say the same thing. Almost every brief I've read could be shorter."[46] For many attorneys, removing unnecessary passive voice and nominalizations can be an easy way to draft briefs that are more concise, more engaging, easier to understand, and faster to read.[47] The arguments will feel sharper and the writer will seem more confident, focused, and in command of the substance.[48]

### D. How to spot passive voice and nominalizations

Attorneys need not only to appreciate the bloat and drag that passive voice and nominalizations create in their briefs, but also how to efficiently spot them in their drafts.[49] Below are easy and effective ways to do so.

45 These nine sentences with no passives or nominalizations compared to nine sentences in which every sentence contains one or the other or both may seem to artificially skew the numbers; in a brief, not every sentence would include passive voice or nominalizations. But it is staggering how much unnecessary passive voice and how many nominalizations many briefs do include.

46 Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 Scribes J. Legal Writing 35 (2010).

47 A recent study that tracked eye movements of participants as they read active and passive passages showed that readers did not read passives more slowly than actives. Laura Winther Balling, *No Effect of Writing Advice on Reading Comprehension*, 48 J. Tech. Writing & Commc'n 104, 114–15 (2018). Though some studies have shown otherwise, even if that is true, there is no doubt that a judge would read a clear, concise, engaging fifteen-page brief much more quickly than a bloated twenty-page brief.

48 Eugene Y. Chan & Sam J. Maglio, *The Voice of Cognition, Active and Passive Voice Influence Distance and Construal*, 46 Personality & Soc. Psych. Bull. 547, 555 (2020) (noting a study that found "authors thinking abstractly also tend to use more passive voice constructions in their writing compared with those thinking more concretely").

49 Garner, *supra* note 6, at 25.

### 1. Passive voice: look for "to be" verbs followed by words ending in "ed."

Passive voice very often involves a "to be" verb followed by a past participle.[50] A past participle is a verb form that typically ends in "ed." Thus one effective way to spot passives is to skim sentences, looking for such clusters as these:[51]

- The decision *will be appealed* by the plaintiff.
- The defendant *was warned* not to delay submitting his discovery responses.
- The defendant *was denied* his request for witnesses to *be sequestered*.

When you notice a "to be" verb followed by a past participle (usually ending in "ed"), ask yourself where in the sentence the actor is. If the actor comes after the action (or is not stated at all), the sentence is passive. Passive sentences can be made active simply by putting the actor in front of the action. Doing so for the first example above creates the active sentence, *The plaintiff will appeal the decision*.

This approach is not foolproof. Some passive sentences have "to be" verbs that are not followed by a past participle ending in "ed" (*e.g.*, *The gun was thrown* into the river.). "Bare" passives do not include a "be" verb at all (*e.g.*, *The lie told* by the witness was subtle.).[52] And some sentences with a "be" verb are not passive, like "*The witness was staring at the jury*." But because they, combined with *–ed* past participles, are often used in passive constructions, these passives are easy to spot. When you do, take a second to confirm that the clause is passive—if the actor is present, is it placed after the action? If it is passive, consider converting it to active voice. Moving the actor to precede the action always does so.

The advantage of this approach is its simplicity and efficiency. Skimming each line of a brief or other writing quickly, looking for "be" verbs will catch many passive constructions. In time, attorneys may notice that passives begin to jump out at them in early drafts, even if they aren't specifically looking for them.

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**50** *Id.* at 37. "To be" verbs include "am," but I omitted "am" from the list because "am" follows only "I" (*I am*), and attorneys rarely use the first person in briefs.

**51** Thomas Sigel, *How Passive Voice Weakens Your Scholarly Argument*, 28 J. Mgmt. Dev. 478, 479 (2009).

**52** Leong, *supra* note 6, at 7. This is an example of a "whiz" deletion (short for "which is") or complement deletion because a complement (which, that, who, etc.) and "to be verb" (is, are, was, were, am, be, being, been) are deleted and thus implied. Charrow & Charrow, *supra* note 31, at 1323. The sentence could be written as *The lie that was told by the witness* instead of *The lie told by the witness.* These "whiz" deletions are common in English, but "because some of the grammatical information is missing, the mind has to work harder to reconstruct it." *Id.*

**2. Passive voice: ask three questions—Action? Actor? Order?**

An effective—but slower, labor-intensive—approach to weeding out passive voice is to work through each sentence of a draft one-by-one and, for each sentence, ask three questions: Action? Actor? Order? (1) Action: What act is happening? (2) Actor: Who (or what) is doing that act? (3) Order: Is the actor placed before or after the act? If the actor is placed before the act, the sentence is active. On the other hand, if the actor is placed after the act, the sentence is passive. Then simply moving the actor to before the action transforms the sentence from passive to active. This is essentially the same approach as the prior one, except without focusing on the "to be" verbs.[53] Rather than skim, the attorney has to read every sentence.[54]

**3. Nominalizations: look for "ion" endings.**

Many nominalizations end with "ion." For example, *take something into consideration* (consider it); *conduct an investigation* (investigate); *enter into deliberations* (deliberate); *make preparations* (prepare). Thus, *–ion* words are another easy red flag—simply skim the sentences looking for words that end in *–ion* (or use the "find" function in Microsoft Word).

Each time you spot a word that ends in *–ion*, ask yourself if it is a nominalization. The answer will not always be "yes," but it often will be. To revise it, simply restate the sentence with the *–ion* word converted back to its verb state. Thus, for the sentence "*The police will conduct an investigation*," just convert the noun (*investigation*) back to a verb (investigate) and restate the sentence: "The police will investigate."

This approach will not catch every nominalization in a brief, as some nominalizations do not end in *–ion*.[55] But most do. You may even decide that a nominalization works better in a particular sentence. Still, many writers do not notice how much they overuse nominalizations. Watching for the *–ion* ending will catch most nominalizations and help writers make their briefs more concise, direct, and engaging.

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53 The advantage of this approach is that it can catch the "bare" passives—passives that drop the "to be" verb—that often form participial phrases (e.g., "The lie *[~~that was~~] told by the witness* was subtle."). This sentence overall is not passive: "The lie . . . was subtle." But, the participial phrase identifying which lie (the lie *told by the witness*) is a passive construction. As is typical, avoiding the passive voice can shorten the sentence: *The witness's lie was subtle*.

54 Despite the inefficiency, though, this approach can be helpful in cementing what passive voice is. When I work with law students and attorneys during legal writing trainings, applying this approach often becomes the "aha" moment for them, with many saying things like, "Yes, now I see it." Though this approach is not optimal for large-scale edits, it can help legal writers grasp passive voice in a way they seem to remember permanently.

55 Some nominalized words end with *–al*, *–ence*, *–ancy*, *–ity*, *–ment*, *–ency*, *–ant*, *-ent*, or *–ance*. Richard C. Wydick, Plain English For Lawyers 26 (4th ed. 1998). However, keeping all of those endings in mind when skimming a draft is difficult. And nominalizations end in *–ion* much more frequently than other endings.

## II. Studying the problems of passive voice and nominalizations

Though surface-level advice to prefer active voice and avoid nominalizations is common, studies about how people actually process each are rare.[56] However, a handful of studies have shown that passive voice and nominalizations, compared to active voice and active verbs, make writing slower to read,[57] harder to read, harder to comprehend,[58] harder to remember,[59] less concise, less familiar feeling,[60] and less engaging.[61] These studies can help legal writers appreciate that overusing passive voice and nominalizations can significantly impede their readers and provide legal writing professors support to show that their advice does not just reflect personal style preferences.[62]

### A. Reading comprehension

One early study by psychology professor E.B. Coleman demonstrated how nominalizations, rather than their verb forms, impede reader comprehension.[63] Using a testing method called the Cloze Procedure,[64] Coleman

**56** Balling, *supra* note 47, at 106 (noting, in 2018, that "investigations of the actual processing of recommended and problem constructions are rare"). Another 2018 article noted that "[a]lthough both the active and passive voices are common, an understanding of their psychological consequences has remained largely absent." Chan & Maglio, *supra* note 48, at 557. Likewise, "existing research on nominalizations is limited." Spyridakis & Isakson, *supra* note 37, at 184. (I omit studies that involved young children as subjects because studying how elementary-school children process passive voice would not necessarily carry over to adult readers. I also omit studies of passive voice in non-English languages. After doing so, I was surprised how little the effects of passive voice and nominalizations have been studied.)

**57** E.B. Coleman, *The Comprehensibility of Several Grammatical Transformations*, 48 J. Applied Psych. 186, 186 (1964) (Studies showed nominalizations are slower to read.); Daniel T. Willingham & Cedar Riener, Cognition: The Thinking Animal 293 (4th ed. 2019) ("[T]he parser assumes that sentences will be active. People are faster in determining the meaning of a sentence in the active voice ('Bill hit Mary') than in the passive voice ('Mary was hit by Bill')." (citing D.I. Slobin, *Grammatical Transformations and Sentence Comprehension in Childhood and Adulthood*, 5 J. Verbal Learning & Verbal Behav. 219–27 (1966)).

**58** E.B. Coleman, *Learning of Prose Written in Four Grammatical Transformations*, 49 J. Applied Psych. 332, 335 (1965) ("A previous experiment showed that a long passage was more easily comprehended after the transformations were applied to it, one of three being detransforming passive sentences to actives (Coleman. 1964a, Experiment I)"); Lloyd R. Bostian, *How Active, Passive and Nominal Styles Affect Readability of Science Writing*, 60 Journalism Q. 635, 636 (1983) ("The bulk of previous research shows readers find active easier to comprehend and recall.").

**59** Coleman, *supra* note 58, at 336 ("Actives were better retained than passives for all scoring systems."); Coleman, *supra* note 57, at 186 (Studies showed nominalizations made it harder for readers to recall the content of the sentences.).

**60** *See generally* Chan & Maglio, *supra* note 48.

**61** Bostian, *supra* note 1, at 38.

**62** These studies may also help students understand one reason they may be struggling when reading some of the cases in their casebooks.

**63** The following text briefly summarizes this study. For a more detailed explanation of the study, see the Appendix, *infra*.

**64** E.B. Coleman & J.P. Blumenfeld, *Cloze Scores of Nominalizations and Their Grammatical Transformations using Active Voice*, 13 Psych. Reps. 651, 651 (1963). Researchers consider this procedure better than others (such as the Flesch reading ease formula and multiple-choice tests) for determining comprehension. *See* Lloyd R. Bostian, *Comprehension of Styles of Science Writing*, 61 Journalism Q. 676–78 (1984).

gave students two passages with every fifth word deleted, substituted by a word-length blank line. One passage had a high percentage of nominalizations; in the other, the nominalizations were converted back to verbs. The students were asked to fill in the blanks. [65]

The results showed that the readers filled in more of the blanks correctly in the active-verb version than the nominalized version[66]—at a statistically significant rate[67]—especially for content words.[68] So favoring verb forms over nominalizations better communicates substantive information;[69] after reading such a passage just once, a reader will learn more than she would on a single read of a passage written with excessive nominalizations.[70]

### B. Studies on recall and reading time

Studies that compared readers' recall and reading time for passages written with a passive style—passive voice, nominalizations, and adjectivalizations[71]—versus a style favoring active voice and verb forms demonstrated that an active style enhanced both recall and reading time.[72] In one experiment, researchers provided college students with the same long passage, written either in the passive–nominalized style or a more active style. Since active constructions are often shorter than passive constructions, the researchers supplemented the active version with articles and prepositions so that both passages had the same word count.[73] Students took a multiple-choice test as soon as they were finished reading and were scored on the number of words they had read and the number of questions they answered correctly. "Anyone interested in improving readability would be heartened by the magnitude of the improvement,"

65 Coleman & Blumenfeld, *supra* note 64, at 652.

66 *I.e.*, 10.80 per passage for the verb version, versus 9.63 for the nominalized version. *Id.* at 652–53.

67 *Id.* at 653.

68 An average of 1.44 times per sentence, compared to 2.22 times for the active-voice versions. *Id.*

69 A subsequent study similarly indicated that "[w]hen nominalizations are not central to the meaning of the text, denominalizing them may not significantly improve readers' recall. However, denominalizing those nominalizations central to the meaning of the text may improve readers' recall of the information provided in the document." C.S. Isakson & J.H. Spyridakis, *Nominalizations: Effect on Recall and Comprehension*, 203, 206, *1995 IEEE International Professional Communication Conference. IPCC 95 Proceedings. Smooth Sailing to the Future*, doi: 10.1109/IPCC.1995.554908.

70 Coleman & Blumenfeld, *supra* note 64, at 653.

71 An adjectivalization is "[t]he conversion of a member of another word class into an adjective; the use of such a word in an adjectival function. The commonest way of forming an adjective from another part of speech is by adding an affix (e.g. *wealth*, *wealthy*; *fool*, *foolish*; *hope*, *hopeful*)." https://www.oxfordreference.com/view/10.1093/acref/9780192800879.001.0001/acref-9780192800879-e-25 (last visited Aug. 8, 2021).

72 Coleman, *supra* note 57, at 186. The following text briefly summarizes these studies. For a more detailed explanation of the studies, see the Appendix, *infra*.

73 Coleman, *supra* note 57, at 187.

Coleman wrote.[74] Some students, he assumed, may have guessed answers for some of the multiple-choice questions. Yet even when corrected for guessing, there was a 25.2% improvement in the number of questions students answered correctly from the active passages, compared to the passive ones.[75]

A second version of this experiment used shorter passages in active and passive styles. No articles or prepositions supplemented the word count, so the active version was shorter than the passive one, and because reading time corresponded to the word count, the students had less time to read the active versions.[76] As soon as students finished reading a paragraph, they were to write what they had read as exactly as they could. Their scores reflected the number of content words the students reproduced correctly and the number of synonyms they'd used for content words they could not recall.[77] The scoring reflected better recall for the active-style versions than for the passive-style ones.[78]

Two other experiments focusing on the effect of nominalizations versus verb forms led to similar results, showing that students recalled the sentences with verb forms more accurately than when the same sentences had some verbs converted to nominalizations.[79]

One reason nominalizations can be harder to comprehend than active-verb versions is because active styles subtly communicate more information to readers: "nominalized sentences lack many specific references," for example, that active-verb versions provide.[80] For example:

**Nominalized version**: An inclusion of this is an admission that it was important.

**Active verb version**: Since she included this, she is admitting that it was important.[81]

74 *Id.* A subsequent study indicates that the results could vary based on whether the passives were reversible or irreversible. Slobin, *supra* note 57. In a reversible passive, the subject and object could be switched, and the sentence would still make sense (even though the meaning may change). For example: *John was kicked by Bill.* In an irreversible passive, the subject and object could not be switched. If they were, the sentence would not make sense. For example, *The ball was kicked by John.* That passive is irreversible because it would not make sense to say, "*John was kicked by the ball.*" Three years after Coleman's study, psychology professor Dan Slobin's study showed that reversible passives create more difficulties for readers than irreversible passives. With reversible passives, it is more difficult to keep track of which noun is the actor. But irreversible passives "create fewer opportunities for confusion" because, even though "the normal subject-object order is reversed, only one of the two nouns could plausibly be the [actor]." *Id.* at 225–26.

75 Coleman, *supra* note 57, at 187.

76 Students had 0.5 seconds per word to read each of four passages of around 100 words each. *Id.*

77 *Id.* at 187–88.

78 *Id.* at 188.

79 *Id.* at 188–89.

80 *Id.* at 189 (citing Otto Jesperson, The Philosophy of Grammar 133–44 (1924)).

81 *Id.*

Active voice requires an actor (Actor → Action → Object), so the actor *she* is inserted in the active-verb version. Including the actor provides the reader with more information: *she* is the subject of the sentence, *she* indicates a person, and *she* indicates a number (a singular person). Also, the verb *included* establishes past tense, whereas the nominalization *an inclusion* does not.[82] Similarly, the verb phrase *is admitting* establishes present tense that progresses from the past, whereas the nominalization *an admission* does not. And *since* expresses causation. All of these specific references are potentially important pieces of information that do not exist in the nominalized version.[83] The nominalized version requires the reader to assume, infer, and insert the omitted information (like *who* included this, *who* admitted that, the implied tenses (past then present), and the causal connection). Yet both sentences have eleven words. So in the same number of words, using active voice can provide more concrete, specific information than a nominalized version may.

This information could be implied from context preceding a nominalized sentence, but using the active verbs expresses them explicitly.[84] If the information is not contextually obvious, then the nominalized version becomes harder to understand.[85] Even if the reader *can* deduce those references from context, doing so requires the reader's effort to make the connections. When the writer provides the specific references, the reader can understand the sentence more quickly and easily.

Also, shorter sentences (and shorter clauses) are easier to understand and comprehend.[86] Using active verbs rather than nominalizations often shortens clauses.[87] Shorter sentences can predict readability because they have less "transformational complexity"—for example, more active voice and active verbs, less passive voice and nominalizations.[88]

**82** For example, the *inclusion* could be past: *Since she included this, she is admitting that it was important.* Or it could be present: *By including this, she is admitting it was important.* Or it could be future: *If she includes this, she will be admitting it was important.* Using the verbs, rather than the nominalizations, makes the tense clear.

**83** *Id.*

**84** *Id.* at 190.

**85** *Id.*

**86** "Flesch has argued that short sentences are relatively easy to comprehend, but a careful reading of his works . . . suggests that he is concerned with clause length more than sentence length." Coleman, *supra* note 57, at 190 (citing R.F. Flesch, The Art of Plain Talk 32 (1946)); R.F. Flesch, The Art of Readable Writing 129 (1949)). "An experiment by Coleman . . . also supports the notion that shortening clauses would improve comprehensibility more effectively than shortening sentences." Coleman, *supra* note 57, at 190 (citing E.B. Coleman, *Improving Comprehensibility by Shortening Sentences*, 46 J. Applied Psych. 131–34 (1962)).

**87** For example, in the 1,000-word sample from one of the long passages in Coleman's first experiment, the average word length for each clause was 15.3 words. However, when he rewrote the passage by replacing passive voice with active voice, replacing nominalizations with active verbs, and replacing adjectivalizations with adjectives or adverbs, the average clause length dropped to 8.9 words, a drop of 58%. Coleman, *supra* note 57, at 190.

**88** *Id.*; *see also* Spyridakis & Isakson, *supra* note 37, at 185 ("We are quite certain that denominalizing would be of benefit in cases where the text is convoluted or heavily nominalized with polysyllabic terminology since denominalizing would shorten the existing clauses and add more concrete words in the verb slot.").

### C. Passive constructions: slower to read, harder to comprehend, and less interesting

About twenty years after the Coleman studies, Lloyd R. Bostian, a journalism professor at the University of Wisconsin-Madison, conducted two studies demonstrating that students found passages written in a passive and nominal style slower going, less comprehensible, and less interesting.[89]

The author rewrote two articles—one, from a sports-medicine journal, addressed injuries to runners; the second, from a soil-science journal, addressed alfalfa's need for sulfur. He assumed readers would find the running article naturally more interesting than the soil article.[90]

First, he rewrote both articles to be in the active voice.[91] Second, he rewrote the articles primarily in the passive voice.[92] Third, he converted the passive verbs in the passive version into nominalizations.[93] For example:

**Active** Researchers have found that more and more Americans are running to achieve physical fitness.

**Passive** It has been found by researchers that more and more Americans are running to achieve physical fitness.

**Nominal** The finding of researchers is that more and more Americans are running for the achievement of physical fitness.[94]

To determine reading speed, the author distributed the six versions randomly and instructed the students to read at a normal pace.[95] After they had read for shortly more than two minutes, he stopped them to determine what percentage of the article each had read.[96] To determine comprehension, he had each student finish reading the article[97] and asked

89 Bostian, *supra* note 1, at 33. Professor Bostian also explained this study and its results in Bostian, *supra* note 58.

90 Bostian, *supra* note 1, at 35.

91 *Id.*

92 Thus, he made more than ninety percent of the transitive verbs passive. Bostian made some exceptions, avoiding situations where multiple passives in a sentence would make the sentence too awkward. *Id.*

93 *Id*. The number of words in the two active articles averaged 561. The number of words in the passive articles averaged 651.5. The number of words in the nominal articles averaged 669. Thus, by doing nothing but converting active voice to passive voice, the articles increased in length by 16%. By converting active voice to nominalizations, the articles increased in length by 19%. Bostian, *supra* note 58, at 638 (Table 1).

94 Bostian, *supra* note 1, at 35 (allcaps in original changed to boldface for consistency and more readable typography).

95 The six samples were comprised of the three versions of the running article and the three versions of the soil article. The students did not know that others received different versions. *Id.*

96 *Id.* at 33.

97 *Id.* at 36

them to complete ten fact-retention questions.[98] He also asked students to rate how familiar they were with the topic of their article, how interesting the material was to read, and how easy it was to read.[99]

The students read the active passages "significantly faster than the passive and nominal passages."[100] In terms of comprehension, the students who read the passive and nominal passages surprisingly did not score significantly lower than the students with the active passages.[101] This result differed from results in other studies, though, in which comprehension was lower when passages were written in passive and nominal styles.[102] This aberration might have been because the subjects were university students, who have experience reading and processing texts written in a passive and nominal style.[103] It might have been because slow readers were allowed to take as much time as they needed to complete the passages, "wash[ing] out effects evident at normal reading speed."[104] Or it might have been because the comprehension questions were simple, fact-retention questions. If the questions had required more difficult analysis or reasoning, the author thought the readers' comprehension would likely be less for those who read the passive and nominal passages (compared to those who read the active passages).[105] Or the similar comprehension scores might have been because the average sentence length across all six versions was fairly short: fifteen words per sentence.[106] Prior research "show[ed] that nominalization adds complexity, so longer sentences in nominal style would likely be more complex and reduce comprehension further."[107]

**98** Professor Bostian did not inform students before they read that they would be tested on the material. *Id.*

**99** *Id.*

**100** *Id.* To be specific, the students read the active passages 7% faster than the passive passages, and 9% faster than the nominal passages. *Id.* Interestingly, a recent study using eye-tracking technology found that subjects did not read nominalizations and passive voice slower than active voice. *See generally* Balling, *supra* note 47. The eye-tracking technology allowed researchers to observe how much time readers' eyes linger on certain words and phrases throughout a passage. The longer eyes linger on a construction indicates reader difficulty. *Id*. at 106. However, the author cautioned that "there is more to comprehension than what an eye-tracking measure can gauge." *Id.* at 115.

**101** Bostian, *supra* note 1, at 36.

**102** *Id.*

**103** *Id.* This factor may be true of judges and lawyers, who are experienced in reading legal writing, much of which is written with passive and nominal constructions. However, this factor may not be true for some clients, who attorneys often draft contracts, memos, and letters to.

**104** Bostian, *supra* note 58, at 640.

**105** Bostian, *supra* note 1, at 36, 38. This factor could apply directly to legal writing, as much of what attorneys write to colleagues and judges involves complex legal analysis and reasoning.

**106** *Id.* at 38.

**107** *Id.* This is an important observation because long sentences—well beyond fifteen words—are common in legal writing. *See, e.g.*, Wayne Schiess, *Sentence Length*, Austin Law., Sept. 2007, at 15 (noting that legal writing experts recommend an average sentence length of 20–25 words).

As for which passages the students found more interesting and easier to read, the author correctly assumed that the students would find the versions of the soil article more difficult, less familiar, and less interesting than the versions of the running article.[108] Regardless of which version they received, students read the running article faster, comprehended it better, and judged it to be more interesting than any version of the soil article.[109] But the students who read the passive and nominal versions of the soil article "judged [them] to be significantly less familiar" than those who read the active version of the soil article.[110] Thus, "an active style enhances the perception of familiarity of an inherently dull topic."[111] A "[n]ominal style [was] clearly the poorest choice of the three styles—it rank[ed] below active and passive in every measure. . . . [N]o matter how much [some writers] value it, nominal style is a poor choice for effective communication; it is dysfunctional pseudo-elegance."[112]

A subsequent study on passive voice and nominalizations, using shorter samples of the soil article, focused primarily on students' comprehension.[113] Following the Cloze Procedure,[114] the author left the first and last sentences intact, but substituted a blank for every fifth word throughout the rest of the passage. Students had as much time as needed to fill in the blanks. [115] The results demonstrated that "[u]niversity students with substantial exposure to technical and scientific writing can comprehend an active style better than a passive style"[116] and that a nominal style is even less comprehensible than a passive style.[117]

**108** Bostian, *supra* note 1, at 38.

**109** *Id.*

**110** *Id.*

**111** *Id.*

**112** *Id.* at 38–39. A word of caution about this study: It is unlikely that any of the three versions of each article reflect an entirely realistic writing style. Version 1 of each article made every sentence active voice, while Version 2 converted over 90% of the transitive verbs to passive voice, and Version 3 converted most verbs into a nominalization. First, even great writing would rarely be entirely active—though it can be close! In a sample of thirty *Wall Street Journal* articles from 2007, researchers found the median frequency of passive voice—measured as "the percentage of sentences with a passive voice construction"—to be 3%. Robert J. Amdur et al., *Use of the Passive Voice in Medical Journal Articles*, 25 Am. Med. Writers Ass'n J. 98, 98–99 (2010). Though most great writing is largely active, there is value in using passive constructions occasionally for variety, interest, rhythm, emphasis, etc. *See* section III, *infra*. Second, even weak writing would typically not be entirely passive, as versions 2 and 3 mostly were. Rather, it would just use passive much too often—not for effect, but just because writers are unaware of when they are using it.

**113** Bostian, *supra* note 64, at 676–78. These samples were approximately 300 words long.

**114** *See supra* note 64 and *infra* note 180 and accompanying text.

**115** The students accurately filled in 43.88% of the blanks in the active version, 38.79% of the blanks in the passive version, and just 36.73% of the blanks in the nominal version—statistically significant differences. Bostian, *supra* note 64, at 678.

**116** *Id.*

**117** *Id.*

These studies should be informative for all writers, including legal writers. Even if attorneys do not use passive voice and nominalizations for *every* transitive verb, many do use them much too often. Further, many attorneys use passive voice more than once in longer sentences, often also combined with one or more nominalizations. Many attorneys do so unknowingly and without realizing the cumulative effect it has on a reader over the course of a brief. The more attorneys overuse passive voice and nominalizations, the more difficult to read their writing becomes.

### D. A study of passive constructions in jury instructions

In a psycholinguistic study of spoken jury instructions, law professor Robert P. Charrow[118] demonstrated that "standard jury instructions . . . are not well understood by the average juror" and that certain linguistic constructions are largely responsible for this incomprehensibility.[119] Two of the constructions Charrow focused on were passive voice and nominalizations.[120]

Charrow first played jury instructions to the subjects, presenting them orally, rather than in writing, since that is how jurors typically receive them.[121] Charrow then asked the subjects to paraphrase what they'd heard.[122] The results demonstrated that the subjects "did indeed have difficulty comprehending the instructions."[123]

Charrow then rewrote the jury instructions to correct the assumed linguistic weaknesses, such as changing the passives to actives and converting nominalizations to active verbs, among other changes.[124] New subjects were presented with the same scenarios as in the first part, but played the rewritten jury instructions. When asked to paraphrase what they'd heard, the subjects performed "significantly and substantially better" than those who had received the original instructions.[125]

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**118** Charrow & Charrow, *supra* note 31, at 1307–08. The study was funded by a National Science Foundation Grant. *Id.* at 1306.

**119** *Id.* at 1309.

**120** Charrow also focused on prepositional phrases, misplaced phrases, complement deletion, lexical items, modals, negatives, word lists, discourse structure, and embeddings. *Id.* at 1321–28.

**121** Because this study focuses on information provided orally rather than in writing, it is not a direct fit for this article. However, I included this study because it still addresses how people understand information when receiving it in an active voice compared to through passive voice and nominalizations. Further, its results parallel the results from the studies that examined the same concepts in writing, as addressed earlier in this section.

**122** *Id.* at 1309–14.

**123** *Id.* at 1316. However, Charrow noted that "the results should not be interpreted as definitive evidence that jurors or juries do not comprehend jury instructions" because other factors may play a role, such as context, closing arguments, specific issues attorneys focus on, etc. *Id.* at 1317.

**124** *Id.* at 1328–29.

**125** *Id.* at 1331.

By isolating the linguistic changes, Charrow found that converting nominalizations to active verbs led to a 45% improvement in paraphrase scores for those particular parts.[126] When focusing on the parts in which passives were converted to active voice, Charrow found an overall improvement of 48.5%.[127] For seventeen of the twenty-two instructions, "subjects performed much better in paraphrasing active-voice phrases than their passive counterparts."[128] Charrow noted, "Of even greater significance, . . . seven subjects who heard the original [passive] version . . . actually misunderstood the phrase; with the rewritten [active] version, only one subject did."[129]

These results indicate that, like the readers tested in the earlier studies, listeners process and understand information better when they receive it in active form compared to passive form.[130]

## III. The positives of passive

Studies prove that advice to prefer active voice and avoid nominalizations is much more than a style preference: passives and nominalizations can impede how a reader comprehends a sentence, paragraph, argument, or analysis. However, while attorneys should be on the lookout for passive voice and nominalizations in their drafts and work to convert them to active voice, they should not do so indiscriminately. For one thing, all-active sentences would lead to a monotonous rhythm. But apart from varying the rhythm, passive voice used strategically can make what matters most in a sentence more prominent.[131]

**126** *Id.* at 1336.

**127** *Id.* at 1337.

**128** *Id.*

**129** *Id.* The results, though, were more nuanced than a blanket conclusion. Charrow noted that passive voice located in subordinate clauses seemed to hurt comprehension more than when passive voice was located in a sentence's main clause. *Id.* Charrow stated that his research indicated "passive construction[s] create serious comprehension problems only when located in a subordinate clause." *Id.* Thus, "there is some evidence that passive constructions, when properly used and not obscured in subordinate clauses, do not impede comprehension." *Id.* at 1326.

**130** Using MRI machines, neurologists found that reaction times were slower when subjects heard passive sentences compared to active sentences. Mack et al., *supra* note 26, at 1202. The neurologists noted that psycholinguistic studies show people interpret the initial noun-phrase in a sentence to be the actor, unless there are context clues to suggest otherwise. *Id.* at 1200. However, passive sentences trigger "thematic reanalysis," meaning that once readers realize the subject is the object, not the actor, readers must revise their initial mapping of *who the actor is* and *what the object is*. This additional mental processing (the "reanalysis") may be what causes longer reaction times for passive compared to active sentences. *Id.* Further, MRI scans showed that when subjects heard sentences in passive voice, regions of their brains "lit up" that did not when subjects processed sentences in active voice. *Id.* at 1203. The regions activated by the passive voice sentences are those associated with processing complex information. *Id.* at 1204. This difference "is most likely associated with the greater . . . complexity of passive compared to active sentences." *Id.* at 1205. This neurological finding supports the prior psycholinguistic studies that indicate passive voice in written form is also more complex for our brains to process.

**131** Wydick, *supra* note 55, at 33. "'Certainly the passive voice has a place in every kind of writing; it is a legitimate tool—but like any tool it must be right for the job.'" Daniel Skinner & Steven Pludwin, *Unsought Responsibility: The U.S.*

### A. To emphasize something other than the actor

When sentences are written in active voice, the primary focus is typically on the actor. For example, in the sentence "*The judge considered the victims' impact statements*," the sentence first focuses on the judge. The rest of the sentence builds on the judge—what did the judge do? Yet to focus the reader on the impact statements themselves,[132] the writer may make them the subject of the sentence:[133] *The victims' impact statements were considered by the judge.* The revision is in passive voice, but it focuses the reader more on the impact statements than on the judge.[134] In fact, the writer could leave the judge out of the sentence altogether, further emphasizing the impact statements: *The victims' impact statements were considered.*[135]

Readers view the grammatical subject as the emphasis of a sentence.[136] In an active sentence, that is the actor.[137] In the same sentences written in passive voice, readers view the direct object, now the grammatical subject, as the main emphasis of the sentence.[138] In fact, one study indicated that readers find that a passive sentence emphasizes the grammatical subject (the verb's object) even more than an active sentence emphasizes the subject (the actor).[139]

If the reader is more interested in or expects a sentence to be chiefly about the verb's object, rather than an actor, then passive voice can be as

*Supreme Court and the Politics of Passive Writing*, 45 Polity 499, 500 (2013) (quoting Martha Kolln & Loretta Gray, Rhetorical Grammar: Grammatical Choices, Rhetorical Effects 48 (5th ed. 2007)). Bryan Garner stated that professional editors find writers use passive voice effectively "for only about 15% to 20% of the contexts in which the passive appears." Garner, *supra* note 4, at 613.

**132** Fogarty, *supra* note 5, at 172.

**133** Rebecca Elliot, Painless Grammar 28 (1997).

**134** William Strunk & E.B. White, The Elements of Style 18 (4th ed. 2000); Bouchouz, *supra* note 28, at 86 ("The passive voice focuses attention on the object of the action by placing it first and relegating the subject or actor of the sentence to an inferior position.").

**135** In fact, "most passive sentences . . . consist only of an object and verb—the actor is omitted entirely." Herbert H. Clark, *Some Structural Properties of Simple Active and Passive Sentences*, 4 J. Verbal Learning & Verbal Behav. 365, 370 (1965). One source stated that "in formal English, more than 80 per cent of passives are [actorless]." R.M.W. Dixon, A Semantic Approach to English Grammar 353 (2005). However, this exact possibility is often one of the problems with passive-voice sentences—the writer may leave the actor out of the sentence, even when it is important who the actor is, but it might not be clear to the reader who the actor is.

**136** For a study so showing, see P.N. Johnson-Laird, *The Interpretation of the Passive Voice*, 20 Q.J. Experimental Psych. 69, 69–72 (1968).

**137** *Id.*

**138** *Id.*

**139** *Id.*; *see also* Clark, *supra* note 135, at 370 (citing B. Andersen, *The Short-Term Retention of Active and Passive Sentences*, unpublished doctoral dissertation, The John Hopkins University (1963) ("[A] study of recall of simple active and passive sentences[] demonstrated that recall is best for the first sentence part and poorest for the second part, regardless of the grammatical form of the sentence.").

easy to comprehend as active voice.[140] These passive sentences effectively, and appropriately, emphasize the object over any actor:

- Senior citizens are harmed most by the new law.
- The plaintiff, not the defendant, was given an extension.
- Punitive damages are being requested.
- The newest employee was never going to be given a fair opportunity.
- The facts are uncontroverted.
- If the integrity of our judicial system is to be maintained, court orders cannot be ignored with impunity.
- Plaintiff's motion for summary judgment is denied.

These sentences all emphasize the beginning of the sentence more than the actor (who is actually present in only the first sentence). Each of these sentences could be rewritten in active voice. But doing so would then emphasize the actor more than the object. When the writer puts the object first—as the grammatical subject—it becomes the focus of the sentence.

### B. When the actor is unimportant or unknown

Sometimes the actor is not important in the information a sentence is delivering. In those situations, passive voice works perfectly fine.[141] Consider these examples:

- Mask-wearing was mandated across the country.
- Restaurants around the country were allowed to reopen under limited capacity.
- Alcohol is not allowed on school grounds.

In all these examples, who did the action, even when the reader can infer who it is, is not important. It is simpler and more to the point to say, "Restaurants around the country were allowed to reopen under limited capacity," rather than to say whether it was mayors, city councils, or governors, etc., who allowed restaurants to reopen in each jurisdiction. Passive voice is typically a wordier way to write a sentence. But, when the actor is unimportant, passive voice allows the writer to leave the actor out of the sentence.[142] In active sentences the actor must be included. Thus,

140 Bostian, *supra* note 58, at 636.

141 Elliot, *supra* note 133, at 27; Garner, *supra* note 6, at 25; Wydick, *supra* note 55, at 33.

142 Up to 80% of the time writers use passive voice, they omit the actor from the sentence. Dixon, *supra* note 135, at 353. Though omitting the actor is often a reason passive voice is less clear for a reader, if the preceding context makes it clear who the actor is, then omitting the actor in the passive sentence does not create that confusion. Similarly, if the actor is unimportant, omitting an actor in a passive sentence will not likely create confusion.

passive voice can sometimes be more concise and effective by omitting such unnecessary information.

Similarly, sometimes the actor may be important but unknown. In those situations, passive voice can be effective.[143] For example, consider these sentences:

- The restaurant was vandalized at 4:00 a.m.
- Four victims were assaulted that same night.
- The jurors may be harmed if their names are revealed.

In each example, if the writer does not know who the actor is, she cannot attach the actor to the sentence unless she does so in general terms, like "*Somebody assaulted four victims that night*." But saying *Somebody* may feel awkward or be imprecise. The writer may not know if one person assaulted all four victims, or if the assaults were unrelated. To put that sentence into active voice (*Somebody, or some people, assaulted four victims that same night*) is wordy and choppy.[144] Ultimately, using passive voice in these situations can make the sentence more smooth, direct, and concise than writing it in active voice.

### C. To improve cohesion and concision through dovetailing

Passive voice at the beginning of a sentence may create an effective "dovetail" connecting adjacent sentences.[145] Two sentences dovetail when a sentence begins with information provided in the prior sentence; often, the direct object in an active sentence becomes the grammatical subject of the subsequent, passive sentence. Consider these examples (with underlining added to highlight the dovetailing).

- Pursuant to CPLR 3126, the court has the power to dismiss or strike any pleading where a party willfully fails to comply with discovery. Striking a pleading is warranted when a party's refusal to comply with discovery is willful and contumacious.
- In subsequent telephone conferences, the defendant's counsel promised to produce the documents within 30 days. The documents were never produced.
- Plaintiff alleged that he sent a demand letter to the driver's guardian on July 15, 2021. However, the demand letter was dated August 1, 2021.

143 Elliot, *supra* note 133, at 27; Garner, *supra* note 6, at 25; Wydick, *supra* note 55, at 33.

144 *See* Leong, *supra* note 6, at 10 (noting that converting "bare" passives (passives without "be" verbs) to active voice can actually add words and sometimes create awkwardness in the sentence).

145 Diana J. Simon, *The Power of Connectivity: The Science and Art of Transitions*, 18 Legal Comm. & Rhetoric 65, 75 (2021).

A dovetail using passive voice can have two stylistic benefits. First, it indicates immediately that the second sentence will focus on the act or object of the prior sentence, which creates flow from one sentence to the next.[146] Second, it can make the writing more concise: the subsequent sentence focuses on the act or object without repeating the obvious actor—something active sentences must do.

Because passive voice can create effective dovetails, a writer should not automatically rewrite every passive construction to active voice. Instead, when a sentence starts with passive voice, a writer should ask herself (1) is the actor obvious,[147] and (2) does beginning with the act or object—rather than the actor—connect from the prior sentence in a clear, concise way? If the answers are yes, then the passive voice will likely be the best choice.

### D. To portray objectivity or deflect responsibility

In other areas of professional writing, such as scientific writing, authors use passive voice to convey objectivity.[148] Scientists use passive voice to remove themselves from the experiments they describe and instead focus on "things" ("organisms, materials, methods, findings, analyses, concepts, etc., [and] *not* [on] themselves").[149] The passive voice "removes the personal qualifications and personal privileges" of the author, emphasizing the results rather than the scientists conducting the experiments.[150] An article addressing passive voice in scientific writing gave this example:

> Protein solution containing 10 to 100 µg protein in a volume up to 0.1 ml *was pipetted* into 12 × 100 mm test tubes. The volume in the test tube *was adjusted to* 0.1 ml with appropriate buffer. Five milliliters of protein reagent *was added* to the test tube and the contents mixed either by

146 Thomas L. Kent, *Paragraph Production and the Given-New Contract*, 21 J. Bus. Commc'n 45, 49–50, 52, 57 (1984); *see also* Balling, *supra* note 47, at 116 ("[A] passive construction that allows the sentence to follow the canonical pattern of given before new information . . . , and is coherent with the previous and following sentences, is likely to be more easily read in a text context than an active [one] that does not.").

147 Or unimportant, as discussed in the prior subsection.

148 "The objectivity that the passive voice communicates explains its popularity in academic writing, where writing is 'object-' or 'thing-centered' and where researchers need to maintain impartiality (Leong, 2014, Pruitt, 1968). But even outside of the academic discourse and journalism, authors tend to use the passive voice to maintain impartiality about the event they are describing. (Reilly, Zamora, & McGovern, 2005)." Chan & Maglio, *supra* note 48, at 548 (citing Leong, *supra* note 6; J.D. Pruitt, *Passive Voice Should be Avoided by Research Writers*, 39 J. Higher Educ. 460–64 (1968); J. Reilly et al., *Acquiring Perspective in English: The Development of Stance*, 37 J. Pragmatics 185–208 (2005)).

149 Daniel D. Ding, *The Passive Voice and Social Values in Science*, 32 J. Tech. Writing & Commc'n 137, 138 (2002) (quoting A.W. Wilkinson, *Jargon and the Passive Voice: Prescriptions and Proscriptions for Scientific Writing*, 22 J. Tech. Writing & Commc'n 319, 322 (1992)).

150 *Id.* at 149.

> inversion or vortexing. The absorbance at 595 mm *was measured* after 2 min and before 1 hr in 3 ml cuvettes against a reagent blank prepared from 0.1 ml of the appropriate buffer and 5 ml of protein reagent (italics added).[151]

The passive voice communicates that the steps in the experiment are important, not the person conducting it:[152] "The implication is that the results are independent of any particular individuals; they may simply be observed, and every qualified working scientist may obtain the same result by following the described procedure."[153]

Consider how similar the structure of the sentences in this order is to the above example:

> On order of the Chief Justice, the motion of plaintiff-appellee to extend the time for filing its supplemental brief is GRANTED. The supplemental brief submitted on December 16, 2021, is accepted as timely filed. On further order of the Chief Justice, the motion of defendant-appellant to extend the time for filing his reply brief is GRANTED. The reply brief will be accepted as timely filed if submitted on or before January 4, 2022.[154]

Though only four sentences long, the Order has eight instances of passive voice. Every passive is truncated, leaving the actor out of all eight passive constructions.[155] Of course, everybody knows it is the justices' responsibility to read the parties' briefs, do the legal analysis, make a decision, and issue an order. And readers know it is the authors of the scientific papers who conducted the experiments. But passive voice in these passages provides a gloss of objectivity, putting the focus on the process and results and keeping the actors from the reader's mind. This effect of objectivity fits well into judges' desires to hide any politics or other subjectivity underlying a written decision.[156]

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**151** *Id.* at 148 (quoting M.M. Bradford, *A Rapid and Sensitive Method for the Quantitation of Microgram Quantities of Protein Utilizing the Principle of Protein-Dye Binding*, 72 Analytical Chemistry 248, 249 (1976) (italics added by Ding)).

**152** *Id.* at 148.

**153** *Id.* at 149.

**154** People v. Hinton, 967 N.W.2d 70, 70–71 (Mich. 2021) (mem.) (emphasis omitted—in the original, both instances of "is GRANTED" were bolded).

**155** The paragraph does start with "On order of the Chief Justice." But the writer then uses all passive voice. Further, it is still not clear who the actor is. Who made the decision? The Chief Justice? A different justice? A panel of justices? Is "On order of the Chief Justice" just boilerplate language? If so, does "On order of the Chief Justice" even intend to identify the actual actor/decisionmaker, or just identify the document—the order?

**156** Patricia J. Williams, The Alchemy of Race and Rights 8–9 (1991) ( "[L]egal discourse is premised on strategies for obscuring subjectivity, even though subjectivity is ever present. This, in turn, gives legal reasoning an air of objectivity that hides the politics at work beneath a passive legal sheen.").

The United States Supreme Court, scholars have observed, uses passive voice to enhance its "judicial legitimacy by suppressing the appearance of the politics of legal decision making" in two ways: it "cast[s] itself as forced to act,"[157] and . . . portray[s] itself "as a messenger, devoid of its own subjectivity and serving as a conduit through which the original intentions of the founders speak."[158]

> The rhetorical erasure of agency creates the illusion of a Court that makes only "legal" judgments. . . . [Passive voice] provides a sense—even if a false sense—of security for those—from judges and justices to citizens who have faith in the law—for whom a legal discourse of subjectivity would be destabilizing. The Court's use of passives rehearses the conventions of legal writing that afford its legal legitimacy.[159]

But it's not just the judges. The ubiquity of passive voice in legal writing generally relates, one professor theorizes, "to the positivist assumptions most legalists internalize":[160] "We like to believe law, legal principles, and precedents stand tall and clear. When we apply the law to controversies, neutral and certain answers emerge. It is easy and ideologically convenient to announce, 'It is so ordered.'"[161]

Similarly, writers may use passive voice to avoid, deflect, or obscure responsibility. For example, passive phrases such as *it is widely understood that*, *it is believed that*, *it is well known that*, *it can only be described as*, "obscure[] agency by placing the actor(s) in the background"[162] and not identifying who the actors are.[163] Such constructions make it ambiguous as to who understands, who believes, or who knows.[164] Yet by obscuring agency in this way, the writer attempts to establish the statement as a common truth that the reader should accept and focus on, rather than focus on the actor. Passive voice has the "capacity to not only bury the

157 Skinner & Pludwin, *supra* note 131, at 513, 513–16.

158 *Id.* at 513, 516–21.

159 *Id.* at 512.

160 David R. Papke, *Sonia Sotomayor: Activist Grammarian*, Marquette University Law School Faculty Blog (June 28, 2009), https://law.marquette.edu/facultyblog/author/david-papke/page/7/.

161 *Id.*

162 Chan & Maglio, *supra* note 48, at 548.

163 For example, in a case about analyzing a police's custodial interrogation, the court stated that the interrogation "can only be described [as] being conversational rather than coercive or forceful." People v. Ealy, No. 06 CF 4866, 2012 WL 12883513, at *22 (Ill. Cir. Ct. Mar. 9, 2012). However, whether intentional or not, the court's use of the truncated passive makes the actor ambiguous. Who could only describe it that way? The court? Anybody and everybody? Or, anybody other than the defendant? By using the truncated passive, the writer obscures not only who could "only describe it that way" but also who made that conclusion. By using passive voice, the court takes itself out of the sentence and portrays its own conclusion as a universal truth.

164 Chan & Maglio, *supra* note 48, at 548.

subject, but to lend an air of inevitability to events"[165] and universality to beliefs.

### E. To distance the reader psychologically

A recent study tested whether passive voice can increase a reader's psychological distance from a topic.[166] The greater the distance from a person, event, or concept, the more likely it is that we will think about it abstractly,[167] more objectively, and less emotionally.[168] Such distancing might be *temporal* (how far into the past (or future) an event seems), *spatial* (how distant in location a place seems), or *hypothetical* (how likely or unlikely it seems that an event was real or will occur).[169]

In this study, subjects who read a passage written in passive voice rated a trip discussed in the passage as occurring farther into the future than did those who read the passage in active voice, despite that each passage stated the trip would occur in six months.[170] Thus, passive voice increased the temporal distance for the reader.[171] Similarly, those who read a passage written in passive voice felt the destination discussed in the passage (North Carolina) was farther away than did those who read the same passage in active voice.[172] Thus, passive voice increased the spatial distance. Additionally, those who read a passage about the "MacBeth effect" ("that a threat to one's moral purity can induce the need to cleanse oneself") written in passive voice felt less certain that the effect was "real" compared to those who read an active-voice version of the same passage.[173] Thus, passive voice increased the hypothetical distance.[174] All three experiments showed that passive voice can increase a reader's psychological distance from the subject.[175]

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165 Skinner & Pludwin, *supra* note 131, at 507.

166 Chan & Maglio, *supra* note 48, at 547, 549.

167 Yaacov Trope & Nira Liberman, *Construal Level Theory of Psychological Distance*, 117 Psych. Rev. 440, 441 (2010).

168 Chan & Maglio, *supra* note 48, at 548–49, 555.

169 Trope & Liberman, *supra* note 167, at 445; Chan & Maglio, *supra* note 48, at 549.

170 Chan & Maglio, *supra* note 48, at 549–50. The study was conducted in September 2018, and the trip the passage discussed was to occur in March 2019. *Id.* at 549.

171 *Id.* at 550.

172 *Id.* at 552.

173 *Id.* at 550–51. After reading the passage, the subjects who read the active version were asked, on a scale of 1–9, "how certain they were that 'the MacBeth effect was real—that a threat to one's moral purity can induce the need to cleanse oneself.'" *Id.* at 551. Those who read the passive version were asked the same question, but in the passive voice—"that the need to cleanse oneself can be induced by a threat to one's moral purity." *Id.*

174 *Id.*

175 *Id.* at 552.

Such results indicate that an attorney might use active and passive voice to alter the pathos of an argument. A prosecutor or plaintiff's attorney might use active voice to make the judge feel closer to the action and the victim and emotionally more engaged. Alternatively, a defense attorney might use passive voice to distance the judge from the action and victim, causing the judge to think about the crime more abstractly and objectively. In increasing hypothetical distance, passive voice could subtly make the judge feel it is less likely that an alleged crime occurred, or less likely the defendant committed it. Voice is just one tool an attorney can wield in manipulating a reader's psychological distance from a topic, and its effects might well be subtle.[176] But any tool that might have such "crucial cognitive consequences for readers"[177] is worth considering.

## Conclusion

Attorneys are professional writers—clients pay attorneys handsomely to write about complex legal analysis for important purposes and contested outcomes. Attorneys write to communicate, educate, and persuade. To do this at a professional level, attorneys must understand the effects of passive and active voice and of active verbs and their nominalizations, be able to spot them in their writing, and use them strategically.

Overuse of passive voice and nominalizations weakens many attorneys' writing, spreading through briefs unchecked like an undiagnosed virus. While most legal writing experts say to prefer the active voice over passive voice, attorneys must appreciate that such advice is more than a style preference. Attorneys who know and use the power of each write clearer, more engaging briefs, providing more forceful, effective, and professional advocacy for their clients.

176 The authors noted that this study was "the first to link the active and passive voices to psychological distance" and that additional studies are needed to explore this with more nuance. *Id.* at 556–57.

177 *Id.* at 547.

## Appendix

This appendix provides further details about the studies summarized in section II of this article.

### A. Professor Coleman's study on reading comprehension summarized in part II.A

For this study, Professor Coleman used the Cloze procedure to test comprehension when a sentence is written in various ways,[178] believing that the Cloze procedure was superior for determining comprehension to other traditional readability formulas (such as the Flesch reading ease formula) and multiple-choice tests.[179] The Cloze procedure works as follows:

> The Cloze procedure randomly deletes an equal number of words from compared passages, such as every nth word, and substitutes an underlined blank of a standard length. Subjects must then write in words they think were deleted. Responses are scored correct when they exactly match words deleted.[180]

Coleman gave 100 college students materials to read and fill in the blanks. Coleman created two alternate versions of the materials. One version included two paragraphs that had a high percentage of nouns nominalized from verbs. The materials also included ten sentences, each of which contained two nominalizations. The second version converted the nominalizations into active verbs.[181]

In each set, Coleman prepared five Cloze tests with every fifth word replaced by a blank line for students to fill in. In the first set of tests, Coleman replaced the first word with a blank line, and did so again for every fifth word thereafter. In the second set of tests, Coleman replaced the second word with a blank, and every fifth word thereafter. He continued this pattern so that he had ten sets of tests—five sets of the nominalized version, and five sets of the active version. Thus, over the five sets of the nominalized version and the five sets of the active version, every word of the passage was replaced at some point by a blank line. This allowed Coleman to pinpoint where in the sentences the use of active voice compared to passive voice affected students' performance. For example, Coleman was interested in whether the passive versus active

178 Coleman & Blumenfeld, *supra* note 64, at 651.

179 Bostian, *supra* note 64, at 677–78.

180 *Id.* at 677.

181 Coleman & Blumenfeld, *supra* note 64, at 652.

transformations affected students' performance when filling in nouns versus verbs, when filling in function words versus content words, etc. To administer the tests, Coleman separated 100 students into ten groups of ten students each and gave each group a different set of the test versions.[182]

The results showed that the average number of blanks students filled in correctly per sentence in nominalized versions was 9.63, while the average number students filled in correctly for the active versions was 10.80.[183] This was statistically significant.[184] Students correctly filled in content words in the nominalized versions an average of 1.44 times per sentence, compared to 2.22 times for the active-voice versions. This was also statistically significant.[185] Unlike with the content words, there was not a significant difference in results when comparing functional words left blank (like articles (a, an, the) and "be" verbs (is, are, was, were, am, be, being, been).[186] Thus, while active voice and nominalizations may make little difference when readers deal with non-content words, Coleman concluded that active voice does a better job of communicating substantive information.[187]

Overall, on average students correctly predicted the various types of words as follows:

- **Nouns**: 7.3 times in the nominalized versions, but 12.9 times in the active versions;
- **Verbs**: 4.6 times in the nominalized versions, but 7.1 times in the active versions;
- **Adjectives**: 9.5 times in the nominalized versions, but 10.6 times in the active versions;
- **Adverbs**: 8.1 times in the nominalized versions, but 11.2 times in the active versions.[188]

### B. Professor Coleman's studies on recall and reading time summarized in part II.B

Coleman conducted four studies that compared readers' recall and reading time for passages written with passive style compared to active style.[189] In particular, the passive passages contained passive voice,

182 *Id.*

183 *Id.* at 652–53.

184 *Id.* at 653.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 Coleman, *supra* note 57, at 186.

nominalizations, and adjectivalizations.[190] One study used long passages (around 3000 words), one used shorter passages (around 100 words), and two used sets of single sentences.

The first experiment involved two difficult passages, both 2969 words long. Coleman then rewrote the passages by (1) changing passive voice to active voice, (2) changing nominalizations into active verbs, and (3) changing adjectivalizations into adjective or adverbial forms.[191] Since active constructions are often shorter than passive constructions, Coleman added many articles and prepositions into the active versions so that the word length would remain consistent between the active and passive versions.[192]

Coleman then provided the passages to forty-eight college students, one in the original version and one in the revised (active) version. The students received twelve minutes to read each passage. As soon as a student finished, Coleman gave the student a multiple-choice test. Coleman scored each student on the number of words the student read and the number of questions the student answered correctly.

Eleven students answered more questions about the original versions, thirty students answered more questions about the active versions, and there were seven ties. Thus, nearly three times as many students answered more questions correctly when the passages were written in active voice than with passive voice and nominalizations.[193] Coleman understood that some students may have guessed at some questions. Yet when Coleman corrected the results for guessing, the average number of questions answered correctly was 5.38 for the active versions and 4.29 for the original versions.[194] Thus, even when corrected for guessing, there was a 25.2% improvement in the number of questions students answered correctly from the active passages compared to the passive passages.[195]

In the second experiment, Coleman followed the same approach as in the first experiment, except Coleman used shorter passages, around 100 words each.[196] Also, the students read four passages each, instead

**190** *See supra* note 71.

**191** Coleman, *supra* note 57, at 186. Coleman noted that he did not water down the vocabulary in the active versions. *Id.* at 187.

**192** *Id.*

**193** *Id.* "By a binomial test, a ratio of 30 to 11 is significant beyond the .005 level." *Id.* Interestingly, the average number of words read did not significantly differ in this study—2,169 words in the active versions compared to 2,160 words in the original versions. *Id.*

**194** *Id.*

**195** *Id.* Coleman also noted that the results will vary based on the relation between the reader's intelligence and the difficulty of the passages. However, Coleman noted that "this improvement is [still] heartening because the only changes made were in the grammatical frame of function morphemes: The content morphemes were not diluted to less technical synonyms." *Id.* In other words, Coleman did not change the substance or vocabulary used in the passages.

**196** *Id.*

of just two. Further, Coleman gave the students 0.5 seconds per word to read the passages. Unlike in the prior study, Coleman did not add articles and prepositions to the active versions to match their word count to the original versions. Thus, the active versions were shorter, which also meant the students had less time to read the active versions.

As soon as students finished reading a paragraph, Coleman told the students to write the paragraph as exactly as they could to what they had just read. Coleman scored the results by computing (1) the number of content words the student correctly reproduced; (2) the number of content words the student correctly reproduced plus the number of synonyms a student used for content words (if the student did not remember the exact content word, but used a synonym instead); (3) the number of content words in correct kernel sentences;[197] and (4) the number of content words plus synonyms for other content words in correct kernels.[198] Under all four of these scoring systems, the students recalled the active versions more accurately than the originals.[199]

For his third experiment, Coleman focused on the effect of nominalizations.[200] This experiment involved twenty random sentences that each contained nominalizations. For each sentence, Coleman revised the sentence to replace the nominalizations with active verbs. When needed, Coleman also added modifiers (like "of course") so that all forty sentences were twenty words long. Coleman then typed each sentence on separate flash cards.[201]

Coleman showed the students the twenty sentences—ten in nominalized form and ten in active form—each on its own flashcard. For each sentence, students saw the flashcard for four seconds. When the flashcard was removed, students had to write down as much of the sentence as they could remember. After students completed this for all twenty sentences, Coleman gave students a twenty-question multiple-choice test (one question per sentence).[202]

Again Coleman scored the students in four ways. First, Coleman scored the number of words that students correctly reproduced. Second,

197 *Id.* A kernel sentence is "a simple, active, declarative sentence containing no modifiers or connectives that may be used in making more elaborate sentences: The sentence *'Good tests are short'* is made from two kernel sentences: *(1) 'Tests are short.' (2) '(The) tests are good.'" Kernel sentence,* Dictionary.com, https://www.dictionary.com/browse/kernel-sentence (last visited Aug. 8, 2021). One long sentence may have multiple "kernel sentences" in it. A kernel sentence is essentially a discrete meaning. So, the sentence "*John's operation of the large boat was skillful*" has three kernel sentences: (1) John operated the boat; (2) This was skillful; and (3) The boat was large. Coleman, *supra* note 57, at 188 n.3.

198 *Id.* at 187–88.

199 *Id.* at 188.

200 *Id.*

201 *Id.*

202 *Id.*

Coleman scored the number of content words that subjects correctly reproduced. Third, Coleman scored the number of content words that students correctly reproduced in correct kernel sentences. Fourth, Coleman scored the number of questions subjects answered correctly on the multiple-choice test.[203] Under all four scoring systems, the results showed that subjects remembered the active-verb versions more accurately than the nominalized versions.[204] In the first three scoring systems, the results differed enough to be considered significant.[205] The results were not different enough to be considered significant in the multiple-choice tests, yet the results still favored the active-voice sentences.[206]

Coleman's fourth experiment also focused on nominalizations compared to active voice.[207] This experiment involved ten "original" sentences. The original sentences each contained two nominalizations. Coleman revised each sentence to replace the nominalizations with active verbs. Coleman then presented the sentences to the students using a Gerbrand memory drum at a one-second rate. This meant that students viewed the sentences one word at a time as the sentence revolved around a wheel. The drum rotated at a rate such that students saw, on average, 4.7 words per second.[208]

After a student saw a sentence for the first time, Coleman gave the student a packet of cards. Each card had on it a content morpheme from the sentence.[209] A morpheme is a unit of a word that cannot be further divided—so, the word *incoming* has three morphemes: *in*, *come*, *ing*.[210] Content morphemes are morphemes that carry meaning—in contrast to function morphemes like *is*, *are*, *was*, *were*, etc. Coleman then tasked the student with placing the cards in the correct order to reflect the sentence.[211] If the student failed, the student viewed the sentence again on the memory drum and tried again. Once students succeeded, they were then tasked with filling in the function morphemes. To help the students

**203** *Id.*

**204** All tests of significance were by Wilcox on matched-pairs tests. The multiple-choice test gave rather disappointing results, failing to reach significance for both samples; however, the difference was in the predicted direction. By all other scoring systems, the differences were significant for both samples—sentences and subjects. *Id.*

**205** *Id.*

**206** *Id.*

**207** *Id.* at 188–89.

**208** *Id.* at 189.

**209** *Id.*

**210** So, for the sentence "*The association of written signs with visual images and with auditory signs is only an extension of the same process*," the student would be given cards which had typed on them the following morphemes: associate-, writ-, sign-, vis-, imag-, audit-, sign-, only-, exten-, same, and proce-. *Id.*

**211** *Id.*

with this, Coleman gave them a list of all function morphemes needed to complete all sentences.[212]

Once again, the results showed that readers process active style better than nominalizations. Fourteen of the eighteen students learned the active sentences in fewer exposures than the nominalized sentences.[213] Overall, it took students an average of 6.19 exposures per sentence to learn the active-verb transformations, but 7.61 exposures to learn the nominalized sentences. Again this difference was statistically significant.[214]

The purpose of the studies was to examine "grammatical transformations as independent variables in readability experiments."[215] Each experiment showed "that some transformations are easier to comprehend than others. The last three experiments more specifically suggested that transformations using active verbs are easier to comprehend than their nominalized counterparts."[216]

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.*

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# Thoughts and Worries About Appellate Practice Post-Pandemic

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Plagues "are not only times of death and suffering, but also of intellectual disorientation."[1] For two years, a true plague, the COVID-19 pandemic, has roiled the world. Like professionals in other fields, many lawyers have been left to wonder how law practice will or must change because of this historical earthquake. General litigators worry about the place of the jury trial in the new world of Zoom trials and in the post-pandemic landscape.[2] Cyber security and privacy specialists are at high alert making sure that the rush to put everything online does not expose critical digital infrastructure and personal information to cyber criminals.[3] And experts in the business of law ponder how law firms will change as work becomes more remote and more technology driven.[4] As a federal judge recently said at a Houston Bar Association luncheon of the effects of COVID-19 on the judiciary,[5] the pandemic has squeezed thirty years of innovation into just a few years.

Appellate lawyers have been buffeted by these raucous seas along with the rest of the legal profession. Many of the concerns we have are the same as those of other lawyers. But appellate lawyers *are* different. The

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1 Frank M. Snowden, Epidemics and Society: From the Black Death to the Present 7–9 (2020).

2 GBAO, Jury trials in a (Post) Pandemic World—National Survey Analysis (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/ncscj-juries-postpandemic-survey-analysis-0620.pdf.

3 For a helpful panel discussion of these issues, see *The Future of Cybersecurity During and After the Pandemic* (U.S. Chamber of Commerce video interview Oct. 7, 2020), https://www.uschamber.com/on-demand/government-policy/the-future-of-cybersecurity-during-and-after-the-pandemic.

4 There are any number of articles worrying about the future of law as a business. *See, e.g.*, Michelle Foster, *The Effects of the Pandemic on the Legal Industry*, Forbes (Nov. 18, 2021, 10:15 AM EST), https://www.forbes.com/sites/forbesbusinesscouncil/2021/11/08/the-effects-of-the-pandemic-on-the-legal-industry/?sh=3fe01f9e7f77.

5 There is no record of this luncheon, and I am paraphrasing the judge's statement. The reader will have to take my word for it.

trial lawyer's joke is that appellate lawyers are the soldiers "who come onto the field of battle after the fighting is over to shoot the wounded."[6] This is meant as a wry comment on the appellate practitioner's tendency to arrive after trial and second-guess their work. But it is also an example of the divide that sets appellate lawyers just a little apart. The skills, work, and role of appellate lawyers is different (however subtly) than those of even our trial lawyer cousins.

This essay therefore discusses some of the possible consequences of the pandemic for appellate lawyers. I consider first whether the pandemic will change *writing,* the chief tool of the appellate lawyer. Should we write differently after the pandemic? If so, how and why? Next, I will consider whether the work of the appellate lawyer *in court* will change after the pandemic. Are oral arguments going to be online in the future? And if they aren't, does that mean this period of video oral argument was an anomaly? Third, I will discuss the potential challenges and opportunities presented for a junior lawyer's development. Might the loosening ties of the office *improve* rather than hurt the experience of the average junior lawyer? Finally, I will discuss whether all these developments might sap the famed collegiality of the civil appellate bar. Appellate practice attracts those who are looking for a kinder, gentler, type of litigation. But will that survive in the new world COVID has made?

## 1. Writing briefs after the plague years: should we change how we do legal writing?

While oral argument is the glitzy reward that appellate lawyers get for their hard work, "the very heart of successful appellate advocacy is superb brief writing."[7] Briefs are where appellate lawyers put in the most concrete terms their best arguments and where they join battle in detail with the opponent. For that reason, any appellate lawyer thinking about the consequences of the pandemic must think about how this extraordinarily disruptive event could have changed how briefs *should* be written.

At first blush, however, there is no reason for writing to change in the face of the pandemic. Writing is often a solitary task. Most appellate firms and offices staff briefs leanly. And a brief that *is* written by a large group often resembles the famous aphorism about the camel—that it is

6 *See, e.g.*, Lee R. West, *Debate between Judge Lee R. West and Judge Robert H. Henry*, 80 Denv. U. L. Rev. 783, 785 (2003) (although the joke in this debate is rendered as being about appellate *judges*).

7 Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 Rev. Litig. 511, 533 (2010). As the sources Hungar and Jindal cite make clear, the notion that the "brief is much more important than oral argument in affecting the outcome of the case" is conventional wisdom (and rightly so) among appellate lawyers. *Id.* at 533, n.101 (quoting Myron Moskovitz, Winning an Appeal 17 (1985) and citing various other scholars and practitioners).

a horse designed by committee.[8] For all those reasons, brief writing is usually a solitary endeavor, with the appellate brief writer hunched over a screen or a piece of paper thinking about how to crisply present the issue to the court. Brief writing was a monastic task before, and it will remain so. While serendipitous discussions with colleagues to flesh out ideas and pressure test arguments are an important part of law practice, my experience during the pandemic is that even this kind of personal interaction can be replicated online with video conferences and phone calls.

My conclusion that brief writing remained the same during pandemic conditions ignores one important point. The process of *writing* may not have changed very much. But the back end—the way judges *read* and process lawyer's writing—likely has changed, and permanently. Even before the pandemic, surveys of judges suggested that the newer generation of decisionmakers tended to read briefs on screens.[9] But in most courts, there remained the back-up of paper copies. Before the pandemic, for example, the Fifth Circuit required paper copies for every appeal, to be provided shortly after the briefs were filed electronically.[10] The Supreme Court of the United States required forty paper copies of many filings.[11] Even to courts as august as those, the pandemic brought immediate and startling changes. The Supreme Court dispensed with the need for paper copies in many circumstances.[12] The Fifth Circuit too required paper copies only in some cases. Indeed, we know that at least one Fifth Circuit judge was marooned on a cruise ship for a month, and nonetheless was able to take care of all her work and continued to issue opinions at pace.[13] It's safe to say she was not receiving briefs by pontoon boat. Although there cannot yet be any hard data, we can therefore

8 The aphorism has no clear author, but it is cited in court cases as early as 1968. Mettee v. Boone, 251 Md. 332, 341 (1968).

9 Jeff Richardson, *The Use of iPads by U.S. Fifth Circuit Judges and Law Clerks*, iPhone J.D. (May 8, 2019), https://www.iphonejd.com/iphone_jd/2019/05/fifth-circuit-ipad.html (noting that two of four Fifth Circuit judges asked at a conference responded that they preferred to read briefs on iPads); *see also* Judge David Nuffer, *Judges + iPads=Perfect Fit?*, 3 Geeks and a Law Blog (June 12, 2012), https://www.geeklawblog.com/2012/06/judges-ipads-perfect-fi.html (noting a survey suggesting that 58% of federal judges as early as 2012 used an iPad for their court work); Nicole Black, *Today's Tech: A Federal Judge and His iPad*, Above the Law (Aug. 21, 2014, 10:15 AM), https://abovethelaw.com/2014/08/todays-tech-a-federal-judge-and-his-ipad-part-1/ (describing Second Circuit Judge Richard Wesley's use of technology to read briefs and during oral argument).

10 5th Cir. R. 31.1.

11 *See, e.g.*, Sup. Ct. R. 12 (requiring forty copies of a petition for writ of certiorari).

12 *Order Rescinding Prior COVID Orders*, Miscellaneous Order (U.S. July 19, 2021) (discussing pandemic orders of March 19, 2020 and April 15, 2020 relieving printing requirement).

13 Portfolio Media, Inc., *Coping with a Pandemic: 5th Cir. Judge Jennifer Elrod*, Law360 (Apr. 10, 2020, 8:26 AM ET), https://www.law360.com/articles/1261915/coping-with-a-pandemic-5th-circ-judge-jennifer-elrod. Judge Elrod was not the only judge working away from chambers. Justice Richard Bernstein of the Michigan Supreme Court worked from the Middle East for nearly three months in 2021 as part of an effort to spread cultural and disability awareness. Beth LeBlanc, *Justice Bernstein Worked from Dubai for Nearly Three Months*, Detroit News (Apr. 8, 2021, 9:36 AM ET), https://www.detroitnews.com/story/news/local/michigan/2021/04/08/justice-bernstein-worked-dubai-weeks-now-israel/7137426002.

speculate that long brewing trends towards e-reading have accelerated. I too spent time away from my office during the pandemic. My habits changed, towards a paperless environment. They had to. If that experience is universal, then our writing as appellate practitioners must also adapt to consider the new circumstances with which we are faced.

Adapt how, though? Even before the pandemic, leading practice academics and appellate practitioners had suggested that reading digitally was "re-wiring" our brains.[14] Screen-only readers skim more text. They get more headaches. Multiple screens "promote multitasking."[15] And even the path the eyes take over the page changes. Rather than reading across and down the entire page, as lawyers do when reading a printed sheet, the eyes follow an "F" pattern, down and across.[16] On top of that, many courts now have digital access to record citations (i.e., they can click on the brief in their iPad or computer and be taken directly to the page in the appellate record) and even direct links to cases embedded in the briefs.

What of it? At the very least, this means that the keen appellate lawyer must experiment, and must convince clients and superiors to part ways with now-obsolete methods. I have recommended to my colleagues (and try in my own briefs) the following ideas and strategies:

- *Extra care in citations (whether cases or record citations)*: What might once have required ordering a physical record to check can now be disproven in seconds. While it was always true that citations needed to be scrupulously honest and correct, the penalty for even an honest mistake now is higher.
- *Use pictures and charts*: Experiment with charts and graphics to illustrate points. If your point is that a hazard is open and obvious, show the court. If every published case in a circuit supports *you* and is against *them*, make a chart. Don't leave your point to chance if it can be illustrated in a clear and persuasive way.[17]
- *Scientific hierarchical structure*: Some observers have recommended using scientific hierarchical structure for section headings (i.e., "Part 1 is followed by Section 1.1 and subsection

14 Robert Dubose, Alexander Dubose & Jefferson LLP, Legal Writing for the Rewired Brain 1 (2020), https://adjtlaw.com/wp-content/uploads/2020/06/Legal-Writing-for-the-Rewired-Brain.pdf.

15 *Id.* at 4.

16 Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 Legal Comm. & Rhetoric 1, 11–12 (2015).

17 For further information about the craft of "visual" legal writing, I recommend the extensive bibliography compiled by Professor Ellie Margolis. This work brings together in one place many of the leading guides to using pictures and other visual elements in briefs and other legal writing. *See* Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 Legal Comm. & Rhetoric 195 (2011).

1.1.1" because this method makes it easier for judges to know where in an argument they are).[18] While in a traditional brief it is easy to flip back to a previous page to check the structure, that process is more disruptive on an e-reader, especially if electronic bookmarks are hard to access. Although this is a fairly dramatic change from traditional briefing methods, in briefs that involve many subparts it makes sense. 1.5.1.1.1 (for example) is sometimes better than I(C)(3)(a)(iii).

- *Repetition*: If judges are skimming, then they miss your killer argument if it appears in only one place. Although this can lead to clunky writing, in the new world of e-reading elegance must sometimes be sacrificed on the altar of effectiveness. Again, the barriers to flipping back and forth in a physical copy increase the need for repetition. This might especially be true when the appellate lawyer is writing in trial court, where the judge might not have the assistance of law clerks or the time to read things several times, or when the lawyer is writing in a context where the court is under time pressure (whether it might be a Petition for Mandamus or a motion seeking stay pending appeal).
- *Typography*: The old fonts may no longer serve as well in the context of iPads and smart phones. Specialists on typography like Matthew Butterick should be consulted to understand what kinds of fonts, spacings, and margins work better for electronic readers.[19]
- *Video*: Some cases are decided by a dispositive video. For example, in some cases where a police officer invokes qualified immunity in a suit involving excessive force, there is a video of the confrontation between police and the plaintiff that led to the claim. In a personal injury case, there might be a video of the slip-and-fall. While the Court will find the video no matter what, why not embed the dispositive evidence *in* the brief if possible? Yes, it's unorthodox. But it may also be decisive.
- *Avoid footnotes*: As many writers have observed, footnotes are less effective on iPads because they require extra scrolling to access the footnote. On some readers, footnotes do not even appear properly. In short, if you expect your judicial reader to be e-reading, leave out footnotes to the extent possible. And

18 *Maximizing Your Appellate Brief for the iPad*, Counsel Press (July 25, 2014), https://www.counselpress.com/page_blog_single.cfm?bid=117.

19 *See, e.g.*, Matthew Butterick, Typography for Lawyers 78–81 (2d ed. 2018), https://typographyforlawyers.com/system-fonts.html (noting that different fonts are appropriate for different scenarios).

> remember, some courts hold that arguments made only in footnotes are forfeited.[20] Those rules are likely to expand in an e-world.[21]

To be sure, all of these tools are likely to face resistance from those used to more traditional brief writing. But just as less traditional office arrangements have gained some acceptance during the pandemic, so too will these writing techniques if they are tried and pay dividends. Clients deserve this effort even if it makes lawyers uncomfortable.

## 2. What of the video argument and hearing?

While changes to writing are perhaps the most important changes wrought by the pandemic, the most immediately dramatic innovation for appellate practice has been the advent of oral arguments, hearings, and trials on video conference. Perhaps the most important specific consequence of this sea-change has been the increased public interest in watching important proceedings. Texas trial courts have streamed almost all proceedings by Zoom since the start of the pandemic. Courts of Appeals have also hurried their adoption of YouTube channels to allow public viewing of oral arguments where possible. During the fraught litigation surrounding the 2020 Presidential election, for example, tens of thousands of members of the public listened to arguments in courts around the country on topics as diverse as Houston's drive-through voting system to Rudolph Giuliani's attempt to explain the standard of review (i.e., strict scrutiny, rational basis, etc.) for the government actions he was challenging.[22] Although of course we cannot know for sure, livestreaming those arguments likely helped, rather than hurt, the public's acceptance of the results of the election and of the litigation.[23] Members of the public were able to see judges carefully and honestly addressing these highly charged issues, and hopefully were persuaded that no matter the result, litigants' claims had been heard in good faith. Nor did fears of showboating come true (although we must remain vigilant). Once lawyers got over the initial surprise of having the public listening in to their arguments, they

20 *See, e.g.*, John Wyeth & Bro. Ltd. v. Cigna Int'l Corp., 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (holding that arguments "raised in passing (such as, in a footnote), but not squarely argued, are considered waived"); CTS Corp. v. EPA, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal[.]").

21 Eugene Volokh, *Writing Briefs When Judges Read on iPads*, Volokh Conspiracy (Jan. 17, 2014, 9:37 AM), https://volokh.com/2014/01/17/writing-briefs-judges-read-ipads/.

22 Jon Swaine & Aaron Schaffer, *Here's What Happened When Rudolph Giuliani Made his First Appearance in Federal Court in Nearly Three Decades*, Wash. Post (Nov. 18, 2020), https://www.washingtonpost.com/politics/giuliani-pennsylvania-court-appearance/2020/11/18/ad7288dc-2941-11eb-92b7-6ef17b3fe3b4_story.html.

23 I have previously written on this topic to argue that video arguments are good for access to justice. *See* Raffi Melkonian, *Zoom Hearings: Might they Survive the End of the Pandemic?*, The Bencher, Nov./Dec. 2021, at 22.

got on with the work. It stands to reason given the success of streamed arguments during the pandemic that the public will demand at least some live access to court hearings in the future. It is no coincidence that the Supreme Court has continued livestreaming its arguments even after lawyers returned to in-person arguments, when before observers had to wait until Friday afternoon for the audio recordings.[24] Lawyers who often litigate high-profile cases might consider whether they ought to be trained for those public-facing opportunities.

But the transition to video oral arguments changed practice for lawyers handling more day-to-day cases as well. Practitioners have hurried to prescribe tips and hints for doing a good appellate argument on Zoom, me included. These have ranged from making sure to stand at a podium (or not),[25] checking your lighting,[26] making sure to have back-up technology available, making sure to moot the case like you are going to argue it (i.e., online),[27] clearing your desk of distractions, and even printing a copy of the judge's face and taping it to your screen to provide a target for your eyes.[28] Perhaps most important, don't appear as a cat![29] All of these have been crucial practice tips for lawyers struggling to provide value to their clients and ensure that their client's important legal issues are given the full consideration they deserve. And appellate lawyers who are embedded with a trial team have been working hard throughout this period to figure out how to preserve appellate error during a video-conference bench or jury trial. How do you make sure the exhibits are properly tracked? What if the video feed dies at a crucial moment? What if people say important things on the video chat that are not captured in the appellate transcript?[30] What if someone is coaching the witness just off screen?

Stepping back from the immediate changes to our practice, however, the most lasting consequence of the new world for argument is likely to

**24** *See, e.g.*, *Supreme Court to Continue Live Audio Streaming Arguments Through Fall*, Epic.Org (Sept. 9, 2021), https://epic.org/supreme-court-to-continue-live-audio-streaming-of-arguments-through-fall/).

**25** Raffi Melkonian, How to Make your Zoom Oral Argument a Hit (Bloomberg Law 2020), https://www.linkedin.com/feed/update/urn:li:activity:6716774844341608448/.

**26** *Virtual Oral Argument,* Jennifer M. Cooper, http://www.jennifermcooper.com/virtual-oral-argument/ (last visited Apr. 7, 2022).

**27** Jordan S. Rubin, *Paul Clement on Pandemic Arguments, Moot Courts, and Scalia*, Bloomberg Law (Feb. 22, 2021, 4:45 AM), https://news.bloomberglaw.com/us-law-week/paul-clement-on-pandemic-arguments-moot-courts-and-scalia.

**28** Martin A. Stern, *Appellate Pointer—Top 10 Tips for Zoom Arguments*, Adams & Reese LLP (Feb. 16, 2021), https://www.adamsandreese.com/news-knowledge/appellate-pointer-top-10-tips-for-zoom-arguments.

**29** In February 2021, an unfortunate Texas lawyer appeared in a state trial court as a small, very afraid, white cat, due to a Zoom filter. The moment of levity went viral across the world. *See, e.g.*, 7News Australia, *Viral "Cat Lawyer" and Texas Judge Explain Feline Zoom Fail*, YouTube (Feb. 10, 2021), https://www.youtube.com/watch?v=0EMzDA9kiN8.

**30** David A. Timchak, *Preserving an Accurate Record for Appeal in the Time of COVID-19 Virtual Proceedings*, ABA App. Issues (Jan. 13, 2021), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/winter/preserving-an-accurate-record-for-appeal-in-the-time-of-covid19-virtual-proceedings/.

be in terms of access to justice, even if remote appellate oral arguments eventually disappear as judges return to in-person court. Being able to broadcast arguments has changed practice dramatically. Clients can now listen to court proceedings without expensive travel and hopefully make better decisions about their representation. In the case of incarcerated defendants, this may allow them to see legal proceedings on appeal they are currently barred from. But another, less appreciated, piece of value appellate lawyers bring to the table is being able to handle significant legal hearings in trial courts. In my practice, this can include dispositive motions arguments, post-judgment motions, motions about supersedeas or appellate bonds, and a wide range of other trial court appearances that benefit from an appellate focus. At least in Texas, this requires travel around the state, sometimes for short hearings with little content. For an individual or a small business embroiled in litigation, these travel costs are prohibitive. Even if they can pay them, each dollar a lawyer is paid for travel time is another dollar unavailable to settle the case or to reinvest in the wounded business. By allowing lawyers to attend trial hearings virtually, courts would take a crucial step towards broadening access to justice and allowing more clients to afford the right lawyers, wherever they might be. And technology may allow lawyers to help more clients who are now without legal counsel. If a pro bono effort means flights to far-flung parts of your state, that is harder for a lawyer to justify to a supervisor who wants to provide the service than if the client can be effectively served by appearing on a video link.

Does this mean every hearing should be virtual? Of course not. Jury trials likely are better in person. For constitutional and policy reasons, most criminal proceedings should be in person. I am sure we can think of other examples of hearings that are inappropriate for virtual treatment. But for many hearings and cases, there is no reason to gather everyone in person at a cost of up to tens of thousands of dollars. Technology can help provide the access to justice that is so lacking throughout the United States. This time, we should not stand athwart that progress yelling, "stop."[31]

## 3. Associate development

Developing junior appellate lawyers is one of the most important—and most rewarding—parts of appellate practice. This is partly out of self-interest. Whether the appellate lawyer works in private practice,

31 This is the famous aphorism of William F. Buckley, the staunch mid-century political conservative: A conservative is one who "stands athwart history, yelling Stop, at a time when no one is inclined to do so[.]" William F. Buckley, *Our Mission Statement*, Nat'l Rev. (Nov. 19, 1955, 1:00 PM), https://www.nationalreview.com/1955/11/our-mission-statement-william-f-buckley-jr/.

government service, or for a public interest organization, it's important to have talented junior colleagues who can help juggle the enormous burden of work lawyers face. Developing excellent junior lawyers might help private clients lower costs, increase the diversity of their lawyers, and develop relationships with counsel who might have more time to understand their business and their daily concerns.[32] After all, while a senior lawyer with many clients may not have time to devote to learning the client's business in detail, a newer lawyer may have the bandwidth to devote to the client, and the long-time horizon needed to grow and develop with them.

Though all of that is true of nearly every lawyer, appellate practitioners perhaps add a dash of evangelization. Appellate practice is a special practice within litigation. It requires unusual dedication to *doing* appellate litigation—otherwise, the path to trial work is always easier to find—and it provides appellate lawyers with unusual levels of pleasure and collegiality. It stands to reason, then, that appellate lawyers are also eager to bring willing new lawyers to the craft. When an enterprising lawyer created a program to match appellate lawyers with aspiring litigators from communities of color, the program was overwhelmed by volunteers looking to mentor the next generation.[33] I like to imagine that this was partly because appellate lawyers are unusually dedicated to growing appellate practice as a whole.

But what will the pandemic do to the process of developing appellate talent in the future? Junior lawyers can now easily work from places outside the office or even from another city. Some significant firms have already announced that lawyers may always work from home or from other locations going forward.[34] Even more conservative firms have tried to balance their skepticism of the new work-from-home regime with some provision for flexibility.[35] The days where junior lawyers were expected to appear at the office every day for "face time" may well be over.

Still, many law firm and law office leaders are worried that weakening the in-person aspect of legal practice will have serious consequences for the development of lawyers. That mentors will not have the same

32 *See, e.g.*, Richard Liu, *How Should Law Firms Develop Their Junior Lawyers?*, ABA L. Prac. Today (Sept. 15, 2020), https://www.lawpracticetoday.org/article/how-should-law-firms-develop-their-junior-lawyers/.

33 Cheryl Cole, *The Appellate Project: Empowering Law Students of Color to Aim High*, DiversityQ (Oct. 26, 2020), https://diversityq.com/the-appellate-project-empowering-law-students-of-colour-to-aim-high-1510581/.

34 Chris Opfer, *Quinn Emanuel Says Lawyers Can Work from Home Indefinitely*, Bloomberg Law (Dec. 20, 2021, 4:10 PM), https://news.bloomberglaw.com/business-and-practice/quinn-emanuel-tells-lawyers-they-can-work-from-home-indefinitely.

35 Ruiqi Chen & Jasmine Ye Han, *Big Law Agrees: Give Attorneys Flexibility as Offices Reopen*, Bloomberg Law (Nov. 10, 2021, 6:01 AM), https://news.bloomberglaw.com/business-and-practice/big-law-agrees-give-attorneys-flexibility-as-offices-reopen.

close connections with their mentees, that the invisible teaching that happens when junior lawyers shadow senior ones can't happen through a video link. There is something to these criticisms, to be sure. Observational learning is part of human learning, from the time we are infants.[36] Dispersed workplaces will necessarily have some costs to the development of lawyers.

But electronic communication needn't be all downside risk. Personal connections advantage a certain type of lawyer and person—that is, someone who is good at interacting in person and navigating the politics that suffuse every workplace. But that talent, valuable as it can be, is not necessarily related to the talents needed to be an excellent lawyer. I have always wondered whether excellent interpersonal skills end up dictating career success in ways that are not conducive to the best results for clients. Why should the lawyer who is good at making small talk be the most successful one?

Moreover, the appellate profession suffers (as many parts of law suffer) from under-representation of women and racial minorities. Perhaps these numbers will fix themselves as the pipeline of women and minority lawyers who have the right kinds of qualifications to secure elite appellate litigation positions fills. There is at least some indication that this is already happening. But there is also some reason to believe that the artificial equality of the "Zoom box" might place people on an equal footing in ways that in-person interaction does not.[37] Do online meetings prevent the loudest voice from dominating the meeting? Do they allow quieter people to finish their sentences because "interruptions are very messy" in the online space?[38] Given these questions, we should be open to the possibility that different kinds of appellate lawyers can be developed in different ways. Some may need in-person time. Others need to be given the opportunity to grow in an environment with less emphasis on in-person interaction. It is and can be a new world.

## 4. Collegiality

Appellate practice has always been "characterized by collegiality."[39] As Professor Larry Solum has put it, "[P]rovocative behavior by appellate

36 The psychologist Albert Bandura is credited with coining the term and showing the centrality of observational learning to human development. *See generally* Albert Bandura, Social Learning Theory (1977); *see also* Mark Kelland, Personality Theory in a Cultural Context, 389–90 (2015), https://cnx.org/exports/9484b2cb-a393-45aa-96bf-e9ae9380dd3e@1.1.pdf/personality-theory-in-a-cultural-context-1.1.pdf.

37 Alexandra Topping, *How Online Meetings Are Levelling the Office Playing Field*, Guardian (Oct. 22, 2021, 4:00 ET), https://www.theguardian.com/money/2021/oct/22/how-online-meetings-are-levelling-the-office-playing-field?CMP=Share.

38 *Id.*

39 Scott B. Smith & Diana B. Bratvold, *The Collegiality of Appellate Practice*, For Def., Nov. 2010, at 28.

lawyers is rare although not unknown."[40] Despite working in a practice area that is effectively zero-sum—just like other litigators—appellate lawyers rarely engage in the kind of personalized disputes that adorn the disciplinary records of state bars or the pages of the legal press. Of course, parts of appellate practice can be sharp-elbowed. Just ask the lawyers of the Supreme Court bar who must compete to secure ever-rare cases and oral arguments.[41] But in general, appellate practice is genteel compared to the bare-fisted rough-and-tumble of trial litigation practice.

Why is this true? There are law-related answers to the question. The prominent Texas appellate lawyer Rusty McMains, for example, points out that appellate lawyers can "afford to be a little more collegial and open" because there are no secrets—both sides have a complete record in front of them, the question is how those set-in-stone facts can be applied to the law to reach the (right) result.[42] Appellate lawyers also rarely need to engage head-to-head in private negotiations, where many of the sharpest exchanges occur. In my trial litigation practice, many years ago, some of the most stressful moments involved the meet-and-confer process and discovery. I even practiced with a lawyer who told me his practice was to have a fight every time he defended a deposition—it threw off the rhythm of the deposition, he said. Those tense interpersonal confrontations just don't happen in appellate practice as a rule. If the parties disagree on something important, the answer is almost always to present the dispute to the court rather than engage in fruitless wrangling.

The same is usually true of judges. Because appellate judges sit in panels of three or five or nine (and sometimes seven), and because even elected judges sit for long terms, appellate judges *must* value collegiality. Judges on the federal courts of appeals often dine together during sittings of the court. In many courts, they shake hands before taking the bench. In the Fourth Circuit, the judges descend the bench to greet each other and counsel. All of these are prophylactics to increase the collegiality of the body and thus allow the court to function more smoothly over time.

But another part of the traditional answer is that appellate lawyers and judges are constrained by the appellate community. The appellate bar is small, even in a state like Texas that boasts an unusually large and well-developed appellate practice. Being unpleasant to hopefully lifelong

40 Lawrence B. Solum, *Virtue Jurisprudence: Towards an Aretaic Theory of Law*, *in* Aristotle and The Philosophy of Law: Theory, Practice, and Justice 1, 15 (2013).

41 The prominent Supreme Court practitioner Deepak Gupta, for example, has discussed this issue before the Presidential Commission on the Supreme Court of the United States. *See* Testimony of Deepak Gupta, *Access to Justice and Transparency in the Operation of the Supreme Court*, WhiteHouse.gov (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf.

42 JoAnn Storey, P.C., *An Interview of Former Appellate Section Chair Russel Hugh "Rusty" McMains*, 30 App. Advoc. 250, 258 (2018).

colleagues will rebound on the person misbehaving. Word will inevitably spread that a lawyer is difficult to work with. And so even lawyers who might be inclined to throw underhanded blows will stay their hand because the short-term benefits aren't worth the consequences in the appellate community. All of that is to the good.

But what happens if personal relationships are replaced with electronic ones? Even twenty years ago, legal scholars began to wonder whether "[a]bsence makes the heart unfamiliar" when it comes to teleconferencing and email.[43] But that author could not imagine today's balkanized world, riven by a pandemic that does not even allow lawyers to see each other in person during the worst outbreaks. It would not be surprising if we are faced in the next decade with fraying collegial bonds on both the appellate bench and in the appellate bar. For example, will appellate lawyers be able to maintain their professional courtesy in briefs and other communications if there are fewer instances where they come face-to-face with their interlocutors? An unnecessarily sharp tone is easier to adopt when the opponent is not a frequent opponent or co-counsel. Similarly, one can imagine technology allowing now regional appellate markets to become more national, and this introducing greater friction into the system than before.

Indeed, I wonder if some of the controversies of this past year in the appellate judiciary had something to do with judges being unable to sit with one another at conference and hash out a disagreement in person rather than through sharp email correspondence.[44] If even appellate judges are experiencing interpersonal strain, then can lawyers be far behind?

Is there a solution to this potential problem? I would say it is the same as what I often preach when using social media—which is to offer your interlocutor some grace and the benefit of the doubt. Tone and inflection are lost online. What may seem like an insult often is infelicity. A challenge might be a joke. Pick up the phone or take a professional colleague to lunch or for coffee.

43 Michal R. Murphy, *Collegiality and Technology*, 2 J. App. Prac. & Process 455, 456 (2000).

44 Recent incidents in the Fifth and Ninth Circuits are illustrative. *See* Madison Adler, *Judicial Opinion Barbs Reflect Political Divisions, Twitter Era*, Bloomberg L. (Feb. 1, 2022, 4:45 AM), https://news.bloomberglaw.com/us-law-week/judicial-opinion-barbs-reflect-political-divisions-twitter-era?context=search&index=0; Debra Cassens Weiss, *The good ship 5th Circuit is afire: Majority invented new Title VII sin in vaccine case, dissenter says*, ABA J. (Feb. 17, 2022, 3:32 PM CST), https://www.abajournal.com/news/article/the-good-ship-5th-circuit-is-afire-dissenter-says-majority-invented-new-title-vii-sin-in-vaccine-case.

## 5. Conclusion

Decades later, I suspect we will remember the pandemic years as world-changing—like 9/11, an inflection point in the history of the modern world. Lawyers can manage those changes in a way that leaves the profession better afterwards. Appellate lawyers cannot be excluded from that responsibility. This essay is intended to be a good start in thinking about the new problems the pandemic has created and the opportunities it has willed into being.

To be sure, this essay is not intended to be comprehensive. Appellate colleagues with different practices might well have different needs—surely, criminal appellate practitioners may have different ideas than mine for the necessary changes to the practice. And it is too early to know what the long-lasting consequences of the pandemic might be. In his early-pandemic book, the social scientist Nicholas A. Christakis analogized the COVID pandemic to Apollo's onslaught against the Greeks in *The Illiad*.[45] As he explained, Apollo has not yet "put down his bow" and ended the rain of his "terrible arrows" against us.[46] And even when the death caused by COVID stops, it will be many years for the full consequences of what we have endured to be clear. Should we look forward to an era of creative destruction, like the 1920s followed the great flu of 1918? Or something worse? In any event, lawyers should think about the consequences now so we and our clients can be prepared. That is the obligation of the forward-looking appellate lawyer.

45 Nicholas A. Christakis, Apollo's Arrow, xvi (2021).

46 *Id.*

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ESSAY

# Remote Legal Services in the Age of COVID

## How Legal Services Organizations Adapted to the Pandemic to Serve Pro Bono Clients

Tiffany M. Graves*

The COVID-19 pandemic has had devastating effects in nearly every aspect of society. The shutdowns used to abate the spread of the disease forced much of the world to quickly pivot to remote operations. Pro bono legal services were no exception. Legal services organizations that served the public primarily in person found themselves scrambling to adapt to a new world of near-exclusive remote interaction. While some organizations already had the technologies in place to seamlessly change their methods, others had to completely suspend client services until they could make the necessary adaptations to perform those functions.

I am pro bono counsel at a law firm that encourages attorneys to engage in pro bono work and provides incentives for doing so. I am also a member of the Association of Pro Bono Counsel (APBCo), a mission-driven membership organization of over 270 attorneys and practice group managers who run pro bono practices in over 130 of the world's largest law firms.[1] The mission of APBCo is to maximize access to justice through the delivery of pro bono legal services.[2]

A significant portion of the work of pro bono counsel involves interacting with legal services and other nonprofit organizations that provide

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1 *Welcome*, Ass'n of Pro Bono Counsel, https://apbco.org/ (last visited Dec. 20, 2021).

2 *Id.* In January 2022, the Association of Pro Bono Counsel (APBCo) published *Positive Change: How the Pandemic Changed Pro Bono and What We Should Keep*, a report that examined what changed for pro bono during the pandemic and what practices should be retained. *Positive Change: How the Pandemic Changed Pro Bono and What We Should Keep*, Ass'n of Pro Bono Counsel (Jan. 20, 2022), https://apbco.org/wp-content/uploads/2022/01/APBCo-Remote-Report_012022.pdf. I was invited to contribute to the report as a co-president of APBCo.

pro bono legal services to people with limited means. Like many of my APBCo colleagues, my firm works with several grantees of the Legal Services Corporation (LSC). LSC is the single largest funder of civil legal aid for income-limited Americans, offering grant funding to over 100 independent nonprofit legal aid programs with more than 800 offices.[3] LSC grantees provide civil legal assistance in every state and territory in the United States and in the District of Columbia.[4] Grantees may serve an entire state, a region within a state, or a single city or county. More than 1.58 million people live in households that were served by legal aid organizations funded by LSC in 2020.[5]

The amount of legal assistance that LSC organizations provided during the first year of the pandemic is reflected in the number of cases "closed." A case is considered closed when the LSC has completed the required services.[6] In 2020, LSC organizations closed 659,000 cases, with 43,000 of those cases being closed by pro bono attorneys.[7]

John G. Levi, Chairman of the Board of Directors of LSC, described 2020 as "a year like no other."[8] In LSC's *2020 Annual Report*, Levi wrote,

> The pandemic changed everything and forced LSC and our grantees to operate in 2020 in new ways that few could have imagined beforehand. Legal aid organizations joined the rest of the judicial system in using new technology or expanding the use of existing online processes and platforms such as electronic filing, case management, secure payment tools, Zoom, Facebook Live, and other video and teleconference applications for meetings.[9]

Recognizing the enormous disruption the pandemic would cause in the lives of income-limited people and in the services provided by LSC grantees, I contacted all of the legal services organizations in my

3 *Who We Are*, Legal Servs. Corp., https://lsc.gov/about-lsc/who-we-are (last visited Dec. 2, 2021).

4 Layton L. Lim, J. Abedelhadi, S. Bernstein & D. Ahmed, *2020 LSC By the Numbers: The Data Underlying Legal Aid Programs*, Legal Servs. Corp. 1 (2020), https://lsc-live.app.box.com/s/amlce75n3jdggjw6omzjewm61eghavzt/file/872174451862.

5 *Id.* at 3.

6 *Case Service Reporting Handbook 2017*, Legal Servs. Corp. ch.8, https://www.lsc.gov/i-am-grantee/lsc-reporting-requirements/case-service-reporting/csr-handbook-2017 (last visited Feb. 3, 2022). These "case closures" can fall into one of eight categories, which reflect the level of action needed to close the case: counsel and advice, where the attorney counseled the client regarding the legal problem; limited action, where the advocate took actions such as contacting third parties by telephone or letter, or prepared a simple legal document; negotiated settlement without litigation; negotiated settlement with litigation; administrative agency decision; court decision; other extensive service not resulting in settlement or court or administrative action; or other resolution, which includes other forms of services provided by the LSC. *Id.*

7 Lim, Abedelhadi, Bernstein & Ahmed, *supra* note 4, at 3.

8 *2020 LSC Annual Report*, Legal Servs. Corp. 2 (2020), https://lsc-live.app.box.com/s/ugh0ttfe6un33o5ilp9g-g3ryoy09j909.

9 *Id.*

firm's geographic footprint, which includes six states and the District of Columbia, to offer our assistance and to learn how they were altering their programs to reach clients and meet the increasing demand for pro bono legal services brought on by the pandemic.

This essay will discuss what I learned from the legal services organizations and highlight how organizations in my firm's footprint adapted in the face of unprecedented challenges to assure the needs of the most vulnerable in our country would still be met. In addition to discussing how the legal services organizations adapted to the pandemic, I will also highlight the ways in which legal services organizations will—and should—continue to draw on the lessons of the pandemic experience to maximize access to justice. Despite the challenges of the pandemic, LSC Board Chairman John G. Levi mentioned an important silver lining in his message in the *2020 Annual Report*: "Some of the ways legal aid organizations and the courts adapted technology to meet the challenges of COVID will continue to transform the future legal landscape for the better."[10]

## I. Reaching legal services clients and others with civil legal needs

Throughout the pandemic, legal aid organizations were able to help people with a host of civil legal matters. The majority of the work was in the areas of domestic violence, housing, income maintenance, and consumer protection.[11] One of the more daunting tasks faced by legal services organizations during the pandemic was reaching and interacting with clients. Organizations that previously relied on outreach methods that included brick-and-mortar office locations where those in need could come find a lawyer were now forced away from traditional methods of in-person intake and consultation. While remote intake procedures predated the pandemic, organizations modified those procedures to make them more conducive to being the sole means of interfacing with clients.

The Legal Aid Society of Middle Tennessee and the Cumberlands (Legal Aid Society) improved its pre-pandemic phone intake system by connecting it to the cloud and implementing voice-over internet protocol (VoIP).[12] VoIP systems enable phone calls to be made using an internet connection rather than a traditional analog phone line and allow staff to take business calls on their personal devices without using their personal

10 *Id.* at 3.

11 Lim, Abedelhadi, Bernstein & Ahmed, *supra* note 4, at 103–04.

12 Interview with Andrae Crismon, Dir. of the Volunteer Lawyers Program, Legal Aid Soc'y of Middle Tenn. & the Cumberlands (Dec. 22, 2021).

phone numbers. The organization also shifted to hosting remote legal clinics and created a phone line dedicated exclusively to legal clinics for streamlining and efficiency purposes. Andrae Crismon, Director of the Volunteer Lawyers Program of the Legal Aid Society, said the transition to virtual legal clinics has helped the organization reach even more people because clients no longer have to take time away from work or other obligations to participate in clinics and receive assistance from pro bono attorneys.[13]

The Dallas Volunteer Attorney Program (DVAP) also streamlined the way it conducted legal clinics. The pandemic forced DVAP to shut down in-person clinics that previously operated throughout Dallas County and develop new models for remote legal clinics.[14] DVAP moved the legal clinic application online and began hosting weekly virtual clinics where pro bono attorneys and law students call applicants to conduct intake interviews. In preparation for each clinic, DVAP sent applications for assistance from prospective clients to volunteer attorneys in advance of the clinics. DVAP then asked the volunteer attorneys and law students to submit their interview notes through an online drop box that DVAP created. This drop box made it easier for the attorneys and law students to provide feedback immediately after calls. The drop box also contained questionnaires and check lists to help guide the intake interviews.[15]

Holly Griffin, Managing Attorney of DVAP, said it will keep many of the changes it implemented because of the pandemic:

> We expect to make virtual clinics a permanent part of our program even when we are able to safely reopen our in-person clinics. The virtual clinics are extremely popular with our volunteers and they reach applicants that may not be able to make it to an in-person clinic due to work, their health, or transportation issues.[16]

Bay Area Legal Services (BALS), an LSC-funded organization that provides free civil legal services to income-limited residents of Tampa Bay, Florida, made similar changes to its client outreach methods that it also plans to maintain after the pandemic.[17] Like other legal services organizations, BALS conducted regular "Facebook Live" sessions for the Hillsborough County community on the legal issues that were caused or

13 *Id.*

14 Interview with Holly Griffin, Managing Attorney, Dall. Volunteer Attorney Program (Jan. 4, 2022).

15 *Id.*

16 *Id.*

17 Interview with Jena Hudson, Pro Bono Manager, Volunteer Lawyers Program of Bay Area Legal Servs. (Dec. 30, 2021).

exacerbated by the pandemic. The organization also turned to Zoom to help deliver pro bono legal services to clients. According to Jena Hudson, Pro Bono Manager for the Volunteer Lawyers Program of BALS, "We already had Zoom accounts, but they were not utilized very frequently."[18] Among other things, the organization used Zoom breakout rooms to facilitate meetings between clients and pro bono volunteers. These changes allowed the organization to serve nearly 13,000 individuals, families, and community groups in 2020.[19]

While BALS has been able to serve clients faster because of some of the changes it implemented, Hudson believes it will resume in-person operations for some of their programming to assure it can continue to meet the needs of their clients:[20]

> We found that running one of our family law legal clinics virtually did not allow us to serve as many clients as we were able to when we accepted walk-in clients at the local courthouse. The clinic is operating in person again, and we are assisting clients at pre-pandemic levels on most days, and at higher levels on others.[21]

## II. Protecting clients during an increase in domestic violence cases

According to the *American Journal of Emergency Medicine*, domestic violence cases were on track to increase by twenty-five to thirty-three percent in 2020.[22] Of the 659,000 cases closed by LSC-funded organizations in 2020, 138,000 of them involved domestic violence.[23] Prior to the pandemic, protective order proceedings and other domestic violence advocacy typically focused on providing a safe environment in which the victim could testify in court, including physical barriers like special separate entrances to the courthouse.[24] Despite the dangers of physical harm typically present in these cases, there was still a preference to conduct the hearings in open court to give the accused abuser a chance to

18 *Id.*

19 *About Us*, Bay Area Legal Servs., https://bals.org/about (last visited Dec. 28, 2021).

20 Interview with Jena Hudson, *supra* note 17.

21 *Id.*

22 *See* Brad Boserup, Mark McKenney & Adel Elkbuli, *Alarming Trends in US Domestic Violence During the COVID-19 Pandemic*, 38 Am. J. of Emergency Med. 2753–55 (Apr. 28, 2020), https://www.ajemjournal.com/article/S0735-6757(20)30307-7/fulltext. The article includes domestic violence statistics from April 2020—only two months into the global pandemic.

23 Lim, Abedelhadi, Bernstein & Ahmed, *supra* note 4, at 3.

24 Interview with anonymous attorney who represents survivors of domestic violence (Dec. 20, 2021).

confront the accuser in person to conform with the requirements of the Sixth Amendment.[25]

Even though remote hearings allow domestic violence accusers to testify from safe locations, they may also present a risk that an accuser might not be safe when testifying, especially if they live in shared space with an accused abuser.[26] Given this possibility, courts throughout the pandemic have been more inclined to conduct hearings in person to protect accusers from possible intimidation and to ensure the safety of accusers. In response to the increased need to protect the health and safety of victims of domestic violence during the pandemic, some courts in Illinois implemented "24-hour, 7-day-a-week access" for emergency petitions in domestic violence cases.[27] The Circuit Court of Cook County made the change because it recognized "that weekday, business hours may not be sufficient for some domestic violence victims who are trying to keep themselves and their families safe, and that some petitioners may need extended hours."[28]

Suzanne Canali, the Director of Legal Advocacy at Safe Alliance, a Charlotte, North Carolina nonprofit organization dedicated to providing hope and healing for those impacted by domestic violence and sexual assault, stated that Safe Alliance saw a dramatic increase in the number of domestic violence referrals at the height of the pandemic.[29] To help meet the demand for legal assistance, Safe Alliance attorneys installed applications on their mobile phones to interact with clients even when they were working outside of the office. However, most of the domestic violence proceedings for Safe Alliance clients have continued to proceed in person, although the local courts have offered remote hearings on occasion. Canali said remote hearings can be problematic in the domestic violence context because not everyone has access to the same technologies, which can negatively affect their ability to participate.[30]

In addition to the work done by its staff attorneys, Safe Alliance, like other legal services cited here, engages with pro bono attorneys to

25 *Id.*

26 *Id.*

27 *Circuit Court of Cook County Seeks to Implement 24-Hour Access for "Emergency Petitions" in Domestic Violence Cases*, Cir. Ct. of Cook Cnty. (Aug. 2, 2021), https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2858/Circuit-Court-of-Cook-County-seeks-to-implement-24-hour-access-for-Emergency-Petitions-in-domestic-violence-cases.

28 *Id.*

29 Interview with Suzanne Canali, Dir. of Legal Advocacy, Safe Alliance (Dec. 30, 2021).

30 *Id.* Canali provided specific examples of occasions where parties tried to introduce evidence at hearings by displaying text messages and other information on their phones but could not figure out how to do it when using the video conferencing platforms. She discussed how introducing phone evidence is rarely an issue in open court proceedings.

31 *Id.*

represent survivors of domestic violence. During the pandemic, the organization shifted from having in-person training sessions for attorneys to offering virtual events to accommodate volunteers who were working remotely.[31] After the pandemic, the organization will continue providing virtual trainings for volunteers. Canali believes the virtual options have helped Safe Alliance recruit new pro bono attorneys who might not otherwise volunteer with the organization.[32]

## III. Facing the special challenges of representing clients in immigration cases

Immigration representation has always presented unique challenges, particularly for individuals detained in locations far from where most legal services organizations and pro bono volunteers are located.[33] These challenges were particularly acute during the pandemic as travel to meet with clients became nearly impossible. On the heels of several pre-pandemic actions by the Trump Administration in 2019 to ban migrants from entering the United States, legal services organizations began using remote technology to connect with clients. However, even with some remote technologies already in place before the pandemic, attorneys were still unable to meet with clients prior to court proceedings during the pandemic. The difficulties that advocates experienced connecting with their clients forced the immigration system to modernize remote hearings, establish online filing systems, and include video conferencing as a way for detained migrants to communicate with their attorneys. Among other things, these changes allowed attorneys to build rapport with their pro bono clients and helped to level the playing field in immigration court proceedings.[34]

Tennessee Justice for Our Neighbors (TN JFON)—a Nashville, Tennessee legal services organization that provides free or low-cost legal services to immigrants, educates the public and faith-based communities about issues related to immigration, and advocates for immigrant rights[35]—reassessed its methods of client interaction because of the pandemic.[36] Prior to the pandemic, TN JFON held client meetings, from the initial intake appointment through the final meeting to explain the

32 *Id.*

33 Interview with anonymous immigration attorney (Dec. 20, 2021).

34 *Id.*

35 *See Our Mission*, Tenn. Justice for Our Neighbors, https://www.tnjfon.org/our-mission (last visited Dec. 27, 2021).

36 Interview with Bethany Jackson, Legal Dir., Tenn. Justice for Our Neighbors (Dec. 30, 2021).

37 *Id.*

client's approved immigration status, in person. According to Bethany Jackson, Legal Director of TN JFON, the pandemic helped the staff realize that in-person meetings are not necessary for every step of legal representation: "The pandemic required us to shift to virtual meetings through a variety of video and audio platforms. The shift also meant that our volunteers had to move from in-person intake clinics and client representation to virtual intake and representation."[37] Despite the shifts, pro bono attorneys and clients "stayed with us as we worked through issues around scheduling, connectivity, interpreters, and confidentiality. Our clients wowed us with their adaptability, including by creating PDFs from photos and uploading documents to our secure case management system."[38]

Immigration Legal Services of Catholic Charities of D.C. (ILS) in Washington, D.C. also shifted to remote operations to fulfill its mission of providing direct legal immigration services to foreign-born individuals and their families.[39] Like TN JFON, ILS offers a range of immigration legal services to clients through staff and pro bono attorneys. Where the organization once provided only "walk-in intakes at our offices," clients can now schedule consultations and access ILS attorneys over the phone.[40] ILS started using an online platform to schedule initial intakes and meetings with clients. It has also moved pro bono attorney trainings and naturalization clinics to video conferencing for the foreseeable future.[41]

While there are upsides to remote services, James Feroli, Pro Bono Coordinator and Government Liaison at ILS, notes its downsides, too:

> I prefer to have attorney trainings in person because it provides a better chance to get to know and meet with volunteer attorneys. Similarly, when we had in-person intakes on Tuesday mornings, it was an opportunity to have volunteer attorneys come into the office, meet with clients, and get involved with our program. We lost some of that outreach and engagement when we went virtual.[42]

Both ILS and JFON have identified services that will remain remote, as well as those that are important to shift live as soon as possible. Jackson said TN JFON will continue providing remote services when it makes sense to do so and when it will not subject clients to additional trauma.

38 *Id.*

39 Interview with James Feroli, Pro Bono Coordinator and Gov't Liaison, Immigration Legal Servs. of Catholic Charities of D.C. (Dec. 29, 2021).

40 *Id.*

41 *Id.*

42 *Id.*

43 Interview with Bethany Jackson, *supra* note 36.

"The pandemic reaffirmed that in person meetings are indispensable for building trust with certain clients, such as those who have experienced trauma. We want to make certain our staff attorneys and volunteers still have the option of sitting side-by-side with a client to hear their stories."[43]

## IV. How the lessons learned in the pandemic can continue to increase access to justice

The pandemic forced legal services organizations to examine how they deliver services and to abandon methods that inhibited the ability of income-limited individuals to safely access justice. Organizations identified clients by online means, including by social media, and developed new intake systems to capture an unprecedented demand for free legal assistance. They implemented case management systems to accommodate a variety of communication modes, including phone, email, text, and messaging applications. They shifted in-person legal clinics to virtual events and used video platforms with breakout room capabilities to ensure volunteer attorneys could meet with clients and maintain confidentiality. These and other shifts enabled legal services organizations and volunteer lawyers to provide income-limited communities with real-time legal information and gave clients ready access to legal assistance without regard to geography and travel limitations or issues of safety.

The changes made necessary by the pandemic have had some unexpected benefits. Patrice Paldino, Executive Director of Coast to Coast Legal Aid of South Florida, a legal services organization that received a grant to purchase a van and convert it into a working office to serve homebound older adults during the pandemic, expressed a sentiment that I heard in several of my interviews with service providers: "In some crazy ways, maybe COVID is helping us to be creative with our services."[44] While we have not yet witnessed the end of the pandemic, public interest organizations and pro bono attorneys are beginning to reflect on the lessons of the pandemic and decide which changes they will maintain in order to maximize access to justice. While some organizations and attorneys may have started the pandemic anxious to return to how everything operated previously, many now recognize that by being "creative with [their] services," they can reach clients and do it in ways that may be considerably more convenient for them.

44 *See* Amanda Robert, *Amid the COVID-19 Pandemic, Legal Services Providers Find Creative Ways to Serve Older Adults*, ABA J. (Jan. 4, 2021), https://www.abajournal.com/web/article/amid-pandemic-legal-services-providers-find-creative-ways-to-serve-older-adults.

I hope those responsible for delivering pro bono legal services (e.g., legal services organizations and pro bono attorneys) and those responsible for the systems with which pro bono client communities interact (e.g., administrative agencies and courts) will consider keeping the changes that benefited income-limited individuals and continue to develop accessible, client-centered systems that deliver just outcomes. Based on my conversations with legal services providers, the following are the types of services that I hope organizations will maintain after the pandemic ends. I make these suggestions not because they might benefit my law firm and others that regularly dispatch pro bono volunteers to help these programs, but because I believe they will benefit the clients we both endeavor to serve.

- Differentiate between client needs that can be addressed remotely from those that should be handled in person, recognizing that some clients will still require in-person intakes and meetings because of the urgent or sensitive nature of their legal issues, because of reasons of disability, or for other legitimate reasons.
- Continue using public platforms (Facebook, YouTube, Twitter, and Instagram) to raise awareness and enable clients (and other members of the public) to access useful, real-time information without the need for in-person consultations.
- Retain virtual legal clinics, by phone and by video, to maximize geographic reach and impact.
- Continue offering trainings for pro bono attorneys by video, but consider hybrid options, when possible, to encourage program staff and volunteers to interact in person.
- Continue, in consultation with pro bono attorneys, to evaluate the efficacy of online client interactions on a client-by-client basis.
- Continue to adjust intake systems to accommodate any means individuals might use to seek legal assistance—whether by email, text, messaging applications, or phone.
- Explore grant and other funding options to develop new and creative ways to continue to reach clients where they are.

Adopting and retaining client-centered, innovative approaches to the delivery of pro bono legal services established during the pandemic will ultimately benefit everyone involved—client communities, legal services organizations, and pro bono attorneys. A silver lining of the pandemic is that it forced legal services organizations and pro bono attorneys to examine their processes and evaluate how clients access legal information

and assistance. Regardless of the legal services organization or pro bono attorney at issue, we are all working to increase access to justice, and I believe many of the changes we made during the pandemic allowed us to better serve pro bono clients and ensure more equitable and just outcomes for all.

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ESSAY

# "If Rules They Can Be Called"

## An Essay on *The Law of Judicial Precedent*

Amy J. Griffin*

## I. Introduction

When judges rely on a new source of legal authority created by non-governmental actors, we ought to pay attention. In 2016, Thompson Reuters published *The Law of Judicial Precedent,*[1] written by Bryan A. Garner and twelve appellate judges.[2] The judges, of course, were not acting in their official capacities when they produced the text, and Bryan Garner, the author of more than two dozen law-related books,[3] holds no official government position. This is nothing new, you might be thinking—third parties have been creating treatises that collect and report the law since before the U.S. legal system even existed. In fact, this book is based on a 1912 treatise that set forth the very same set of doctrines.[4] And yet, I argue here, the creation and ready acceptance of a text codifying this particular set of unwritten norms is well worth our notice.

In our current legal system, judges have the freedom to choose any source of authority to support their decision, their choices constrained only by social norms.[5] The once limited universe of legal sources is now virtually unlimited,[6] and there is no process for vetting the sources

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1 Bryan A. Garner, et al., The Law of Judicial Precedent (2016).

2 Those co-authors are Carlos Bea, Rebecca White Berch, Neil M. Gorsuch, Harris L. Hartz, Nathan L. Hecht, Brett M. Kavanaugh, Alex Kozinski, Sandra L. Lynch, William H. Pryor Jr., Thomas M. Reavley, Jeffrey S. Sutton, and Diane P. Wood.

3 *See Books by Bryan Garner*, Law Prose, https://lawprose.org/bryan-garner/books-by-bryan-garner/ (last visited May 18, 2022).

4 Henry Campbell Black, Handbook on the Law of Judicial Precedents (1912).

5 Amy J. Griffin, *Problems with Authority,* 97 St. John's L. Rev. __ (forthcoming 2023).

6 *See, e.g.*, Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 Calif. L. Rev. 1673 (2000); Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 Seton Hall L. Rev. 909 (2011); Frederick Schauer & Virginia Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. Legal Stud. 49 (2000).

judges choose to rely on. Any evaluation of sources cited comes either from judicial colleagues or from third parties, such as scholars and practitioners. In other words, there is no legal authority on legal authority. The lack of any systemic means of either tracking or evaluating all unofficial legal authority cited creates the risk that judicial norms about legal authority are adopted without sufficient reflection or evaluation—a problem bigger than any one text.[7]

Here, I consider just one new source of authority that judges have started to rely on: *The Law of Judicial Precedent*. This self-styled "hornbook" contains 93 "Blackletter Principles" related to the operation of precedent in the U.S. legal system. The principles address subjects like the nature and authority of precedent, the weight of decisions, the law of the case doctrine, treatment of state law in federal court, and the weight of foreign precedents. Each of the 93 principles is presented in boldface, followed by several pages of explanation. For example, the very first principle states, "**Like cases should be decided alike. Following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability.**"[8] The authority cited in support of this particular principle includes scholarly books and articles, Supreme Court cases, a Ninth Circuit case, and *Black's Law Dictionary*. In this manner, over the course of 783 pages, the text sets forth what it has labeled the "law" relating to the operation of judicial precedent. The law of judicial precedent, in turn, determines what substantive law principles courts must follow when they are articulated in cases. Reading this text made me wonder, who gets to decide what counts as law?

Rules about the operation of precedent—which cases and which parts of cases are binding—are almost entirely uncodified. Like other uncodified judge-made rules, operational rules are not always easy to pin down—they are sprinkled throughout cases in no particular order, they are not always expressed in identical language, they evolve, and there are often conflicting versions. To find common law rules, a researcher can look directly at written opinions themselves, finding them with the help of digests prepared by publishers (electronic or otherwise) or by using direct word searches in electronic databases. In some common law fields, the law has been codified by a Restatement or a Uniform Act. Otherwise, in fields without an organized effort to codify, treatises may be the easiest way to find common law rules, and the closest thing to a codified version.

And so, when *The Law of Judicial Precedent* was published in 2016, many judges and lawyers were surely pleased. Not since 1912 had anyone

7 Griffin, *supra* note 5.

8 Garner et al., *supra* note 1, at 21.

attempted to synthesize a set of rules on the topic.[9] The book, a self-described "conventional description of contemporary practice" in the U.S. system,[10] collects and organizes a lot of very useful information. It has somewhat quietly entered the realm of authoritative sources. Since its publication in 2016, it has been directly cited as support in 149 judicial opinions[11] (77% federal, 23% state) by 78 different judges (including 7 of its authors, one of them Supreme Court Justice Neil Gorsuch.)[12] In the scheme of things, 149 opinions in five years may not seem like very many. But it is quite possible that number will continue to increase over time and, in my view, even the current level of citation is sufficient to establish that the book has acquired some authoritative status.

A book review in the *Harvard Law Review*, authored by a Ninth Circuit judge and two of his former clerks shortly after publication, was quite positive: "The main contribution of *The Law of Judicial Precedent* is identifying and assembling in one volume the various problems and questions of precedent that practicing lawyers and judges might encounter, as well as guiding principles for resolving them."[13] According to the review authors, it does what a treatise is expected to do—"organize and clarify an area of law for the sake of reference."[14] That review acknowledges possible "skepticism"[15] about the project (noting that "[t]o begin with, principles of precedent often seem more like modes of reasoning than firm rules")[16] but puts the skepticism aside as likely unfounded and chooses to "take[ ] up the treatise on its own terms as a practice guide for working lawyers and judges."[17]

I do not take up the treatise on its own terms here. Instead, I question its core unstated premise: that judicial practices related to precedent are appropriately presented as definitive blackletter law. Which is not to impugn the book's quality—it is an impressive synthesis of material from a wide variety of sources. But the book bypasses critical questions about the origin and status of practices related to the operation of precedent,

9 Black, *supra* note 4.

10 Garner et al., *supra* note 1, at 18.

11 As of the end of 2021, cited directly 114 times by federal judges and thirty-five times by state court judges. I excluded references that were not direct, such as a citation to another case that had referenced *The Law of Judicial Precedent*.

12 In addition to Justice Gorsuch, it has been cited by Judge William H. Pryor Jr. (22 times); Judge Harris L. Hartz (5 times); Judge Sandra L. Lynch (5 times); then-Judge Brett Kavanaugh (3 times); Judge Jeffrey S. Sutton (3 times); and Judge Carlos Bea (2 times).

13 Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent,* 131 Harv. L. Rev. 543, 549 (2017).

14 *Id.*

15 *Id.* at 548.

16 *Id.* at 547.

17 *Id.* at 544; *see also* John G. Browning, *Examining Precedent*, 80 Tex. B.J. 500, 500 (2017) ("The tome is an invaluable resource for all lawyers, judges, and law students, and appellate practitioners in particular will find it indispensable. . . . *The Law of Judicial Precedent* is a 'must have' for those in the legal profession and merits a place on any lawyer's bookshelf.").

labeling them "law" without discussion. The book tells us the doctrines related to precedent are "sorely in need of elucidation,"[18] but its goal of organizing and textualizing judicial decisionmaking practices as specific, concrete rules may have unintended consequences. The codification of judicial norms is, at the very least, worthy of discussion.

## II. The codification of informal judicial practices

If "the law of judicial precedent is a dizzying matrix of doctrines and subdoctrines"[19] (and I don't disagree with that description), why wouldn't we want a treatise synthesizing them in an orderly fashion for easy reference? As is true of so many things, the fact that there is a market for such a treatise does not warrant its existence. There are valid reasons to pause and reflect on its publication. Is it a good idea to transform a complex, messy set of judicial practices into neat, numbered principles—to codify them? The rules related to the operation of precedent are distinct from other sorts of legal rules, and may not be well suited for codification. The "law of judicial precedent" is based on the social practices of the judiciary, with no textual source. Such practices are foundational rules governing the process of judicial decisionmaking, often intertwined with and even indistinguishable from what we label judicial reasoning. Presenting these practices as rigid rules minimizes their subtle, complicated, evolving nature. Moreover, the codification of these sorts of rules allows judges—the creators of the rules—to distance themselves from the rules, citing them as if judges themselves had no role in their creation: a sort of performative formalism.

### A. Operational rules about precedent are informal norms

Rules about the operation of precedent comprise a unique category of foundational norms and practices distinct from traditional common law rules. Rules about what counts as binding law are secondary (or second-order) rules, not substantive laws that govern public conduct. Secondary rules are rules *about* the primary rules, determining how those primary rules can be created, recognized, interpreted, applied, and so on.[20] In particular, rules governing the operation of precedent guide judicial decisionmaking, dictating whether judges should defer to existing judicial opinions, and which parts of those opinions judges should defer to. They

18 Garner et al., *supra* note 1, at 19.

19 *Id.* at 781.

20 H.L.A. Hart, The Concept of Law 94 (3d ed. 2012).

authorize the creation of substantive common law, and are thus in some sense prerequisites for substantive rules. Unlike other secondary rules, such as rules of procedure, rules about what counts as law are largely informal—unwritten.

One of the distinguishing features of rules about precedent is the way they are created: they are norms, arising from the ground up.[21] They cannot be traced to any moment of deliberation or any formal process of rulemaking. The cornerstone doctrine of *stare decisis* itself cannot be traced to any single case or enacted law—there is no single origin point for it. Trace back citations to *stare decisis* in any Supreme Court decision—the earliest cases only recognize a pre-existing rule without purporting to invent it. As Henry Campbell Black wrote in his 1912 treatise on the laws of precedent, "the rules which govern the subject,—if rules they can be called, . . . rest only in judicial discretion and have no stronger sanction than judicial habit."[22] To the extent that they dictate what is binding on courts, they are, in H.L.A. Hart's terms, rules of recognition,[23] or what others have called practices of recognition[24]—the practices that determine what counts as law.

Because such practices are created by judges and often articulated in judicial opinions, they are easily conflated with substantive common law rules. But thinking about rules of precedent as common law poses a vexing circularity. Socially accepted practices that *give* authoritative status to statements in judicial opinions (such as *stare decisis*) cannot derive their authoritative status *from* statements in judicial opinions. In other words, it is circular to say that rules articulated in judicial decisions have the authority to establish which parts of judicial decisions are authoritative. These sorts of operational ground rules require judicial consensus; it is the consensus that makes them authoritative.

Evolving practices regarding judicial precedent are not specific rules derived from the resolution of a particular case or controversy.[25] Dicta

21 *See, e.g.*, Griffin, *supra* note 5; Grant Lamond, *Legal Systems and the Rule of Recognition: Discussion of Marmor's Philosophy of Law*, 10 Jrslm. Rev. Legal Stud. 68, 76 (2014); Frederick Schauer, *The Jurisprudence of Custom*, 48 Tex. Int'l L.J. 523, 531–32 (2013).

22 Black, *supra* note 4, at v.

23 Hart, *supra* note 20, at 100.

24 Schauer, *supra* note 21, at 532 n.65 ("[T]he ultimate rule of recognition is best understood as a collection of practices (in the Wittgensteinian sense), practices that may not be best understood in rule-like ways."); A.W.B. Simpson, *The Common Law and Legal Theory*, in Oxford Essays in Jurisprudence 73 (A.W.B. Simpson ed., 1973).

25 Kent Greenawalt, Statutory and Common Law Interpretation 212 (2012) ("A later court is likely to take the view that in such large matters of judicial practice, a particular court cannot settle matters with the degree of finality that would attach to narrower solutions of substantive law. . . . Mel Eisenberg is persuasive that there are basic institutional principles of common law interpretation, though these have developed over time rather than being established by particular precedents.").

does not suddenly become authoritative because one judge decided to defer to it in one opinion. Courts do not necessarily follow a rule because another court (even one with the power to bind the subsequent court) has articulated it.[26] Thus, ground rules for the resolution of individual cases and controversies are better understood as practices, whose authority is derived from their very existence. Formalizing the so-called "law" of precedent masks, at least to some extent, the significant and unique characteristics of this set of judicial practices.

*The Law of Judicial Precedent* seems to recognize the nature of the rules it presents: the text's self-described "mission" is to provide a "description of contemporary practice."[27] But its form of presentation belies this description. As noted above, the authors present a principle at the start of each section, followed by several pages of explanation for each principle. The principles themselves are not accompanied by any direct citations—they stand alone at the top of a page, set apart from the cited discussion that follows. This form of presentation places great emphasis on the text of the principle—the words chosen by the authors in the sentences that articulate the "blackletter principle." The rhetorical effect is hard to miss: the fixed language used in the bold lines of text at the beginning of each section has great import.[28]

Similarly, the numbering and ordering of a specific, limited set of textual rules (93 to be precise) also has rhetorical effect. A finite number is, in fact, a little odd. Do we know how many legal principles there are in any other field of law? *The Law of Judicial Precedent* does not purport to be an empirical study. How then did the authors determine the content of the 93 blackletter principles? According to the preface, Bryan Garner's approach was to "discern the major propositions first, and then write in support of them."[29] His methodology, however, is not explained. The numbered presentation of definite rules seems atypical for a treatise. Scholars have identified an increasing focus on the text of judicial opinions[30]—the actual

**26** Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. Chi. L. Rev. 1551, 1565 (2020) ("Indeed, it is common for a court to proclaim a principle for identifying the holding of one case only to violate that principle in the next case.").

**27** Garner et al., *supra* note 1, at 18.

**28** Scholars like Ruth Anne Robbins and Matthew Butterick have shown us that typographic choices truly matter. *See* Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 113 (2004) (on the visual effectiveness of text itself, "visual presentation matters"); Matthew Butterick, Typography for Lawyers (2d ed. 2018); *see also* Derek H. Kiernan Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ALWD 87 (2010) (reviewing existing literature on document design).

**29** Garner et al., *supra* note 1, at xiii.

**30** *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. 219, 222 (2010) (arguing that "overemphasis on words, phrases, and quotations to the exclusion of legal principles" is one of the reasons why dicta becomes holding); Peter M. Tiersma, *The Textualization of Precedent*, 82 Notre Dame L. Rev. 1187, 1188 (2006) ("[T]he common law is embarking on a path towards becoming increasingly textual.").

words rather than underlying ideas—and the presentation of this book is consistent with that trend.

The authors did amass quite a bit of evidence in support of each textualized principle. The sources cited to support each articulated principle are varied, including mostly cases and a variety of scholarly books and articles. That method seems like a reasonable way to determine contemporary practices if empirical data isn't available. Take, for example, Principle # 25, "**Approval, Acceptance, and Recognition: Another court's approval of a decision can bolster its credibility and increase its value as precedent. The absence of approval or affirmation through citation or reference can leave an opinion vulnerable to attack**."[31] This section's 28 citations include references to eighteen decisions from nine different state courts (dates ranging from 1811 to 2006); nine Supreme Court decisions (dates ranging from 1803 to 2014); three federal circuit court decisions (1991, 1993, 2013); five scholarly articles (from 1985 to 2011), and *Black's Law Dictionary*. This sort of citation has a kind of anecdotal feel—the book does not explicitly address the nature of the rules or whether they conform to particular jurisdictions. Some sections are devoted to specific federal or state practices, but not specific federal circuits or specific states.[32] And these sections, for the most part, address rules that are only relevant in one system or the other (for example, how federal courts should treat state court precedent) rather than different versions of the same rules for federal and state courts.

My point is not that these citations are somehow "wrong"—the nature of judicial practices as social norms means that they do not necessarily align with traditional jurisdictional limits. One way of establishing the existence of such norms and practices is through empirical data, but that is not the only way. Many judicial practices related to precedent may be general law, which "emerges from patterns followed in many different jurisdictions."[33] Norms, given their nature as social practices, are perhaps appropriately identified with this sort of wide-ranging cross-jurisdictional evidence used in the text.

However, two key characteristics of the text conflict: the presentation of distinct rules contradicts the descriptions of much looser practices. Can the two be reconciled, or are many of these norms and practices simply not suitable for codification?

31 Garner et al., *supra* note 1, at 233.

32 The first four and the last two sections (A–D and H–I) are not jurisdiction specific. The middle three are aligned with federal and state jurisdictions. Section E is labeled "Federal Doctrine and Practice," section F is "State Law in Federal Court," and section G is "State-Law Doctrine and Practice."

33 Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 505 (2006) (defining general law as "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions").

### B. Should judicial norms of precedent be codified?

The format of the book entrenches the idea that the law of precedent is comprised of a uniform set of rules. The book flap boasts that "[n]ever before have so many eminent coauthors produced a single law book without signed sections but instead writing with a single voice." Presumably, the quotation refers to stylistic voice. But the book aims to do the same thing with respect to its substance, prioritizing the clarity of uniformity. It is not at all clear that rules about the operation of precedent actually are, or even should be, uniform national rules. Courts are institutions with varying responsibilities and expertise, serving different functions at different levels of the judicial hierarchy.[34] There are many other distinctions between judicial institutions, including, most notably, subject matter. Thus, rules related to the operation of precedent not only do vary from court to court, but arguably *should* vary.[35]

The book, however, presents its 93 principles as if they comprise a single body of law, without geographical boundaries. Some of these rules surely are the sort of general rules that judges in all U.S. courts follow, rather than rules specific to any jurisdiction. But an anecdotal rather than empirical approach has the effect of glossing over any jurisdictional differences that do exist. In the explanatory pages following each principle, the authors sometimes articulate differences among jurisdictions,[36] but they do so without purporting to provide a comprehensive accounting of rule variations. The book's dominant form of presentation—a uniform set of principles—has the effect of deemphasizing any differences and underscoring uniformity.

It is actually quite difficult to determine exactly how some of these rules operate in any given jurisdiction, due to their nature as complex principles of reasoning. Take for example, the process of determining an opinion's holding. There is no consistent definition of a holding, even within specific jurisdictions.[37] A 2020 study identified a particular definition of a holding used by four state courts and the Ninth Circuit. Using empirical evidence, the author showed that this definition of holding, broader than many traditional definitions, had a discernible effect on decisionmaking in those jurisdictions.[38] The task of identifying all of the

**34** For example, trial courts review evidence; appellate courts correct errors; the highest court in a jurisdiction creates law. Rules of procedure are different at each level of the judicial hierarchy, and each court sets its own local rules.

**35** Tyler, *supra* note 26, at 1598 ("[A] particular court's rules of precedent should be sensitive to the court's capabilities, obligation, and institutional context.").

**36** *See, e.g.*, Garner et al., *supra* note 1, at 428 (citing a 1923 Mississippi case and a 1927 Wisconsin case for the proposition that "[j]urisdictions adhering to this principle [about reliance upon "an old rule of property"] further split between those that permit the presumption to be overcome and those that don't").

**37** Tyler, *supra* note 26, at 1553 ("[M]any courts are wildly inconsistent in how they go about determining the holding of a case.").

**38** *Id.* at 1566 (naming "Arizona, Illinois, Maryland, and Minnesota").

variations on precedent practices in different jurisdictions in the careful way this study did would be a herculean one, so it is certainly understandable why the book did not attempt it. Again, I do not aim to criticize the quality of what the authors were able to accomplish but to point out the inherent limits of such a project.

The overall message the treatise sends is one of definiteness. Even if the description following a principle captures the variety of views on a topic, the particular words chosen for the blackletter principle may not. The book absolutely acknowledges the existence of uncertainty with respect to some of its principles in the supporting text.[39] But the "blackletter principle" presentation gives no hint of uncertainty or unsettledness.[40]

Some of the practices presented as settled principles may not be all that settled. Take for example Blackletter Principle # 90, **Value of Foreign Precedents**.[41] The blackletter rule here states that **"[t]he value of a foreign precedent is increased by its relevance to the issue at hand, but is diminished to the extent that it is based on conditions—geographic, climatic, social, economic, or political—peculiar to the foreign state or country**."[42] In the text that follows, the authors note that "in some contexts, foreign decisions are persuasive to an American tribunal," citing to a Ninth Circuit case and *Roper v. Simmons*,[43] a Supreme Court case well known for its debate over the propriety of referencing juvenile death penalty practices in other countries.[44] Like many of the other blackletter principles in the book, this one strikes me as simply not well suited to rule format. Whether it is appropriate to put any weight at all on foreign precedent is not settled, and the debate is not captured by the book's blackletter principle. Scholars and judges have debated this at length and continue to do so.[45]

Can the common law decisionmaking process really be reduced to 93 principles? The text, like just about any treatise, is a formalist work.

39 *See, e.g.*, Garner et al., *supra* note 1, at 195–213 (Blackletter Principle #20, Plurality Opinions, which provides the rule that "the only opinion to be accorded precedential value is that which decides the case on the narrowest grounds," but acknowledges in the following description that there is still debate about what counts as the holding, and that many complicating factors make this task a difficult one).

40 Nils Jansen, The Making of Legal Authority 118 (2010) ("[I]t is general knowledge today that typography may visually create different values of, and relations between, different bodies of text . . . .").

41 Garner et al., *supra* note 1, at 751–61.

42 *Id.* at 751.

43 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

44 Garner et al., *supra* note 1, at 759.

45 *See, e.g.*, Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 Calif. L. Rev. 1335 (2007); Mark Tushnet, *When is Knowing Less Better than Knowing More—Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 Minn. L. Rev. 1275 (2006).

Formalism can be described as "decisionmaking according to *rule*,"[46] and that is exactly the assumption that underlies this book. Putting these judicial practices into a concrete, textual form suggests that decisionmaking happens in accordance with rules—it suggests that judicial autonomy is limited. One reason to be skeptical about this is that "we are all realists now"—few still believe that a judge's identity and values have no impact on their decisions; that a judge is no more than an umpire calling balls and strikes.[47] An unofficial project purporting to define and concretize evolving judicial decisionmaking practices contradicts prevailing perspectives on how decisions are made.[48] Few would argue today that judges use precedent in the mechanical way that these rules arguably suggest.

Many of the blackletter principles in *The Law of Judicial Precedent* look like methods of judicial reasoning. For example, principles 6–9 in part A are "**The Context for Extracting a Rule or Standard**,"[49] "**Substantially Similar Facts**,"[50] "**Distinguishing Cases**,"[51] and "**Analogous Cases**."[52] The authors of the 2017 book review noted that "the very effort to codify blackletter rules of precedent might imply an unrealistic view of judging in which answers about how to interpret and apply precedent can be looked up and rotely applied to the case at hand."[53] The book review authors concluded that any initial skepticism along these lines would "prove largely unfounded"[54] because the book does not try to settle any debates about the extent to which precedent constrains judging, and it is "transparent about the principles that cannot be readily reduced to firm rules and for which it can offer only general guidance and illustrations."[55]

As it turns out, the principles courts have cited most frequently look a lot like a code of judicial reasoning. The single-most-cited principle (26 times) is #4: **Dicta v. Holdings,**[56] the second-most-cited (16 times) is

46 Frederick Schauer, *Formalism*, 97 Yale L. Rev. 509, 510 (1988).

47 *See, e.g.*, David Klein, *Law in Judicial Decision-Making* in The Oxford Handbook of U.S. Judicial Behavior 236–37 (Lee Epstein & Stefanie Lindquist eds., 2017) ("Virtually all knowledgeable observers today would agree that judging is not simply a matter of applying readily ascertained legal rules to individual cases.").

48 An official project (a national set of rules, for example) would pose many of the same problems, but see *infra*, text accompanying notes 64–66 for discussion about problems with this particular set of authors.

49 Garner et al., *supra* note 1, at 80.

50 *Id.* at 92.

51 *Id.* at 97.

52 *Id.* at 105.

53 Watford, Chen & Basile, *supra* note 13, at 548.

54 *Id.*

55 *Id.* at 549.

56 Garner et al., *supra* note 1, at 44 ("The *holding* of an appellate court constitutes the precedent, as a point necessarily decided. *Dicta* do not: they are merely remarks made in the course of a decision but not essential to the reasoning behind

#36: **Choosing Between Discordant Decisions**,[57] and Principle #6, **The Context for Extracting a Rule or Standard**,[58] is the third-most-cited (13 times).[59] These judicial decisionmaking practices are, in many respects, not objective. Is the definition of dicta evolving at this very moment? It is hard to say, without specific and rigorous empirical evidence. Even if we had such evidence, it wouldn't be dispositive, as the interpretation of precedent is just not a mechanical task. In the context of complex decisionmaking, where most would acknowledge there is no one right way to read cases,[60] it seems almost meaningless to cite to a book like *The Law of Judicial Precedent* as if it were dictating some of these analytical choices.

A judge might very well be able to find the right principle to support any conclusion, bringing to mind Karl Llewellyn's infamous "thrust" and "parry" chart, in which he presented opposing canons on almost every point of statutory interpretation.[61] Blackletter Principle #4 states that "**the holding of an appellate court constitutes the precedent, as a point necessarily decided**."[62] Blackletter Principle #6 states in part that "**a general rule or standard may be extracted that is broader than that in the holding itself and broad enough to apply to a novel case**."[63] Later in the treatise, the authors provide rules on when to overrule a decision (Blackletter Principle #46, **Overruling a Decision**). Many of the principles in the text can be described, in Llewellyn's words, as "conflicting correct ways" of reading a case.[64] To that end, consider a recent Eleventh Circuit case, in which the majority opinion and dissenting opinion disagree over the scope of the majority's holding. The two cite to different principles from *The Law of Judicial Precedent*—the majority quotes the book for the principle that it is "improper for a later court to infer an alternative holding or rationale where none is sufficiently expressed in

that decision.").

**57** *Id.* at 300 ("If two decisions of equal authority are irreconcilable, the choice of which one to follow depends on the circumstances.").

**58** *Id.* at 80 ("The language of a judicial decision must be interpreted with reference to the circumstances of the particular case and the question under consideration. Yet a general rule or standard may be extracted that is broader than that in the holding itself and broad enough to apply to a novel case.").

**59** The Law of the Case Principles are also frequently cited—there are eight principles in this section collectively cited 23 times.

**60** Karl Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 395 (1950) ("One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.").

**61** *Id.* at 401.

**62** Garner et al., *supra* note 1, at 44.

**63** *Id.* at 80.

**64** Llewellyn, *supra* note 60, at 395 ("These divergent and indeed conflicting correct ways of handling or reading a single prior case as one 'determines' what it authoritatively holds, have their counterparts in regard to the authority of a series or body of cases.").

the precedent,"[65] while the dissent counters with the principle that "the rationale that carries the force of precedent is that without which the judgment in the case could not have been given, and not the reasoning articulated by the court."[66]

Interestingly, this text has attracted only a fraction of the attention attracted (garnered?) by its sister treatise, *Reading Law: The Interpretation of Legal Texts*.[67] That book, written by Bryan Garner and Justice Antonin Scalia, contains 56 "Sound Principles of Interpretation" and "Thirteen Falsities Exposed"—bold principles exactly like those in *The Law of Judicial Precedent*. Both books are efforts to codify judicial practices related to decisionmaking. Yet, while the status of interpretive methodology is the subject of countless books and articles, the status of rules related to precedent has remained largely unaddressed—somewhat invisible. I suspect that the lack of attention is at least partly rooted in our history, as there was once no question at all about which sources counted as law.[68] But now we do recognize that there is such a question.[69] Determining what counts as law—and the operation of precedent is a big part of that—is at the very core of judicial power.

The nature of the book's project—setting down the "law of judicial precedent"—inherently prioritizes order, concreteness, and uniformity. Assume that every single principle in the book is an accurate reflection of judicial practices on the date it was published. Textualization has power—those principles are now more established than they were before. Is that a good thing? On the positive side, the textualization of these principles might enhance the transparency and predictability of the judicial decisionmaking process. Easily accessible principles might be more equitable for parties who are subject to the court's power. In other words, the text might advance a rule-of-law ideal by making the rules easier for everyone to find.

On the other hand, there are reasons to think that we might not want to cement this particular set of practices, which differ from substantive

**65** United States v. Johnson, 921 F.3d 991, 1003 (11th Cir. 2019) (quoting Blackletter Principle # 10, "The language of a judicial decision must be interpreted with reference to the circumstances of the particular case and the question under consideration.").

**66** *Id*. at 1019 (Rosenbaum, J., dissenting) (Blackletter Principle # 6) (remarking that the majority "invokes everyone from Chief Justice John Marshall to Bryan Garner for the truism that judicial decisions are limited to the facts of the case before the court. *See* Majority Op. at 1002–03. But that does not respond to the problem here.").

**67** Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts (2011) By any metric, *Reading Law* has attracted far more attention. Since its publication in 2012, over 2,000 judicial opinions have cited it. A search of "secondary sources" on Westlaw, scalia /s "Reading Law" = 1,810 results. Garner /s "law of judicial precedent" turns up only 105 results. Book Review Digest Plus finds 12 book reviews for *Reading Law*; 2 for *The Law of Judicial Precedent*.

**68** Berring, *supra* note 6, at 1691 (in 1899, authority issues were simple because the world of authority was much more restricted). However, the distinction between holding and dicta has always been a concern.

**69** For example, the question of whether presidential tweets should be considered authority.

laws in so many ways. Transparency may be at least a little less significant with respect to operational rules because they are addressed to judges, not the public. They do indirectly affect the public, but it is not clear the reliance interest is quite as significant as it is with respect to substantive rules. More significantly, putting them into textual form makes them more rigid. A system based on judicial practices established by consensus over time is flexible, allowing for a more responsive judicial system. A system which establishes rules as judges converge on a practice allows for experimentation, and codifying the rules may shortcut that valuable process. The stakes are high for foundational rules that apply in every case, so we should be concerned if the text has the effect of stunting their evolution.

Even if we do think that these rules should be codified, there is reason to think that such codification should not be at the hands of a small group of unofficial actors. This set of authors—its twelve distinguished judges—is certainly well qualified to opine on these rules. The laws of judicial precedent are the very tools of their profession. But in an ideal world, should a group of twelve judges (distinguished, elite, and homogenous), in isolation, decide what these rules are? To be fair, these judicial authors are perhaps no different than the elite set of lawyers who work on crafting Federal Rules, or those chosen to serve on the American Law Institute, creating Restatements and Model Codes.[70] In that respect, this text may simply be one example of a much bigger problem. However, Restatements, Rules, and Model Codes all have the benefit of some transparent and deliberative processes—that is not true of this text.

Collecting and recording existing rules is, of course, not lawmaking. But maybe it is, effectively. When a principle elucidated in the text is cited by a judge in an opinion, that citation could be window dressing.[71] However, it could also be influencing the judge's decision, in which case whether we label it "law" or not makes little practical difference.[72]

Finally, I wonder, why now? The publication date of the 1912 treatise *Handbook on the Law of Judicial Precedents* falls squarely within what many have deemed the Formalist Age.[73] What does it say that the next version of the treatise was produced 100 years later in 2016? In the preface, Bryan Garner suggests that it has not been done before because the task of compiling this body of law was "staggering."[74] I think it instead

70 *See, e.g.*, Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 Nw. U. L. Rev. Online 52 (2018).

71 Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1353 (2018) ("The question of how much work the canons are really doing and how much is mere 'show' (or cover for the common law tools they wish to deploy) is difficult to resolve.").

72 Greenawalt, *supra* note 25, at 183.

73 Grant Gilmore, The Ages of American Law 11 (2d ed. 2014) (Civil War to World War I as a formalist era).

74 Garner et al., *supra* note 1, at xiii.

might reflect a kind of performative formalism.[75] By that, I mean visible reliance on rules suggesting that the rules dictate the outcome, even when those in the legal system don't believe they do. Somewhat ironically, in a legal system in which strict formalism has been largely debunked,[76] citation to formal doctrine might be valuable as a proxy for judicial neutrality, pushing back against the notion that results are driven by a judge's personal values. If a judge cites to this book as authority on how to extract a rule from a case, that citation deemphasizes the role of choice in the judge's decision. The textualization of these practices allows judges to artificially separate themselves from the rules, even though they themselves are the creators.

The next edition of this book, if there is one, could be different. The "typographical presentation of a text" contributes to its legal authority;[77] form matters. Eliminating the 93-blackletter-principle boldface presentation would avoid the appearance of formal fixed laws, instead depicting the rules as the evolving social practices they are. The authors could also provide more research (including some empirical data) on the practices that vary across and within jurisdictions. In my view, the text needs more diverse authors, with different life experiences, to provide an array of perspectives on the critical question of what should count as law. And finally—though this would require a title change—the authors should acknowledge that there is no written law of precedent. That's the beauty, in many respects, of the common law.

## III. Conclusion

At the very least, we ought to recognize the nature of the practices presented as textual rules in *The Law of Judicial Precedent* and consider the consequences of their unofficial codification. Formalizing unwritten rules prioritizes uniformity, order, and certainty—values we might be willing to sacrifice in exchange for the benefits of ever-evolving practices. Creating a written law of precedent may elevate the weight of precedent at the expense of other less-tangible sources, such as policy, principles, and values, particularly if our legal system continues on its current path of prioritizing text. To the extent that this text reflects the allure of formalism in today's realist world, serving a performative purpose, we should be wary. Citation to authority (of whatever sort) remains a mainstay of judicial opinion writing and deserves our constant attention.

75 *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. Rev. 1619, 1625 (2020) (discussing the "performative use of citations").

76 Frederick Schauer, *The Failure of the Common Law*, 36 Ariz. St. L.J. 765, 779 (2004).

77 Jansen, *supra* note 40, at 141.

# Oral Advocacy

## A Bibliography

Barbara Gotthelf*

## I. Introduction

Wither oral argument? That is the question often posed by many the articles in this bibliography.[1] A centuries-long trend has brought us from an oral tradition of persuasion to one that is writing based. Oral arguments that once consumed days are now delivered in fifteen minutes or less, if at all. And that was before COVID-19. Today, oral arguments are even less common, and they are conducted via glitchy software across erratic broadband connections. Meanwhile, an unlucky cohort of law students whose opportunities to practice oral advocacy in law school were already limited are graduating without ever having stood before a lectern to address a panel of judges.

Does this matter, as other writers ask?[2] After all, the literature suggests that most judges have their minds made up before arguments are heard.[3] Yet, after a year on the bench, Chief Justice John Roberts concluded that "oral argument is terribly, terribly important. I feel more confident about that now than I ever did as an advocate."[4] For Chief Justice Roberts, oral argument "is the organizing point for the entire judicial process."[5] That may well be the case in the United States Supreme Court,

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1 *See, e.g.*, James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!,* 19 J. App. Prac. & Process 89 (2018).

2 *See infra* section II.5.

3 Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future,* 10 J. App. Prac. & Process 247, 267 (2009).

4 John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar,* 30 J. Sup. Ct. Hist. 68, 69 (2005).

5 *Id.* at 70.

which cherry picks 70–80 cases per year from more than 7,000–8,000 certification petitions[6] and reverses more than half of the lower court opinions.[7] Similarly, in my home state of New Jersey, our Supreme Court heard 87 appeals in 2019–2020, and reversed in 55.6% of the cases.[8] Asked if oral argument matters, Chief Justice Stuart Rabner responded, "[M]ost definitely, yes."[9]

But what about other courts where cases are not handpicked? Does oral argument matter in the circuit courts of appeals, where, across all circuits, less than 20% of cases were argued in 2020? [10] Does it matter in the federal and state trial courts? In dispositive motions only? What about pre-trial motions, evidentiary motions? In short, does oral argument matter—and should the decline in such opportunities trouble us—based not on the "glamour" of a United States Supreme Court argument, but on the "blue-collar, day-in-day-out thing[s] lawyers do routinely?"[11]

By and large, the works cited in this bibliography answer "yes." They tell us why oral argument is important; how to do it; how to teach it; and how to see it through the eyes of the judges we want to persuade. Importantly, many of these authors also see the value of oral advocacy beyond the courtroom and stress the need to continue teaching and practicing these skills. Michael Vittiello reminds us that

> oral advocacy training helps lawyers in many areas other than in making formal appellate arguments: whether one is a trial lawyer, a transactional lawyer, or a mediator, she is often called on to make coherent presentations to diverse audiences. She must learn core skills to do so and a good advocacy course can begin that training.[12]

Moreover, the very act of speaking—or even preparing to speak—can sharpen our analytical skills. Edward T. Swaine points out that the specter of oral argument "is consequential . . . disciplining written submissions by forcing counsel to anticipate the possibility of being chewed out" by the

6 *U.S. Supreme Court Research Guide: Overview*, Univ. Mich. L. Lib. (last updated Feb. 4, 2022), https://libguides.law.umich.edu/scotus.

7 The Court issued opinions in 69 cases during its October 2020 term. It reversed 55 lower court decisions (79.7 percent) and affirmed 14. *SCOTUS case reversal rates (2007–Present)*, Ballotpedia (last visited June 1, 2022).

8 Bruce D. Greenberg, *Supreme Court of New Jersey Year in Review–2019–2020,* New Jersey Appellate Law (Oct. 7, 2020), http://appellatelaw-nj.com/supreme-court-of-new-jersey-year-in-review-2019-2020/.

9 Bruce D. Greenberg, *Supreme Court Oral Argument Tips From Chief Justice Rabner*, New Jersey Appellate Law (Mar. 20, 2019), http://appellatelaw-nj.com/supreme-court-oral-argument-tips-from-chief-justice-rabner/.

10 Mark A. Neubauer, *The Disappearing Oral Argument*, 48 Litig. 40 (2022).

11 K. Larkins Jr., *Oral Argument on Motions*, 23 Litig. 16, 16 (1997).

12 Michael Vitiello, *Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill*, 45 Seton Hall L. Rev. 1031, 1044 (2015).

court.[13] Lisa McElroy sums it up this way: "[S]peaking—like writing—is in and of itself a form of thinking."[14] In other words, while Yogi Berra may have said, "you can hear a lot by listening,"[15] these authors tell us that you can learn a lot by speaking.

## II. The bibliography

The universe of materials on oral advocacy is predictably large, and this bibliography does not purport to include them all. By necessity, lines must be drawn, and the majority of the works cited below were published after 2000. The bibliography includes books and articles covering both "oral argument" and "oral advocacy," but materials on the broader topic of public speaking have been omitted. I am responsible for the inevitable omissions.

Many books combine discussions of both legal writing and oral advocacy, and I have included the relevant chapters in the bibliography. Articles fell roughly into three categories: scholarly articles in law journals; articles written for a national audience in periodicals like *Litigation*, the ABA's quarterly publication; and short, practice-oriented works that appear in various local and state bar journals. This bibliography is principally comprised of relevant law journal articles and a selection of the widely circulated periodicals, but almost none of the short works, which were overwhelming in number and often jurisdiction specific. The bibliography also largely excludes articles that offer granular analyses of the workings of the United States Supreme Court. While these touch on oral argument, the empirical work done on reversal rates, argument length, and what cases generate the most questions (and from whom) are beyond the scope of this work.

The materials below are categorized, with unavoidable overlap, as follows: (1) Books written about oral advocacy specifically or, more frequently, both written and oral advocacy; (2) Pedagogy; (3) Practice; (4) Oral advocacy beyond the appellate courtroom; (5) Does oral argument matter?; (6) Bias in oral advocacy; and (7) Virtual oral advocacy.

13 Edward T. Swaine, *Infrequently Asked Questions*, 17 J. App. Prac. & Process 271, 284 (2016).

14 Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 Ind. L.J. 589, 594 (2009).

15 Kravitz, *supra* note 3, at 267.

### 1. Books and book chapters about oral argument generally

Oral argument is certainly responsible for "generating . . . adrenaline,"[16] as Mary Beth Beazley points out, but the excitement of standing at the podium is typically preceded by long hours spent researching and drafting the brief. Hence, much of what is written about oral advocacy is coupled with guidance on brief writing, as in many of the books listed below.

Am. Bar Ass'n, Legal Writing Sourcebook 116 (3d ed. 2020).

Mary Beth Beazley, A Practical Guide to Appellate Advocacy ch. 13 (5th ed. 2018).

Ursula Bentele & Eve Cary, Appellate Advocacy: Principles and Practice (5th ed. 2012).

Carole Berry & Raymond Michael Ripple, Effective Appellate Advocacy: Brief Writing and Oral Argument chs. 8–10 (5th ed. 2016).

Brooke J. Bowman et al., Stetson Univ.: Inst. for the Advancement of Legal Commc'n, Oral Argument: The Essential Guide (2018).

David J. Dempsey, Legally Speaking: 40 Powerful Presentation Principles Lawyers Need to Know (rev. & updated ed. 2009).

J. Scott Colesanti, Oral Advocacy: Style and Substance (2017).

Alan L. Dworsky, The Little Book on Oral Argument (2d ed. 2018).

Tessa Dysart et al., Winning on appeal: better briefs and oral argument (3d ed. 2017).

Michael R. Fontham & Michael Vitiello, Persuasive Written and Oral Advocacy In Trial and Appellate Courts (Rachel E. Barkow et al. eds., 4th ed. 2007).

David Frederick, The Art of Oral Advocacy (3d ed. 2019).

Bryan A. Garner, The Winning Oral Argument: Enduring Principles with Supporting Comments from the Literature (1st ed. 2007).

Brian K. Johnson & Marsha Hunter, The Articulate Attorney: Public Speaking for Lawyers (2d ed. 2013).

Mary-Beth Moylan & Stephanie J. Thompson, Global Lawyering Skills (2d ed. 2018).

16 Mary Beth Beazley, A Practical Guide to Appellate Advocacy 288 (4th ed. 2014).

Michael D. Murray & Christy H. DeSanctis, Advanced Legal Writing and Oral Advocacy: Trials, Appeals, and Moot Court (3d ed. 2022).

Edward D. Re & Joseph R. Re, Brief Writing and Oral Argument chs. IX–X (9th ed. 2005).

Joan M. Rocklin et al., An Advocate Persuades ch. 14 (2016).

Randall P. Ryder et al., Advocacy on Appeal (4th ed. 2021).

Robert N. Sayler & Molly Bishop Shadel, Tongue-Tied America: Reviving The Art of Verbal Persuasion (2011).

Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges chs. 55–111 (3d ed. 2008).

Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing (3d ed. 2013).

Steven Wisotsky, Speaking With Power and Style: A Guide for Lawyers and Law Students (2013).

## 2. Pedagogy

Alarmingly, some commentators say that courts are limiting or eliminating oral argument not just because their dockets are bursting, but also because the lawyers are not very good at it. According to the Oral Argument Task Force Report of the American Academy of Appellate Lawyers, "[F]or some appellate judges, the problem with oral argument is the poor quality of the lawyers' work. We know that appellate courts could be more efficient if they received a better average quality of advocacy in both briefs and oral argument."[17] Judge Kravitz is more direct. He says, "I am also told that lawyers are not good oral advocates and that as a result, oral argument is a waste of time."[18] This, of course, sets up a self-fulfilling prophecy, Kravitz says, "for lawyers are unlikely to develop strong oral-argument skills if they almost never have the opportunity to use them."[19]

For most lawyers, practice in oral advocacy begins in law school, in first-year legal writing courses, upper-level appellate programs, trial advocacy programs, and moot courts. These programs, and moot courts in particular, have their critics, who argue that moot courts have a "make-believe quality" that renders them pedagogically ineffective.[20] Michael V.

17 Am. Acad. of Appellate Lawyers, Oral Argument Task Force Report 14 (Oct. 2015), https://www.appellateacademy.org/publications/oa_final_report_10_15_15.pdf.

18 Kravitz, *supra* note 3, at 270.

19 *Id.*

20 Alex Kozinski, *In Praise of Moot Court—Not!*, 97 Colum. L. Rev. 178, 178-79 (1997).

Hernandez concedes that "the process can be a bit artificial," but adds that we who teach in these programs also know "that shortcoming characterizes any simulated activity."[21] Those shortcomings vanish when we see people "literally transformed for the better by their experiences in moot court," Hernandez says.[22] "Students who were petrified by the thought of speaking in public, much less making an oral argument before a panel of real judges under adversarial fire, suddenly have come alive in the heat of battle."[23]

These articles help us ignite our students' passion for advocacy through oral argument. Part 1 includes articles about teaching oral argument in a variety of contexts, while Part 2 is focused on teaching through moot courts.

**Part 1: Teaching oral argument**

Heather Baxter, *Using* Hamilton's *"Farmer Refuted" to Teach Oral Argument*, 27 Persps. 66 (2019).

Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 Stan. L. & Pol'y Rev. 425 (2013).

James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 Stetson L. Rev. 75 (2008).

Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 BYU Educ. & L.J. 299 (2003).

Joy Kanwar, *Avatars, Acting and Imagination: Bringing New Techniques into the Legal Classroom*, 43 J. Legal Pro. 1 (2018).

Franklyn P. Salimbene, *Using Moot Court Simulations as Teaching Tools: An Implementation Guide for Business Law Instructors*, 19 Atl. L.J. 177 (2017).

Louis J. Sirico Jr., *Teaching Oral Argument*, 7 Persps. 17 (1998).

Stephanie A. Vaughan, *Experiential Learning: Moving Forward in Teaching Oral Advocacy Skills by Looking Back at the Origins of Rhetoric*, 59 S. Tex. L. Rev. 121 (2017).

21 Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court-Not!,"* 17 Rev. Litig. 69, 71 (1998).

22 *Id.* at 77.

23 *Id.*

Michael Vitiello, *Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill*, 45 Seton Hall L. Rev. 1031 (2015).

Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 Miss. L.J. 869 (2006).

C.J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 Suffolk J. Trial & App. Advoc. 203 (2020).

Emily Zimmerman, *Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy*, 12 Persps. 109 (2002).

**Part 2: Moot court**

***Books***

James Dimitri et al., The Legal Writing Inst., The Moot Court Advisor's Handbook: A Guide for Law Students, Faculty, and Practitioners (2015).

***Articles***

David W. Case, *A Pedagogical Rationale for the Law Professor as Moot Court Coach*, 89 Miss. L.J. 367 (2020).

Darby Dickerson, *In Re Moot Court*, 29 Stetson L. Rev. 1217 (2000).

Richard E. Finneran, *Wherefore Moot Court?*, 53 Wash. U. J.L. & Pol'y 121 (2017).

Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court-Not!,"* 17 Rev. Litig. 69 (1998).

Alex Kozinski, *In Praise of Moot Court—Not!*, 97 Colum. L. Rev. 178 (1997).

Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle,* 37 U. Mem. L. Rev. 45 (2006).

Gerald Lebovits et al., *Winning the Moot Court Oral Argument: A Guide for Intramural and Intermural Moot Court Competitors*, 41 Cap. U. L. Rev. 887 (2013).

Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, 69 Tex. B.J. 224 (2006).

## 3. Practice

The literature confirms that you need to do two things to succeed in oral argument: First, prepare. Second: answer the court's questions. It is that easy, and that difficult. These authors give us guidance on how

to prepare for argument; how to handle a hot *or* cold bench; crafting a rebuttal; and when to use humor (never).[24] There is no shortage of advice or guidance on how to do an oral argument, but at the end of the day, perhaps Ruth Bader Ginsburg said it best: "At argument, gems will be missed if counsel forgets to speak clearly, slowly, with a full voice, and to maintain good eye contact with the judges."[25]

Part 1 includes articles from a variety of sources on topics both broad—like fielding questions from the bench—and narrow, like swearing in court. Part 2 is a compilation of advice from our audience: the judges and law clerks who hear our arguments. Part 3 recognizes that, as Mark Twain is credited with saying, "There are two types of speakers: Those who get nervous, and those who are liars." [26] The articles in this section reassure us that if Simone Biles can survive a bout of "the twisties," so can we.[27]

**Part 1: General guidance**

***Articles***

Timothy S. Bishop, *Trial and Error: Oral Argument in the Roberts Court*, 35 Litig. 6 (2009).

Eric Caugh, *Splitting Oral Argument: Avoiding Misadventures in Division*, Am. Bar Ass'n (Nov. 28, 2018), https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2018/fall2018-splitting-oral-argument-avoiding-misadventures-in-division.

Cynthia K. Conlon & Julie M. Karaba, *May It Please the Court: Questions About Policy at Oral Argument*, 8 Nw. J. L. & Soc. Pol'y 89 (2012).

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25 Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 569 (1999).

26 Jerry Weissman, *Another Humorous View on the Fear of Public Speaking*, Forbes (June 17, 2014), https://www.forbes.com/sites/jerryweissman/2014/06/17/another-humorous-view-on-the-fear-of-public-speaking/?sh=60f448716708.

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Stephanie A. Vaughan, *Persuasion is an Art . . . But It is Also an Invaluable Tool in Advocacy*, 61 Baylor L. Rev. 635 (2009).

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### 4. Oral advocacy beyond the appellate courtroom

Speaking can be a tool for persuasion and a tool for pedagogy. These authors recognize that lawyers and law students speak in a variety of contexts, for a variety of purposes. They give us guidance on harnessing the power of oral advocacy outside of the traditional appellate courtroom.

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Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 Legal Comm. & Rhetoric 73 (2011).

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Paula Gerber & Melissa Castan, *Practice Meets Theory: Using Moots as a Tool to Teach Human Rights Law*, 62 J. Legal Educ. 298 (2012).

John K. Larkins Jr., *Oral Argument on Motions*, 23 Litig. 16 (1997).

Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 Ind. L.J. 589 (2009).

Michael D. Murray, *The Positive Pedagogy of Presentations to Partners*, 21 Second Draft 11 (2006).

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Rachel Stabler, *Making the Most out of Court Observations in the 1L Year*, 33 Second Draft 40 (2020).

### 5. Does oral argument matter?

According to Ruth Bader Ginsburg, "Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between

court and counsel."[28] That dialogue is important to the decisionmaking process. Even when the court does not change its views based on counsels' arguments, "the lawyers during oral argument can provide judges with a measure of confidence in their decision making that cannot be provided by written briefs alone."[29] Judge Kravitz explains that "[o]ral argument can convey a sense of urgency, sincerity, and (dare I say?) emotion that is not easily communicated by a written brief, for the speaker has at his disposal intonation, gesture, and other non-verbal cues that are unavailable to the writer."[30] To dispense with oral argument, some writers argue, "is a loss like teaching a law school class by reading judicial opinions aloud without discussion or question and answer."[31] These articles largely defend oral argument and raise a variety of concerns about its decreasing frequency.

***Articles***

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David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeal: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119 (2012).

Clark Collings, *Oral Argument Reform in Utah's Appellate Courts: Seeking to Revitalize Oral Argument Through Procedural Modification*, 2013 Utah L. Rev. OnLaw 174.

Marshall L. Davidson III, *Oral Argument: Transformation, Troubles, and Trends*, 5 Belmont L. Rev. 203 (2018).

Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. App. Prac. & Process 121 (2007).

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28 Ginsburg, *supra* note 25.

29 Kravitz, *supra* note 3, at 267.

30 *Id.* at 286.

31 David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119, 125 (2012).

Spencer D. Levine, *Differing Schools of Thought: Changing Perceptions of Oral Argument*, 31 St. Thomas L. Rev. 133 (2019).

James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!,* 19 J. App. Prac. & Process 89 (2018).

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Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25 (1999).

Mark A. Neubauer, *The Disappearing Oral Argument*, 48 Litig. 40 (2022).

Edward T. Swaine, *Infrequently Asked Questions*, 17 J. App. Prac. & Process 271 (2016).

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Jay Tidmarsh, *The Future of Oral Argument*, 48 Loy. U. Chi. L.J. 475, 478 n.16 (2016).

Warren D. Wolfson, *Oral Argument: Does it Matter?*, 35 Ind. L. Rev. 451 (2002).

### 6. Bias in oral advocacy

From the moot courtroom to the United States Supreme Court, we continue to find bias in oral advocacy. The good news is, we continue to grapple with it and to publish across a range of topics, from the amount of speaking time women get in the Supreme Court to the reality that our clothes, our hair, and our voices may still be seen as measures of our credibility.

Michael J. Higdon, *Oral Advocacy and Vocal Fry: The Unseemly, Sexist Side of Nonverbal Persuasion*, 13 Legal Comm. & Rhetoric 209 (2016).

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Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 Pace L. Rev. 379 (2017).

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### 7. Virtual oral advocacy

It started with a cat or, more specifically, a Zoom cat filter that went viral and reminded all of us that we are not alone in our halting, clumsy, and sometimes riotous efforts to flip the switch on our lives and learn to communicate virtually. Whatever the future may hold in terms of masks, boosters, and variants, the consensus is that virtual arguments are here to stay. They will not replace every argument, but judges and litigants are embracing them for the convenience and efficiency they (usually) offer. Like it or not, this is the future. These articles begin to show us the way.

Pierre H. Bergeron, *COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. App. Prac. & Process 193 (2021).

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Christine Tamer & Melissa Schultz, *The Adaptive Law Professor: Ten Tips for Keeping the Magic of an Oral Argument Competition Alive on Zoom*, 52 Syllabus 7 (2021).

Edward Toussaint, *Minnesota Court of Appeals Hears Oral Argument Via Interactive Teleconferencing Technology*, 2 J. App. Prac. & Process 395 (2000).

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# Legal Writing Mechanics

## A Bibliography

Margaret Hannon*

## I. Introduction

Great legal writing is about more than mechanics. But careful attention to legal writing mechanics is nevertheless critical for effective, clear, and persuasive writing. Proper grammar, usage, and correct punctuation makes analysis clearer and therefore more effective. It also shows the reader that the writer has paid close attention to detail, which makes the reader more likely to find the writer credible.[1] Relatedly, communicating in plain language is critical to making sure that "readers can easily find what they need, understand what they find, and use that information."[2] And proper citation—or even better, stylish citation[3]—helps the reader easily understand what kind of persuasive value the cited authority has, how the cited authority supports the proposition, and where to find the cited authority, all without requiring the reader to read the authority themselves.

Because legal writing mechanics are so essential to effective communication for all legal writers, this bibliography aims to collect resources that explore various types of legal writing mechanics, identify best practices with respect to each of these fundamental aspects of legal writing, and advance our understanding of how legal writing mechanics contribute to overall communication.

* Clinical Professor of Law, University of Michigan Law School. Thank you to Hannah Shilling for their invaluable research assistance and to Ted Becker, Alexa Chew, and Beth Wilensky for their feedback. Many thanks also to Ruth Anne Robbins for encouraging me to write this bibliography and to Kristen Murray and Hadley Van Vactor Kroll for their exceptional editing.

1 Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 186–87 (2d ed. 2008) (explaining that strong command of grammar, usage, and punctuation is essential to the writer's credibility).

2 *Clarity International*, Plain Legal Language, https://www.clarity-international.org/plain-legal-language/ (last visited Feb. 18, 2021).

3 Alexa Z. Chew, *Stylish Legal Citation*, 71 Ark. L. Rev. 823 (2019).

## II. The bibliography

Legal writing scholars have invested a significant amount of time and energy in examining legal writing mechanics and setting out best practices. This bibliography gathers these resources and divides them into three broad categories: grammar, usage, and punctuation; plain language; and citation.[4] There is some unavoidable overlap between these categories, so where books or articles could be placed into more than one category, I have attempted to assign each to its primary category. My goal is for this bibliography to serve as a resource for any legal writer, whether practitioner, academic, law student, or judge. I also hope that this bibliography will inspire future scholarship on legal writing mechanics.

This bibliography does not include visual aspects of legal writing such as document design, typography, or images, though those topics could also fall into the broad category of legal writing mechanics. Readers interested in learning more about those areas should consult Ellie Margolis's excellent bibliography on Visual Legal Writing.[5] In addition, this bibliography does not include materials focused on legal writing pedagogy and generally excludes bar journal articles, though I hope that the materials included here will nonetheless be helpful resources for teachers and practitioners. For example, many legal writing textbooks cover these topics, but these textbooks have generally been excluded from this bibliography. This bibliography also excludes materials focused specifically on contract drafting.

### A. Grammar, usage, and punctuation

Grammar, usage, and punctuation are critical components of effective legal writing because they have a profound impact on the readability and meaning of a document.[6] As a result, there is a robust body of work focusing on proper grammar, usage, and punctuation; how proper grammar, usage, and punctuation affects legal analysis; and how grammar, usage, and punctuation can be used as tools for effective legal writing style.

Legal scholars have paid particular attention to passive voice, the doctrine of the last antecedent, and, most recently, pronouns and the use of the singular they. On the punctuation side, scholars debate the use of the Oxford (or serial) comma, hyphens, and the possessive apostrophe.

4 In general, this bibliography takes a descriptive approach in that it does not choose between various options for how language should be used but instead compiles resources addressing a range of approaches. In some areas, however, the bibliography is prescriptive in that it focuses on resources that have advocated for legal writers to make particular choices in their writing. *See, e.g.*, *infra* section II.B.

5 Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 Legal Comm. & Rhetoric 195 (2021).

6 Alexa Z. Chew & Katie Rose Guest Pryal, The Complete Legal Writer 403 (2d ed. 2020).

Some of the books listed below are style manuals that do not focus exclusively on grammar, usage, and punctuation, but they are included in this bibliography because they include significant discussion of those mechanics specifically in the context of legal writing. Most of the books included in this bibliography are focused specifically on legal writing, but I've included a few others that are especially helpful for legal writers. For example, *Dreyer's English* is particularly helpful for legal writers: it tackles persistent language errors, reinforces good habits, and encourages concision.[7] Similarly, while Strunk & White is not written for legal writers, many legal writers have treated it as authoritative on matters of grammar and style, particularly because of its focus on clarity, brevity, and boldness.[8]

**Articles**

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Jill Barton, *Supreme Court Splits ... on Grammar and Writing Style*, 17 Scribes J. Legal Writing 33 (2017).

Ryan C. Black & Timothy R. Johnson, *Obsessive Over the Possessive at the Supreme Court of the United States: Exploring SCOTUS'/SCOTUS's Use of Possessive Apostrophes*, 22 J. App. Prac. & Process 14 (2022).

Heidi K. Brown, *Get with the Pronoun*, 17 Legal Comm. & Rhetoric 61 (2020).

Jacob Carpenter, *An Active Look at Passive Voice*, 19 Legal Comm. & Rhetoric 95 (2022).

Mark Cooney, *Style is Substance: Collected Cases Showing Why It Matters*, 14 Scribes J. Legal Writing 1 (2012).

Doug Coulson, *More than Verbs: An Introduction to Transitivity in Legal Argument*, 19 Scribes J. Legal Writing 81 (2020).

Judith D. Fischer, *A Contemporary Take on Strunk and White for Legal Writers*, 15 Scribes J. Legal Writing 127 (2013).

Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in Barnhart, Why Both Are Weak, and How Textualism Postures*, 16 Scribes J. Legal Writing 5 (2015).

Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, Tex. J. Bus. L., Fall 2004, at 199.

7 Kristen E. Murray, *Meta-Questions for Legal Writers,* 17 Legal Comm. & Rhetoric 167, 169 (2020) (reviewing Dreyer's English: An Utterly Correct Guide to Grammar and Style); Jonathan Tietz, Book Note, *On Lawyers and Copy Editors*, 118 Mich. L. Rev. 1307, 1309 (2020).

8 Judith D. Fischer, *A Contemporary Take on Strunk and White for Legal Writers*, 15 Scribes J. Legal Writing 127, 130, 146 (2013).

Joan Ames Magat, *Hawking Hyphens in Compound Modifiers*, 11 Legal Comm. & Rhetoric 153 (2014).

David A. Marcello, *The Case of the Serial Comma: What Can Plain-Language Drafting Tell Legislative Drafters?*, 19 Scribes J. Legal Writing 127 (2020).

Elitza Meyer, *It's Not the Oxford Comma, It's the Ambiguity*, 8 Houston L. Rev.: Off the Record 25 (2017).

Jery Payne, *Gluing Qualifiers with a Knife: Another Look at Why a List Might Backfire*, 19 Scribes J. Legal Writing 143 (2020).

Kristen Konrad Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Legal Writing 257 (2002).

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Stephen V. Armstrong, Timothy Terrell & Jarrod F. Reich, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (4th ed. 2021).

Robert E. Bacharach, Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word (2020).

Deborah E. Bouchoux, Aspen Handbook for Legal Writers: A Practical Reference (5th ed. 2021).

Deborah Cupples & Margaret Temple-Smith, Grammar, Punctuation & Style: A Quick Guide for Lawyers and Other Writers (2013).

Benjamin Dreyer, Dreyer's English: An Utterly Correct Guide to Clarity and Style (2019).

Anne Enquist, Laurel Currie Oates & Jeremy Francis, *Just Writing*: Grammar, Punctuation, and Style for the Legal Writer (6th ed., Aspen Publ'g 2022).

Lenné Eidson Espenschied, The Grammar and Writing Handbook for Lawyers (ABA 2011).

Ian Gallacher, A Form and Style Manual for Lawyers (2005).

Bryan A. Garner, Garner's Dictionary of Legal Usage (3d ed. 2011).

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Bryan A. Garner, *The Redbook: A Manual on Legal Style* (4th ed., West Academic 2018).

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Ross Guberman, Point Made: How to Write Like the Nation's Top Advocates (2d ed. 2014).

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Jane N. Richmond, Legal Writing: Form and Function (2002).

University of Chicago, Chicago Manual of Style (17th ed. 2017), https://www.chicagomanualofstyle.org/home.html.

### B. Plain language

Since the early 1990s, most legal writing experts have advocated for the use of "plain language" rather than legalese.[9] Plain language, also referred to as plain English, is about more than vocabulary: "It involves all the techniques for clear communication—planning the document, designing it, organizing it, writing clear sentences, using plain words, and testing the document whenever possible on typical readers.[10] Writing in plain English helps readers better understand what they are reading, leads to fewer questions about what they have read, and saves readers time and money.[11]

It would be difficult to include every plain language resource here because of the large volume of work on plain language communication, so this list focuses on the most authoritative works. This includes numerous works by Professor Joe Kimble, a leading expert on plain language. While

9 Julie A. Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. Rev. 287 (2011).

10 Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1, 3 (1997).

11 *Id.*

there have been critiques of plain language,[12] this bibliography takes the perspective that writing in plain language is essential to effective communication.

In addition to the articles and books listed below, readers interested in plain language may be interested in *Clarity*,[13] an international plain language organization that publishes *The Clarity Journal*.[14] The Plain Language Action and Information Network, a "working group of federal employees from different agencies and specialties who support the use of clear communication in government writing," also provides extensive resources on its website.[15] Finally, the *Michigan Bar Journal* publishes a monthly Plain Language column that is "widely read outside Michigan"[16] and "the longest-running legal-writing column in any journal."[17]

### Articles

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Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. Cooley L. Rev. 1 (1992).

12 *See, e.g.*, David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 Rutgers L.J. 713 (2002); Richard Hyland, *A Defense of Legal Writing*, 134 U. Pa. L. Rev. 599 (1986); Sofia Turfler, *Language Ideology and the Plain-Language Movement: How Straight-Talkers Sell Linguistic Myths*, 12 Legal Comm. & Rhetoric 195 (2015).

13 Clarity International, https://www.clarity-international.org/ (last visited May 25, 2022).

14 Available at https://www.clarity-international.org/clarity-journal/. *The Clarity Journal* "features the latest plain language research, practical advice, before-and-after examples, success stories, campaign strategies and much more."

15 *Plain Language Action and Information Network*, PlainLanguage.gov, https://www.plainlanguage.gov/ (last visited May 25, 2022). These resources include the Plain Writing Act of 2020, the Federal Plain Language Guidelines, and resources for federal departments and agencies. *See Law and Regulations*, PlainLanguage.gov, https://www.plainlanguage.gov/law/ (last visited May 25, 2022). The site also includes federal, state, and international style guidelines. *Style Guides*, PlainLanguage.gov, https://www.plainlanguage.gov/resources/guides/ (last visited May 25, 2022).

16 Bryan A. Garner, *Bryan Garner touts the Michigan Bar Journal's celebration of plain English*, ABA J. (Oct. 1, 2021), https://www.abajournal.com/magazine/article/celebrating-plain-english-in-michigan.

17 *Plain Language Column*, State Bar of Michigan, https://www.michbar.org/generalinfo/plainenglish/home (last visited Feb. 23, 2022).

Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 Scribes J. Legal Writing 109 (2000).

Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 Scribes J. Legal Writing 1 (2004).

Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1 (1997).

Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does it Matter?*, 4 Drexel L. Rev. 417 (2012).

Wayne Schiess, *What Plain English Really Is*, 9 Scribes J. Legal Writing 43 (2004).

Wayne Schiess, *The Art of Consumer Drafting*, 11 Scribes J. Legal Writing 1 (2007).

Wayne Schiess, *Writing for Your Client*, 12 Scribes J. Legal Writing 123 (2009).

**Books**

Michèle M. Asprey, Plain Language for Lawyers 83 (4th ed. 2010).

Peter Butt, Modern Legal Drafting: A Guide to Using Clearer Language (Cambridge Univ. Press ed., 3d ed. 2013)

Bryan A. Garner, Legal Writing in Plain English (2d ed. 2013).

Joseph Kimble, Lifting the Fog of Legalese: Essays on Plain Language (2006).

Joseph Kimble, Seeing Through Legalese: More Essays on Plain Language (2017).

Joseph Kimble, Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law (2012).

Robert J. Martineau & Michael B. Salerno, Legal, Legislative and Rule Drafting in Plain English (2005).

David Mellinkoff, The Language of the Law (1963).

Wayne Schiess, Writing for the Legal Audience (2d ed. 2014).

Wayne Schiess, Preparing Plain Legal Documents for Nonlawyers (2015).

Richard Wydick & Amy Sloan, Plain English for Lawyers (6th ed. 2019).

## C. Citation

### Citation manuals

The legal profession loves rules, and citations are not immune from our affection. The inaugural edition of *The Bluebook* was published in 1926,[18] and it is now in its twenty-first edition. Law journals began adopting *The Bluebook* in the 1930s, and it eventually became the citation guide most widely used by academics and practitioners.[19] *The Bluebook* is now marketed as the "definitive style guide for legal citation in the United States."[20]

The *ALWD Guide*, initially published in 2000, is another commonly adopted citation manual.[21] The *ALWD Guide* focuses on citation forms used by practitioners, and compared to *The Bluebook*, is recognized as a more user-friendly and more easily taught citation manual.[22]

Another, lesser-used alternative to *The Bluebook* is *The Indigo Book*, which distinguishes itself from *The Bluebook* and other citation manuals by being free of charge, making it a more easily accessible resource.[23] In addition, because it is in the public domain, its creators hope that users will copy it, distribute it, and improve on it.[24] The *Universal Citation Guide* from the American Association of Law Libraries, on the other hand, is not designed to compete with *The Bluebook* but to complement it "by effectively bridging the gap between the current print-based citation forms and the technology-based future of legal information."[25]

This bibliography does not include jurisdiction-,[26] court-,[27] and journal-specific citation guides[28] because they are not widely adopted.[29]

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18 Susie Salmon, *Shedding the Uniform: Beyond a "Uniform System of Citation" to a More Efficient Fit*, 99 Marq. L. Rev. 763, 775 (2016).

19 Alex Glashausser, *Citation and Representation*, 55 Vand. L. Rev. 59, 62 (2002).

20 The Bluebook: A Uniform System of Citation 1 (Columbia L. Review Ass'n et al. eds., 21st ed. 2020).

21 Salmon, *supra* note 18, at 784.

22 *Id.* at 777, 787.

23 The Indigo Book: An Open and Compatible Implementation of a Uniform System of Citation, *Introduction*, https://law.resource.org/pub/us/code/blue/IndigoBook.html (last visited May 25, 2022).

24 *Id.*

25 Am. Ass'n of Libraries, https://www.aallnet.org/resources-publications/publications/universal-citation-guide/ (last visited May 11, 2022).

26 *See, e.g.*, Texas Law Review, Texas Rules of Form: The Greenbook (14th ed. 2018).

27 *See, e.g.*, Supreme Court of the United States Office of the Reporter of Decisions, The Supreme Court's Style Guide (Jack Metzler ed. 2016), https://budgetcounsel.files.wordpress.com/2018/10/supreme-courts-style-guide.pdf; Michigan Supreme Court Office of the Reporter of Decisions, Michigan Appellate Opinion Manual (2017), https://www.courts.michigan.gov/4a4a11/siteassets/publications/manuals/msc/miappopmanual.pdf.

28 *See, e.g.*, The Maroonbook: University of Chicago Manual of Legal Citation (3d ed. 2019).

29 Interestingly, individual courts are taking the lead in promoting open access to the law, as they are among the first to permit or require vendor-neutral citation. Coleen M. Barger, *The Uncertain Status of Citation Reform: An Update for the Undecided*, 1 J. App. Prac. & Process 59, 89 (1999).

American Association of Law Libraries Committee on Citation Formats, Universal Citation Guide (3d ed. 2014).

The Bluebook: A Uniform System of Citation (Columbia L. Review Ass'n et al. eds., 21st ed. 2020), also available online at legalbluebook.com.

The Indigo Book: An Open and Compatible Implementation of a Uniform System of Citation, https://law.resource.org/pub/us/code/blue/IndigoBook.html.

Carolyn V. Williams, ALWD Guide to Legal Citation (Wolters Kluwer ed., 7th ed. 2021).

**Select citation manual reviews**

With *The Bluebook*'s popularity came "strident criticism," dating back to at least the 1940s."[30] For example, one critic (hyperbolically) complained that "[t]he operating principle of the Bluebook is that 'NATURE ABHORRETH A VACUUM,' so the Bluebook has provided a way to cite every single source since the invention of papyrus."[31]

Because there is such an extensive history of critique of citation manuals, providing an exhaustive list of reviews would be challenging. So, this list includes only select reviews, focusing in particular on foundational and more recent reviews and reviews with a broader focus than changes to the most recent edition at the time. In addition, it focuses on reviews of *The Bluebook* and *The ALWD Guide* and does not include reviews of other citation manuals. Finally, this list does not include study guides on citation.

Bret D. Asbury & Thomas J.B. Cole, *Why the Bluebook Matters: The Virtues Judge Posner and Other Critics Overlook*, 79 Tenn. L. Rev. 95 (2012).

Stephen M. Darrow & Jonathan J. Darrow, *Beating the Bluebook Blues: A Response to Judge Posner*, 109 Mich. L. Rev. First Impressions 92 (2011).

Jennifer L. Cordle, *ALWD Citation Manual: A Grammar Guide to the Language of Legal Citation*, 26 U. Ark. Little Rock L. Rev. 573 (2004).

A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook (Including Compendia of State and Federal Court Rules Concerning Citation Form)*, 26 Stetson L. Rev. 53 (1996).

30 Glashausser, *supra* note 19, at 63; Salmon, *supra* note 18, at 779.

31 James D. Gordon III, *How Not to Succeed in Law School*, 100 Yale L.J. 1679, 1692 (1991).

Christine Hurt, *The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship*, 82 Ind. L.J. 49 (2007).

M.H. Sam Jacobson, *The ALWD Citation Manual: A Clear Improvement Over the Bluebook*, 3 J. App. Prac. & Process 139 (2001).

Alex Glashausser, *Citation and Representation*, 55 Vand. L. Rev. 59 (2002).

James W. Paulsen, *An Uninformed System of Citation*, 105 Harv. L. Rev. 1780 (1992).

Richard A. Posner, *The Bluebook Blues*, 120 Yale L.J. 850 (2011).

Richard A. Posner, *Goodbye to the Bluebook*, 53 U. Chi. L. Rev. 1343 (1986).

Melissa H. Weresh, *The ALWD Citation Manual: A Coup de Grace*, 23 U. Ark. L. Rev. 775 (2001).

David J.S. Ziff, *The Worst System of Citation Except for All the Others*, 66 J. Legal. Educ. 668 (2017).

### Citation form and its impact

Legal citation has existed in some form since ancient Rome,[32] so it is perhaps not surprising that practitioners, law students, and academics have spent considerable energy focused on its importance and impact. Citations are a critical component of legal analysis because they communicate to the reader both how to find the authority that supports a legal argument *and* the weight of that support.[33] Citations, therefore, serve as a crucial connection between the legal argument and the basis for that argument.[34] As a result, scholarship in this area is about more than just form.

A significant amount of scholarship on citation addresses its broader impact beyond its use in a particular legal document. For example, traditional citation form impacts where legal researchers conduct their research because it directs researchers to "traditional systems developed for references to print sources."[35] This, in turn, limits open access to the law.[36] In addition, there are costs associated with conforming to uniform citation codes, including time spent teaching citation format as well as the time spent checking and revising citations.[37] These costs, then, may

32 Salmon, *supra* note 18, at 772–73.

33 Alexa Z. Chew, *Citation Literacy*, 70 Ark. L. Rev. 869, 872–73 (2018).

34 Kris Franklin, *". . . See Erie": Critical Study of Legal Authority*, 31 U. Ark. Little Rock L. Rev. 109, 111 (2008).

35 Barger, *supra* note 29, at 60.

36 *See id.* at 61.

37 Salmon, *supra* note 18, at 764–65.

contribute to exacerbating existing inequities in the legal system.[38] On the other hand, citations can also be used as a tool to confront the failures of the legal system and its legacy of slavery.[39]

While citation is not just about the form of a citation itself, the form of a citation is nevertheless important. Resources abound as to citation form more generally as well as specific aspects of citation form such as the use of signals, parentheticals, and quotations.

Scholars have spent considerable time debating the benefits of inline citations versus the use of footnoted citations. While Bryan Garner advocates for footnoted citations, most other legal writing experts conclude that inline citations are preferable for the reader, and those resources are included in a separate section below. This debate has been addressed extensively in bar journals, particularly with respect to local practices and issues. However, because bar journals are excluded from this bibliography, those articles are not included here.

This bibliography excludes legal citation resources focused on scholarly citation and scholarly citation counts as outside of the scope of this bibliography. In addition, this bibliography excludes resources that overlap with the concept of citation but which are not focused on the citations themselves. This includes, for example, scholarship on the weight of authority and the differences between unpublished and unreported cases.

**Articles on citation**

Coleen M. Barger, *The Uncertain Status of Citation Reform: An Update for the Undecided*, 1 J. App. Prac. & Process 59 (1999).

Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. App. Prac. & Process 61 (2019).

Alexa Z. Chew, *Citation Literacy*, 70 Ark. L. Rev. 869 (2018).

Alexa Z. Chew, *Stylish Legal Citation*, 71 Ark. L. Rev. 823 (2019).

Kris Franklin, *". . . . See Erie.": Critical Study of Legal Authority*, 31 U. Ark. Little Rock L. Rev. 109, 111 (2008).

Ian Gallacher, *Cite Unseen: How Neutral Citation and America's Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law*, 70 Alb. L. Rev. 491 (2007).

38 *Id.*

39 Justin Simard, *Citing Slavery*, 72 Stan. L. Rev. 79 (2020); Rule 10.7.1(d), The Bluebook, *supra* note 20, at 1; *Who is Citing Slavery*, Ziff Blog, https://ziffblog.wordpress.com/2022/02/02/who-is-citing-slavery/ (Feb. 2, 2022).

Christine Hurt, *Network Effects and Legal Citation: How Antitrust Theory Predicts Who Will Build a Better Bluebook Mousetrap in the Age of Electronic Mice*, 87 Iowa L. Rev. 1257 (2002).

Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2018).

Michael D. Murray, *For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning*, 38 U. Dayton L. Rev. 175 (2012).

Michael D. Murray, *The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs*, 10 Legal Comm. & Rhetoric 229 (2013).

Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed*, 48 Duke L.J. 1043 (1999).

Susie Salmon, *Shedding the Uniform: Beyond a "Uniform System of Citation" to a More Efficient Fit*, 99 Marq. L. Rev. 763 (2016).

Justin Simard, *Citing Slavery*, Stan. L. Rev. 79 (2020).

Eric P. Voigt, *Explanatory Parentheticals Can Pack a Persuasive Punch*, 45 McGeorge L. Rev. 269 (2013).

James H. Wyman, *Freeing the Law: Case Reporter Copyright and the Universal Citation System*, 24 Fla. St. U. L. Rev. 217 (1996).

**Articles on inline citations versus footnoted citations**

Edward R. Becker, *In Praise of Footnotes*, 74 Wash. U. L.Q. 1 (1996).

Bryan A. Garner, *The Citational Footnote*, 7 Scribes J. Legal Writing 97 (2000).

Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. Legal Educ. 65 (2010).

Peter M. Mansfield, *Citational Footnotes: Should Garner Win the Battle Against the In-Line Tradition?*, 19 App. Ad. L.J. 163 (2020).

Wayne Schiess & Elana Einhorn, *Bouncing and E-Bouncing: The End of the Citational Footnote?*, 26 App. Advoc. 409 (2014).

BOOK REVIEW

# Small Teaching, Big Impact

*Small Teaching: Everyday Lessons from the Science of Learning*
James M. Lang (Jossey-Bass 2016), 259 pages

Ashley B. Armstrong, rev'r*

James M. Lang's thesis in *Small Teaching* is simple: There are small things that educators can do to improve learning outcomes in their classrooms. Lang asserts that these "small but powerful modifications to our course design and teaching practices"[1] are easy for teachers to incorporate and supported by research on learning. Lang is well steeped in pedagogical best practices—he is the former director of the Center for Teaching Excellence at Assumption College in Worcester, MA, and he regularly writes for the *Chronicle of Higher Education*.[2]

While Lang is a former English professor, the techniques he describes in *Small Teaching* can be adapted for any learning environment. The strategies that he offers are based both on the learning sciences and Lang's own observations—whether he himself productively used the techniques in his classroom or observed other educators employ them successfully.[3] The suggested methods include short, five- to ten-minute learning activities, one-time interventions (activities that might span an entire class period during the semester), and adjustments to course design and student-teacher communication.[4] *Small Teaching* offers a

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1 James M. Lang, Small Teaching 5 (2016) (advocating for "small shifts in how we design our courses, conduct our classrooms, and communicate with our students"). Lang recently published a second edition of *Small Teaching* while I was in the process of writing this review. *See* James M. Lang, Small Teaching (2d ed. 2021). The new edition boasts "updated research, new examples and techniques, and brand-new resources." I look forward to reviewing these updates in a follow-up to this review.

2 *See, e.g.*, James M. Lang, *How to Improve Your Teaching—Fast*, Chron. Higher Educ. (Sept. 30, 2021); James M. Lang, *2 Ways to Fairly Grade Class Participation*, Chron. Higher Educ. (May 17, 2021), https://www. chronicle. com/article/2-ways-to-fairly-grade-class-participation; James M. Lang, *Distracted Minds: Why Your Students Can't Focus*, Chron. Higher Educ. (Sept. 14, 2020), https://www.chronicle.com/article/distracted-minds-why-your-students-cant-focus.

3 Lang, *supra* note 1, at 6–7.

4 *Id.* at 7–8.

variety of interventions, including how to effectively use opening and closing questions during class sessions to promote information retention, leveraging your syllabus as a tool in your teaching arsenal,[5] and balancing the benefits of interleaving[6] and massed versus spaced learning. Yes, some of the suggested techniques[7] would not work for my law students, but I found that the vast majority of the methods presented would easily transfer to the legal research and writing classroom. Additionally, some of Lang's suggestions on motivation and growth also apply to the supervisor-supervisee relationship—particularly those related to providing feedback.

*Small Teaching* is organized in three main parts: *Knowledge*, *Understanding*, and *Inspiration*. The first part—*Knowledge*—covers small teaching activities to help students absorb the course material, laying the foundation for higher-order activities like comprehension, application, synthesis, and evaluation.[8] Lang divides this section into three chapters, spanning techniques for introducing new material and reviewing old material with students: Retrieving, Predicting, and Interleaving. In the second part of the book—*Understanding*—Lang presents active learning techniques—helping students use the knowledge they are acquiring in the course to form deeper connections by "*doing* things in the classroom rather than merely sitting there passively."[9] Lang discusses ways to actively engage students in the section's three chapters: Connecting, Practicing, and Self-Explaining. In the final part of *Small Teaching—Inspiration*—Lang transitions to discussing how teachers can inspire students (and themselves), inviting educators to thoughtfully consider how they act and react in the classroom and how that affects the success of their courses.[10] This part is separated into chapters on Motivating, Growing, and Expanding.

Each chapter includes the same, easy-to-navigate subsections. Sandwiched between the chapter's introduction and conclusion, the reader is met with a description of the learning *theory* that provides support for the suggested teaching *models* that follow, a list of *principles* upon which those classroom interventions are based—intended to help professors

5 *See, e.g.*, *id*. at 36–37 (retrieval practice); *id.* at 184 (invoking self-transcendent purpose); *id.* at 210 (growth talk); *id.* at 214 ("Tips for Success in This Course").

6 *Id*. at 65 ("Interleaving . . . involves two related activities that promote high levels of long-term retention: a) spacing out learning sessions over time; and b) mixing up your practice of skills you are seeking to develop.").

7 For example, providing my students with an adlib-style set of lecture notes where they could fill in the blanks during class wouldn't fly in my very interactive, skills-based course—although I absolutely see how this is effective in other learning environments. *See id*. at 103.

8 *Id*. at 13 (discussing the Bloom taxonomy).

9 *Id.* at 85.

10 *Id*. at 161–62.

design their own models in the same vein, and a summary of *small teaching quick tips*. If you want the *TLDR*, you could simply read the *principles* and *small teaching quick tips* sections of each chapter and still glean a ton of useful, actionable information from this book. I plan on making myself a quick reference guide with my notes from those sections—something I can easily access as I think about updating my course for the next academic year. If you want a bit more depth on the proffered *quick tips*, then I suggest reviewing the *models*—which are detailed examples of the teaching, student communication, or course-design interventions.

I found myself least enamored with the *theory* sections of each chapter—they were too sparse for my liking. I wanted more information—more studies, and more details on the study designs so I could evaluate the experiments and their results. Even so, this limitation did not detract from the value of *Small Teaching*—after all, Lang's project was not intended as a comprehensive exploration of the theory behind why different interventions work; these sections were intended as a baseline for further exploration, with suggested sources for additional reading. Also, many of these interventions feel familiar; as you read the suggested interventions, I suspect that they will intuitively seem like good teaching practices (either based on your experience as a student, or because you have successfully used some of these techniques in your classroom).

And, even though the recommendations felt familiar, *Small Teaching* inspired me—as I journeyed through the chapters, I kept reflecting on how I could improve my teaching. I really liked Lang's suggestions on practicing[11] and self-explaining.[12] I would like to think I already deploy these strategies in my course but, as I read, I started seeing other ways to "amp up" my approach. For *practicing*, Lang encourages educators to think about the compendium of skills you expect your students to learn. Make a list. Then, think about how you can designate class time for students to practice each of these skills—for example, asking students to engage in an activity based on that day's material during the last ten to fifteen minutes of class.[13] I thought about my own legal writing course—while I give students time to practice rule synthesis during class (with instructor and peer feedback), for example, there are a host of skills that I introduce but do not ask them to try in class. Things that I could easily incorporate into my lesson plan—like giving them time to practice drafting a preliminary statement and complete analogies and distinctions. Why is creating time for practice in class important? *Because it promotes mindful learning*.

11 *Id.* at 113–36 (ch. 5: Practicing).

12 *Id.* at 137–59 (ch. 6: Self-Explaining).

13 *Id.* at 129.

Lang argues that if you are present when your students are practicing a new skill, you can intervene and help them think about what they are doing, provide feedback on the task in real time, and assist them if they get stuck.[14] I also appreciate this tactic because it is another way to meaningfully incorporate skills-based, active learning in the classroom.

*Small Teaching* also inspired me to think about how I teach legal citation. One technique that I plan to try stems from the self-explaining chapter, which is premised on the notion that learning is improved when students explain what they are doing as they do it.[15] Lang describes a "peer instruction" model[16] where the instructor poses a question, students work on it individually, then pair up with classmates and take turns discussing their response, followed by a second chance to answer the question. Finally, the instructor solicits responses and provides the correct answer. I absolutely can see this activity helping my students become more comfortable navigating a citation guide to correctly format legal citations. Comparing their responses and self-explaining how they reached their answer will provide them with additional practice, as well as the opportunity to learn how their peers approach this process.

Finally, I want to highlight two pieces of advice that Lang offers in the final part of his book—*Inspiration*. While his target audience is educators, these pieces of advice apply broadly—to anyone in a mentorship or supervisor role who works with students.

First, Lang invites educators to "think carefully about how our teaching and feedback practices might help shape student attitudes toward learning and intelligence *in ways that will enhance their learning—or, at the very least, will not detract from it*."[17] This is something I often think about—both in how I approach students in my classroom and the tone of my written feedback on their memos and briefs. Educators can help students cultivate a growth mindset by reminding them that they can improve—that "intelligence is malleable" and "hard work and effort" play a pivotal role in their success.[18] Lang wants educators to ask themselves—when you comment, "Are you telling students that they have fixed abilities? Or are you telling them that they can get better?"[19] *Small Teaching* encourages educators to give "growth-language feedback"[20] and

14 *Id.* at 124–45.

15 *Id.* at 138.

16 *Id.* at 152–54.

17 *Id.* at 163 (emphasis added).

18 *Id.* at 199.

19 *Id.* at 201.

20 *Id.* at 208–09 ("Excellent work—you took the strategies we have been working on in class and deployed them beautifully in here," or, "You have obviously worked very hard at your writing, and it shows in this essay.").

use "growth talk"[21] to inspire students, to remind them that effort matters and will help them improve. With a focus on growth, Lang also suggests including a "Tips for Success in This Course" section on the syllabus and sharing letters from top students with future students on how to do well in the course.[22] All practical, easy-to-implement strategies with the power to inspire students: You can learn the material, hone the skills, and be successful in this field.

Second, and related to thinking carefully about our teaching and feedback practices and the power that we have vis-à-vis shaping student learning, Lang urges educators *to show compassion*.[23] Leading with compassion is just as important for motivating our students as is approaching our courses with enthusiasm for the subject[24] and invoking self-transcendent purpose.[25] Lang advises,

> Whenever you are tempted to come down hard on a student for any reason whatsoever, take a couple of minutes to **speculate on the possibility that something in the background of that student's life has triggered emotions that are interfering with their motivation or their learning**. Just a few moments of reflection on that possibility should be enough to moderate your tone and ensure that you are offering a response that will not send that student deeper into a spiral of negative or distracting emotions, thus potentially preventing future learning from happening in your course.[26]

This advice reminded me of "Habit 3: Parallel Universe Thinking" from *Five Habits for Cross-Cultural Lawyering* by Sue Bryant and Jean Koh Peters.[27] This habit invites students and lawyers to brainstorm all the possible reasons a client is acting a certain way[28]—to ask themselves, "I wonder if there is another piece of information that, if I had it, would help me interpret what's going on?"[29] This *small teaching* adjustment, asking educators to approach their students with compassion, has an impact on

21 *Id.* at 209–11 (Asking teachers to assess whether their verbal and written communications "instill the conviction that students can succeed in [their] course through hard work, effort, and perseverance.").

22 *Id.* at 216.

23 *Id.* at 189.

24 *Id.* at 187.

25 *See, e.g., id.* at 186 ("On your syllabus . . . [highlight w]hat skills will students develop that will enable them to make a difference in the world. What purpose will the learning they have done serve in their lives, their futures, their careers?").

26 *Id.* at 189–90 (emphasis added).

27 Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in Race, Culture, Psychology & Law (Kimberly Holt Barrett & William H. George eds. 2005).

28 *Id.* at 56.

29 *Id.* at 57.

student motivation, *but it also encourages educators to model a key characteristic of being a good attorney and a good supervisor*. It is, perhaps, one of the most powerful suggestions that Lang raises in this book. After all, how we treat our students (or supervisees) influences how they will treat their future clients and supervisees.

In *Small Teachin*g, Lang's "ultimate aim" is "to convince you that you can create powerful learning for your students through the small, everyday decisions you make in designing your courses, engaging in classroom practice, communicating with your students, and addressing any challenges that arise."[30] He succeeds in this goal. Whether you are in the beginning of your teaching career, a seasoned educator who could use a little inspiration, or a practitioner who supervises law students, I highly recommend adding *Small Teaching* to your reading list.

30 Lang, *supra* note 1, at 243.

BOOK REVIEW

# Noise Pollution

*Noise: A Flaw in Human Judgment*
Daniel Kahneman, Olivier Sibony & Cass R. Sunstein (Random House 2021), 410 pages

Patrick Barry, rev'r*

The authors of *Noise: A Flaw in Human Judgment* are a trio of intellectual heavy hitters: Nobel Prize-winner Daniel Kahneman, constitutional law scholar Cass Sunstein, and former McKinsey consultant (and current management professor) Olivier Sibony. As prolific as they are prominent, the three of them have collectively produced over fifty books and hundreds of articles, including some of the most cited research in social science.[1] If academic publishing ever becomes an Olympic sport, they'll be prime medal contenders, particularly if they get to compete as a team or on a relay. Their combined coverage of law, economics, psychology, medicine, education, finance, political science, corporate strategy, statistics, and even Star Wars gives the book the feel of a cognitive decathlon.[2]

At the center of it all is a key distinction: the difference between *bias* and *noise*. Judgments are biased, the authors explain, when they are "systematically off target."[3] If, however, "people who are expected to agree

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1 The Google Scholar page for Kahneman credits his work with having received over 232,000 citations. *Daniel Kahneman*, Google Scholar, https://scholar.google.com/citations?user=E8z3WEYAAAAJ&hl=en (last visited May 19, 2022). And the one for Sunstein indicates a similarly large influence: 164,689 citations and counting. *Cass Sunstein*, Google Scholar, https://scholar.google.com/citations?user=ddq2_gkAAAAJ&hl=en (last visited May 19, 2022). Newer to the scholarly world, Sibony still comes in at a respectable 1,737 citations as of May 18, 2022. *Olivier Sibony*, Google Scholar, https://scholar.google.com/citations?user=PJARmj0AAAAJ&hl=en (last visited May 18, 2022).

2 For a sense of the authors' cumulative range, *see, e.g.*, Bernard Garrette, Corey Phelps & Olivier Sibony, Cracked It! How to Solve Big Problems and Sell Solutions Like Top Strategy Consultants (2018); Daniel Kahneman, Thinking, Fast and Slow (2011); Olivier Sibony, You're About to Make a Terrible Mistake! How Biases Distort Decision-Making—and What You Can Do to Fight Them (2019); Cass Sunstein & Richard Thaler, Nudge: Improving Decisions about Health, Wealth, and Happiness (2009); Cass Sunstein, The World According to Star Wars (2016); Cass Sunstein, Simpler: The Future of Government (2013).

3 Daniel Kahneman, Olivier Sibony & Cass R. Sunstein, Noise: A Flaw in Human Judgment 4 (2021).

end up at very different points around the target,"[4] then we have a different problem: the problem of noise.[5]

Failing to recognize and separate these two flaws in decisionmaking can have major consequences, especially given that

- trying to persuade a group of people who are biased—geographically, politically, economically, socially—is different than trying to persuade a group of people that is noisy;
- fixing an academic grading scheme that is biased is different than fixing an academic grading scheme that is noisy; and
- working through a set of feedback that is biased is different than working through a set of feedback that is noisy.

A major benefit of Kahneman, Sunstein, and Sibony's book is that it gives you a way to distinguish—and navigate—each of these situations.

## I. Bias, noise, and dart boards

To help illustrate their bias vs. noise dichotomy, the authors begin the book with an example that involves a bullseye at a gun range.[6] When I summarize the main points of the example for my law students, however, I switch the visual to a bullseye on a dart board. I ask them to imagine that a group of people throw a bunch of darts. Each person aims directly for the bullseye. Each person tries their best. Yet when we take a look at where their darts end up, we notice that every single one of them lands slightly to the right of the bullseye. Not to the left. Not above. Not below. All cluster in the same spot to the right.

That's what bias is, according to Kahneman, Sibony, and Sunstein. The darts are, to return to the definition above, "systematically off target."

Think of the many studies that have uncovered racial bias and gender bias in the way hiring decisions are made,[7] criminal sentences are delivered,[8] and mortgage rates are offered.[9] There is a (depressingly) recognizable pattern to these forms of discrimination. We can predict how the next decision in the queue is going to go.

4 *Id.*

5 *Id.*

6 *Id.* at 3–5.

7 Lincoln Quillian, Devah Pager, Ole Hexel & Arnfinn H. Midtbøen, *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 Proc. Nat'l Acad. Sci. 14 (2017).

8 Rhys Hester & Todd Hartman, *Conditional Race Disparities in Criminal Sentencing: A Test of the Liberation Hypothesis from a Non-Guidelines State*, 33 J. of Quantitative Criminology 77 (2017).

9 Justin Steil, Len Albright, Jacob Rugh & Douglas Massey, *The Social Structure of Mortgage Discrimination*, 33 Housing Stud. 759 (2018).

Or, to take a less grave example, consider a research paper by the economist Noland Kopkin called *The Nature of Regional Bias in Heisman Voting*.[10] Using a data set that stretched over twenty-five years, Kopkin found that the hundreds of journalists and other pundits who vote every year for college football's most prestigious award, the Heisman Trophy, have exhibited a consistent bias towards players from their own region.[11] Voters from the Northeast favor players from the Northeast. Voters from the Southwest favor players from the Southwest. And so on.

The bias isn't egregious, and Kopkin suggests that the overall effect is decreasing now that there are more and more ways to watch games from every region.[12] But if we imagine each of those votes as darts on the dart board we've been talking about, we'd probably see quite a bit of clustering. There'd be a cluster around the Northeast of the dartboard, representing the bias of voters from that region. There'd be a cluster around the Southwest of the dartboard, representing the bias of the voters from that region. There'd be clusters all over the place.

Not so with *noise*. When the problem is noise, there aren't any clusters. There aren't predictable patterns. There's simply a random assortment of darts.

## II. Noisy judgments, major damage

Bias and noise are both big problems. But Kahneman, Sibony, and Sunstein worry that concerns about bias, however legitimate, have overshadowed concerns about noise. "The topic of bias has been discussed in thousands of scientific articles and dozens of popular books," they write, "few of which even mention the issue of noise."[13] Bias has become "the star of the show," while noise is treated as "a bit player, usually offstage."[14] Their book tries to correct that imbalance, a task they believe is particularly important given the stakes involved. Here are few of the areas they identify where noisy judgments can cause major damage:

10 Nolan Kopkin, *The Nature of Regional Bias in Heisman Voting*, 5 J. Sports Analytics 85 (2019). Kopkin has also found evidence of "own-race" bias. *See* Nolan Kopkin, *Evidence of Own-Race Bias in Heisman Trophy Voting*, 100 Soc. Sci. Q. 176 (Feb. 2019).

11 Each of the six regions—Northeast, Mid-Atlantic, South, Southwest, Midwest, and Far West—are given 145 votes. All living Heisman Trophy winners are also allowed to vote, and one collective vote is awarded based on a fan poll. Scott McDonald, *How the Heisman Trophy Winner is Selected, and When the Finalists are Named*, Newsweek (Dec. 22, 2020, 8:30 PM EST), https://www.newsweek.com/how-heisman-trophy-winner-selected-when-finalists-are-named-1556818#:~:text=Who%20are%20the%20Heisman%20voters,with%20145%20voters%20per%20region.

12 Kopkin, *supra* note 10, at 87.

13 Kahneman, *supra* note 3, at 6.

14 *Id.*

*Doctor Diagnoses*: "Faced with the same patient, different doctors make different judgments about whether patients have skin cancer, breast cancer, heart disease, tuberculosis, pneumonia, depression, and a host of other conditions."[15]

*Child Custody Decisions*: "Case managers in child protection agencies must assess whether children are at risk of abuse and, if so, whether to place them in foster care. The system is noisy, given that some managers are much more likely than others to send a child to foster care."[16]

*Patent Applications*: "The authors of a leading study on patent applications emphasize the noise involved: 'Whether the patent office grants or rejects a patent is significantly related to the happenstance of which examiner is assigned the application.'"[17]

## III. Personality change

One source of these distortions is what the authors call *occasion noise*—when faced with the same decision at different times, people make conflicting judgments. Asked to review an identical set of X-rays several months apart, for example, a set of doctors disagreed with their original judgment between sixty-three percent and ninety-two percent of the time.[18] That's not doctors coming to a different conclusion than other doctors. That's doctors coming to a different conclusion than themselves.

Or consider a frequent criticism of personality tests like the Myers-Briggs Type Indicator. If you take the test more than once, there's a good chance you'll find out that your "personality" has changed.[19]

That happened to Adam Grant, an organizational psychologist at the University of Pennsylvania and author of bestselling books such as *Give and Take* and *Think Again*. In an article titled *Goodbye to the Myers-Briggs Typical Indicator, the Fad That Won't Die*, Grant shares the incompatible scores he received.[20] The first time he took the test he was classified as an "INTJ," meaning he was allegedly more introverted than extroverted, more intuiting than sensing, more thinking than feeling, and more judging

15 *Id.*

16 *Id.*

17 *Id.* at 7.

18 Robert Sutton, *How to Turn Down the Noise that Mars Our Decision-Making*, Wash. Post (May 21, 2021, 3:18 PM EDT), https://www.washingtonpost.com/outlook/how-to-turn-down-the-noise-that-mars-our-decision-making/2021/05/19/758be210-b370-11eb-9059-d8176b9e3798_story.html.

19 David J. Pittenger, *Measuring the MBTI . . . And Coming Up Short*, 54 J. Career Plan. & Emp. 48 (Nov. 1993); *see also* Joseph Stromberg & Estelle Caswell, *Why the Myers-Briggs Test is Totally Meaningless*, Vox (Oct. 8, 2015, 8:30 AM EDT), https://www.vox.com/2014/7/15/5881947/myers-briggs-personality-test-meaningless.

20 Adam Grant, *Goodbye to MBTI, the Fad That Won't Die*, Psych. Today (Sept. 18, 2013), https://www.psychologytoday.com/us/blog/give-and-take/201309/goodbye-mbti-the-fad-won-t-die.

than perceiving. These labels initially seemed to match his own image of himself. "Although I spend much of my time teaching and speaking on stage, I am more of an introvert—I've always preferred a good book to a wild party. And I have occasionally kept lists of my to-do lists."[21]

Yet when Grant took the same test a few months later, each of those classifications reversed. Now, apparently, he was a big-time extrovert. "Suddenly, I had become the life of the party, the guy who follows his heart and throws caution to the wind."[22]

Grant's experience is a textbook example of occasion noise and also one of the reasons he says that "when it comes to accuracy, if you put a horoscope on one end and a heart monitor on the other, the Myers-Briggs Test falls about halfway in between."[23] In other words, the test has a lot of noise and not much use.

## IV. (Under) performance

The authors of *Noise* don't mention Grant's essay. But he is one of many academic luminaries who provides a cover blurb for the book. "Get ready," he raves, "for some of the world's greatest minds to help you rethink how you evaluate people, make decisions, and solve problems."[24] He has also done an extensive research project as a consultant for Facebook to help fix something the *Noise* authors devote an entire chapter to: employee performance reviews.[25]

One complaint about performance reviews—especially those that happen only once a year—is the time lag involved. The reviews come long after the person being reviewed could have used the instruction and guidance the process is designed to provide. Here's how a manager at PricewaterhouseCoopers, which is one of the many major companies that have moved away from annual performance reviews, expressed that frustration:[26] "You don't give elite athletes coaching at the end of the season. You give it in the middle of the game."[27]

21 *Id.*

22 *Id.*

23 *Id.*

24 Kahneman, *supra* note 3.

25 Janelle Gale, Lori Goler & Adam Grant, *Let's Not Kill Performance Evaluations Yet*, Harvard Bus. Rev. (Nov. 2016), https://hbr.org/2016/11/lets-not-kill-performance-evaluations-yet.

26 Lillian Cunningham & Jena McGregor, *More U.S. Companies Moving Away from Traditional Performance Reviews*, Wash. Post (Aug. 17, 2015), https://www.washingtonpost.com/business/economy/more-us-companies-moving-away-from-traditional-performance-reviews/2015/08/17/d4e716d0-4508-11e5-846d-02792f854297_story.html.

27 Alexia Elejalde-Ruiz, *Companies are Scrapping Annual Performance Reviews for Real-Time Feedback*, Chi. Trib. (Apr. 22, 2016, 9:20 AM), https://www.chicagotribune.com/business/ct-performance-reviews-overhaul-0424-biz-20160421-story.html.

The authors of *Noise*, however, focus on a different problem. Discrepancies in evaluations often have more to do with who is doing the evaluating than with the employees themselves. Imagine that you ran a race and three different stopwatches evaluated how well you did compared to the other runners. One stopwatch said you finished second overall. Another said you finished eleventh. And the third didn't even put you in the top fifty.

Wouldn't that be kind of frustrating? Wouldn't you think something was wrong with the way your performance in the race was assessed?

Any student who has picked a class based on whether the teacher is a hard or easy grader has faced a similar issue. For over a century, research has shown that teachers vary widely on how they evaluate students.[28] In one of the most cited experiments, the same two English papers were given to 200 teachers. The authors of the study—Daniel Starch and Edward Elliott of the University of Wisconsin—were quite disturbed by the huge discrepancy in the grades the papers received. One paper, for example, earned a near perfect score from some teachers, but it received a failing score from others. "It is almost shocking to a mind of more than ordinary exactness," Starch and Elliot said of the overall results, "to find that the range of marks given by different teachers to the same paper may be as large as 35 or 40 points."[29]

When Starch and Elliot tried the same experiment with math teachers—a group presumably more committed to objective, stable standards—the variation persisted.[30] Identical student responses to questions about theorems, bisecting angles, and the hypotenuse of a triangle. Yet widely different grades. That's not bias. (There was no identifying information about the students' race, gender, or other characteristics which could have improperly influenced the teachers.) That, alarmingly, is noise.[31]

## V. Decision hygiene

By the end of the book, it is hard not to think that we live in an exceedingly noisy world. There is noise in the way actuaries calculate

**28** For an overview of this research, including a discussion of a few studies that push back on the research that shows high grade variability, see Susan M. Brookhart et al., *A Century of Grading Research: Meaning and Value in the Most Common Educational Measure*, 86 Rev. Educ. Res. 803, 806–20 (2016).

**29** Daniel Starch & Edward C. Elliott, *Reliability of the Grading of High-School Work in English*, 20 Sch. Rev. 442 (1912). For a more recent study, see Hunter M. Brimi, *Reliability of Grading High School Work in English*, 16 Prac. Assessment, Rsch. & Evaluation 1 (2011).

**30** Starch & Elliott, *supra* note 29, at 254.

**31** *Id.*

insurance premiums.[32] There is noise in the way judges decide asylum cases.[33] There is noise virtually everywhere, including in high-stakes judgments made every day in banks, start-ups, daycares, law firms, nonprofits, and the C-suites of Fortune 500 companies. It's enough to make you want to invest in a really good pair of earplugs.

A better approach, however, would be to follow the steps the authors suggest lead to good "decision hygiene."[34] The quotations below contain a few that one of those authors, Olivier Sibony, highlighted in an interview soon after the book was published.[35] I've then added some potential ways to apply them to the writing that lawyers and professors do.

*Aggregate multiple independent judgments*: "Whenever you have different people making judgments, rather than assign the judgment to one person or gathering three people to talk about it around the table, get them to make their judgments independently and take the average of that."[36] An appellate judge, for example, might canvas each of their clerks separately about a particularly hard case instead of—or at least before—holding a chambers-wide discussion about the issues involved. Group dynamics being what they are, you don't want one clerk's strong "Reverse" to prematurely influence (and perhaps even silence) another clerk's helpfully dissenting "Affirm."

*Invest in competence*: "Some people are going to be better than others at any judgment. In medicine, for instance, some diagnosticians are better than others. If you can pick the better people, that helps. The better people are going to be more accurate; they are going to be less biased but they're also going to be less noisy. There is going to be less random error in their judgments."[37] Recommendation letters are full of noise. How do you compare a candidate that one reference describes as "exceptional" with a candidate that a different reference describes as "amazing?"

One tactic is to evaluate the evaluators: Which recommenders consistently supply you with people who actually end up being well suited for the positions you are trying to fill? Many veteran judges, hiring partners, and admission officers already have informal networks of people and organizations that fulfill this "feeder" function. But if you're just starting out in one of these roles, it might be helpful to take a more systematic approach

32 Kahneman, *supra* note 3, at 23–33.

33 *Id.* at 6–7.

34 *Id.* at 226.

35 Olivier Sibony, *Sounding the Alarm on System Noise*, McKinsey Q. (May 18, 2021), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/sounding-the-alarm-on-system-noise.

36 *Id.*

37 *Id.*

by keeping a tally of the success vs. dud ratio of your initial set of sources. You might also ask repeat recommenders to indicate how the current person they're touting stacks up against previous applicants they've sent your way. As the next tip from Sibony makes clear, comparison is key.

*Use relative rather than absolute scales*: "If you replace an absolute scale with a relative scale, you can eliminate a very big chunk of the noise. Think of performance evaluations again. Saying that someone is a 'two' or a 'four' on a performance-rating grid—even when you have the definition of what those ratings mean—remains fairly subjective, because what 'an outstanding performer' or 'a great relationship skill' means to you is not necessarily the same thing that it means to me. But if you ask, 'Are Julia's relationship skills better than those of Claudia?' that's a question I can answer if I know both Julia and Claudia. And my answers are probably going to be very similar to yours. Relative judgments tend to be less noisy than absolute ones."[38]

A helpfully visual way to operationalize relative judgments was suggested to me in graduate school in a class about pedagogy. Suppose, the teacher said, you are grading a bunch of papers. After you finish the first one, place it on the floor. Then move on to the next one. After you finish that one, place it on the floor as well—but be very deliberate about where it goes. If you think it's better than the first paper, it should go above that paper. If you think it's worse, it should go below.

Now repeat this same process with the rest of the papers, each time figuring out where precisely the most recent one fits among the set already ranked on the floor. Does it go above all but the top two? Below all but the bottom four?

You might even create large areas of physical space between key clusters. Perhaps the seventh, eighth, and ninth best papers are pretty similar in quality but each is significantly better than the tenth best paper. Or maybe there's a big drop off between number fifteen and number sixteen—the kind of gap that's less like the difference between a B+ and B and more like the difference between a B+ and a C-. Seeing two feet of flooring between those two papers (or exams, or resumes, or any other documents you're asked to evaluate) might helpfully separate them in your mental scoring system.

38 *Id.*

## VI. Thankless but helpful

None of the decision hygiene ideas above are especially novel or sophisticated. Implementing them won't necessarily earn you any awards for innovative teaching or management. Nor will conducting the "Noise Audit" the authors attach as an appendix to the book.[39] As Sibony acknowledges, noise prevention is "a little bit thankless."[40]

But what you miss out in terms of gratitude and acclaim, you might gain in terms of efficiency, accuracy, and fairness. You don't need Daniel Kahneman's Nobel Prize in Economics to know that's a pretty good trade-off.

39 Kahneman, *supra* note 3, at 23–33.

40 Sibony, *supra* note 35.

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BOOK REVIEW

# Swimming with Russians

*A Swim in a Pond in the Rain: In Which Four Russians Give a Master Class on Writing, Reading, and Life*
George Saunders (Random House 2021), 433 pages

Ian Gallacher, rev'r*

This is the best book you'll read about writing and reading this year. Perhaps ever. You owe it to yourself to buy this book and read it often. I'll repeat this opening paragraph at the end of the review because it should be said twice. This book is that good.

It's a challenge to review, and recommend, a book about writing for a group of professional writing teachers and people who are deeply thoughtful about the writing and reading process. But think of it this way. When we stand in front of our students, on a grey Wednesday morning in October when the first excitement of being in law school has left them and all they can think about is the torts midterm that's coming up tomorrow, we are delighted when we see one student—maybe more, but let's not get above ourselves here—have one of those "ah-ha" moments. The student's facial expressions change, reflecting the internal analysis and comprehension that's going on, and the eyes suddenly glint a little, reflecting the new possibilities and opportunities that have suddenly been revealed. It's the moment we live for.

Well, think of us as the students, in the grey October mornings of our careers. It's my guess that we've thought about writing for so long, and taught it to others for so many semesters, that we're all a little (a lot?) jaded by it. It's not that we don't enjoy what we do, of course, but we've grown used to the magic of it. We haven't had those "ah-ha" moments for some time now, and we don't expect them anymore. This book has them on almost every page. It's a book for anyone who loves writing and

* Professor of Law, Syracuse University College of Law. As always, this is for Julie McKinstry.

reading, but it's particularly exciting for a group like us who perhaps think that the magic has gone. It hasn't. It's here.

So. The basic information first. This is a book by George Saunders, perhaps the most distinguished writer of short stories in America today and certainly one of the most respected writing teachers. Professor Saunders is on the faculty of the writing program at Syracuse University (the one on main campus, not the College of Law) which, technically, makes him my colleague. I say this in order to shed light on what some might feel is a conflict of interest, but let me assure you: Professor Saunders and I move in very different circles, and I have not met him, nor am I ever likely to meet him except by pure accident, probably in the checkout line at Wegmans. Even then, I wouldn't recognize him.

As part of his class load at Syracuse, Saunders teaches a class in the Russian short story and it's an abbreviated, and certainly simplified, version of that class he presents in this book: the title of the book is drawn from events in one of the stories; *Gooseberries*, by Chekhov. Now, if you're like me, Saunders' chosen medium presents a significant roadblock. I don't enjoy short stories. I recognize the technical opportunities they present but for me they always feel like etudes, those things you practice alone in a room to perfect your technical skills on an instrument but nothing you would play in public. So for me, they're almost always unsatisfying and I choose not to read them most of the time. You might love them. Potato, potato.

After reading this book, nothing has changed. I still find short stories unsatisfying, and I still dislike Russian nineteenth-century literature. Neither of these roadblocks prevented me from devouring this book, though, and if you have similar reservations they should not stop your forward momentum to buying and reading this book. I'll try to explain why.

The book is organized simply. Saunders presents seven short stories by Chekhov, Turgenev, Tolstoy, and Gogol. (Gogol's *The Nose*, is a story I love, and therefore the exception that proves my feelings about Russian short stories.) With the exception of the first story—Chekhov's *In The Cart*—Saunders lets you read the story through without interruption, and then writes his "thoughts" on the stories and includes an "afterthought." For the first story, Saunders weaves his thoughts into the text, giving you an insight into the level of reading detail he's expecting of you and showing you how to think about what the writer is doing and why. At the end, he includes three writing exercises as "appendices." And that's it. Four hundred and six pages of the most intense education you will ever receive about writing and reading.

Examples of that education? No. It wouldn't be especially revealing if I tried to excerpt some of what Saunders says, and it would be unhelpful as well. This is an organic work, in which everything builds on, and is related to, everything else, and to excerpt, or synopsize, some of Saunders' commentary would be to diminish it without demonstrating its value. So no, I'm not going to try to pick a passage or two that shows you why this book is so magical. I will say this, though. While, as you would expect, the book is generally generous in its praise of the short stories it uses to make its points, Saunders is not afraid to criticize or draw attention to a lapse in either technique or motivation. The stories he uses are impressive vehicles for the lessons he wants to teach, but they're not perfect and he's not afraid to point out a deficiency when it occurs. Whether or not Saunders intended it this way, this warts-and-all approach (and, truth to be told, there aren't many warts) makes you trust him more. If you spotted a problem and he didn't comment on it, you might think him to be an uncritical booster for Russian short stories. Not George Saunders.

The book can be enjoyed on multiple levels. As you become attuned to the way Saunders wants you to read the stories themselves, you start to pull out the coded information that perhaps you recognized but didn't try to decipher before (why does Tolstoy include those clothes, fluttering on a line, in the village in *Master and Man*? Ah. Maybe that's why). Then there's the technical information Saunders imparts, information about how someone—who's thought long and carefully about these stories, and is one of the best writers alive today—wants you to think about the techniques used by the writers and how we might want to adapt those techniques into our writing. And there's Saunders' writing: his masterful use of voice to assume the position of friendly guide who isn't showing off how much he knows but is sincere in his desire to help you get as much out of the stories as possible; his conversational style that is so much more than the conversations we usually have about writing; and his use of the personal anecdote to both explain a point about writing he's making and to draw you closer to him, so you feel you know and can trust someone who's sharing this sort of detail with you. If you use the same techniques Saunders wants you to apply to the short stories to his own writing, you feel as if you're really beginning to delve into the heart of his writing technique and it's a fascinating experience. "Ah-ha's" abound.

Now, none of this has anything to do with the law, of course. And it's a fair criticism to say that lawyers can't write like either nineteenth-century Russians or twenty-first-century writing teachers so what does this book really have to say to us about what we do. I'd answer it by saying what we always say when confronted with this thought: good writing is good writing, and the better we understand how to read and

write—anything—the better legal writers we will be. And the better legal writing teachers we will be as well. And if that doesn't persuade you, then divorce this book from what we do, and look on it as a deeply pleasurable reading experience. It has more to say than your normal beach read, it's written so well that it's just fun to read, and (if you don't share my antipathy to Russian short stories) it's a good excuse to read, or re-read, seven classics of the genre. You might even become a convert to the style although—mercifully—that's not required to enjoy the book.

What else to say? The technical exercises included as appendices to the book are simple but effective reminders of how writing can be taught and could stand on their own. But when you read them after going through the rest of the book first they gain added luster from everything you've read and thought about.

Downsides? Well, in its hardback version it's probably not so easy to lug the book around in a beach bag. But the good news is that it's coming out in a paperback version this spring. In fact, by the time you read this that edition will be on your bookshop's shelves. It's still a substantial book, but portability will be less of a problem.

If you read the book and like the experience (and anyone reading this journal will like the experience), then there's more good news. Saunders has launched a newsletter—Story Club—in which he takes subscribers on guided tours through more short stories, branching out beyond Russian literature; the first story he analyzes is Hemingway's *Cat in the Rain*. (Thanks to David Thomson for alerting me to this.) There's a free layer to the newsletter, but all the meaty stuff is behind a paywall. When I looked, the annual price appeared to be $50, but prices change so what it might be when you read this I can't say. Whatever the price ends up being, though, I can guarantee you that it'll be less expensive than coming to Syracuse and signing up for the MFA courses Saunders teaches. And you won't have to deal with the snow. In the literature or in person.

Unlike the book, you're not alone when you read what Saunders has to say and the comments section (really some of the most pleasant and supportive comments you'll ever read on the internet) makes the experience feel very much like a writing class. You're welcome to join in or to sit quietly and take in the collective wisdom of Saunders and the participants. There are t-shirts and hats as well, but the only reason to subscribe are the fascinating, engaging, and deep discussions about writing and reading. Sound interesting? The newsletter can be found on Substack.

I'll end as I began. This is the best book you'll read about writing and reading this year. Perhaps ever. You owe it to yourself to buy this book and read it often. This book is that good.

BOOK REVIEW

# Transitioning From Practical Legal Writing to Academic Scholarship

*The Legal Scholar's Guidebook*
Elizabeth Berenguer (Aspen Publishing 2020), 340 pages

Anne E. Mullins, rev'r*

A client walks into your office with a problem—mostly standard, but with an unexpected issue. After the meeting, you hop on your computer to do some preliminary research. As you continue researching, you realize that your client's unexpected issue is quite a riddle. No court or agency has solved the riddle. You turn to journals and law reviews, trusting that surely some professor somewhere has tackled this riddle! Not so. Your client's case is eventually resolved with the riddle still intact. Long after your client is gone, that riddle is still there, inviting you to come play, to solve it if you dare. What to do?

Of course, you know what to do. You can hear your favorite professor's parting advice to you as you galloped off into the sunset of law practice: When you find an issue that you just can't let go of, *write an article!* But it's been years since you graduated from law school, and you're not even sure where to begin . . . .

*The Legal Scholar's Guidebook*[1] is a highly effective resource for newcomers to scholarly legal writing because it demystifies the scholarly legal writing process. It doesn't simply tell readers *what* to create; it teaches them *how* to create it. As such, it is particularly well suited to practitioners transitioning into academia and new faculty members. There are six chapters in the book. Each chapter focuses on a distinct part of the process—choosing a topic, performing initial research, determining whether the topic is preempted, managing the research process efficiently and ethically, using sources effectively, and writing the final product.

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1 Elizabeth E. Berenguer, The Legal Scholar's Guidebook (Rachel E. Barkow et al. eds., 2020).

Each chapter includes prompts to help readers engage with their source material and their own project with the mental agility and flexibility of an experienced scholar. Relatedly, each chapter concludes with steps that readers can follow to write the final product. Finally, each chapter contains concrete advice for readers experiencing imposter syndrome as they work through the scholarly writing process. As a result, the book is especially useful for anyone who might hesitate before entering scholarly conversation.

## 1. Getting started

The *Guidebook* opens by helping readers choose a topic. Consistent with its how-to approach, the *Guidebook* doesn't just tell readers where to look for topics. Instead, it explains how to engage with sources through a mixture of description, stock questions the reader can use to probe a source, and the author's own experience as a practitioner transitioning into academia. It encourages readers to narrow the topic down to something manageable—a major challenge encountered by most (all?) novice scholars.

With background instruction on how to choose a topic, readers are ready to draft their own topic selection essay. There are guidelines for readers to follow in drafting their essays, and the *Guidebook* explains how the reader will use the essay in upcoming parts of the process. Readers can see a sample essay in Appendix 1.

## 2. Research strategies and preemption checks

After helping the reader choose a topic, the *Guidebook* explains how to conduct initial research. The starting place is a thoughtful organizational scheme that sets researchers up to succeed managing large amounts of research. There are tips for a variety of different organizational preferences, from color-coding schemes for the pen-and-paper readers to Zotero[2] for the more technology-reliant readers.

After laying the groundwork with organization, the *Guidebook* moves to research planning. It lays out a four-step process in which readers identify questions, identify potential sources, make a research plan, and track information. The *Guidebook* explains to readers how to follow each step in the process, offering examples, sample research tracking charts,[3]

2 Zotero is an online tool to help researchers collect and organize sources and produce bibliographies. You can read more about Zotero in Chapter 2 and by visiting Zotero.org.

3 Berenguer, *supra* note 1, at 27–29.

and concrete advice. For example, in explaining how to make a plan, the *Guidebook* advises readers to "allot time in blocks, usually two to four hours, for research."[4] And the *Guidebook* explains why: "Less than that, you probably will not have time to find enough helpful sources, which will require you to revisit the same research task at another time. Longer than that, you will likely hit a wall and become inefficient in your research process."[5]

After providing readers with a structured approach to their research, the *Guidebook* provides an overview of databases that legal scholars typically use. The *Guidebook* covers the usual suspects, like Westlaw and Lexis. Importantly, it also covers how to access databases that will be less familiar to novice scholars—including JSTOR, HEINOnline, SSRN, govinfo, LegalTrac, Index to Legal Periodicals, and ProQuest. The *Guidebook* tells readers how to access these databases and why it might make sense to do so.

With a structured approach and several places to find sources, the *Guidebook* refreshes readers on the research process. Part of the process section is dedicated to readers who know very little about their topic; part is dedicated to readers who already have some knowledge. The *Guidebook* provides advice to help readers determine when they are finished researching.

Once readers have familiarity with the research process and planning, the *Guidebook* leads readers in creating a research plan and working bibliography. Instructions and a series of prompts are included to help readers complete the research plan, along with references to Appendices II and III to see sample research plans and working bibliographies.

With a research plan in place, the *Guidebook* helps readers determine whether a topic has been preempted, i.e. covered already by another scholar. The *Guidebook* explains what preemption is and why readers should care about it. Significantly, the preemption check is reframed from a tedious obstacle to an opportunity to make progress in the research process. There are tips on how to set alerts for topics in rapidly changing areas of law. The *Guidebook* also directs readers to a variety of databases that will be most helpful in determining whether a topic is preempted—a helpful refresher for practitioners accustomed to using one or two of the major commercial platform providers in their typical day-to-day work.

Once readers have conducted preemption research, the *Guidebook* assigns a 500-to-1,000-word essay identifying the leading scholars in the

4 *Id.* at 26.

5 *Id.*

field and summarizing their positions on the reader's topic. Appendix IV provides a sample essay.

Finally, the *Guidebook* teaches readers how to make reading source material strategic and efficient. The *Guidebook* places prioritizing sources in context by urging readers to consider the purpose for which they are writing, and from there identifying reliable sources most relevant to that purpose. As a result, the *Guidebook* distinguishes between the type of prioritizing that readers use in law practice versus prioritizing for the purposes of producing legal scholarship. The *Guidebook* challenges readers to assess each source and determine its reliability. In keeping with its how-to approach, the *Guidebook* does not just tell readers to use reliable sources. Instead, it defines what reliability is, and it shows readers how to assess reliability through the identity of the publisher, the author, and the purpose of the source. Finally, the *Guidebook* provides a step-by-step process for reading sources in a resource-conscious manner.

The *Guidebook* concludes its research instruction by challenging readers to develop a 2,500 to 3,000-word research summary. A structured worksheet is included to help readers complete the summary. The worksheet supplies prompts to force readers to capture basic information, like a source's purpose. Significantly, the worksheet also supplies prompts that provide scaffolding to guide a novice scholar in approaching sources critically, the way a disciplined and experienced scholar does reflexively. For example, the worksheet asks readers to identify the source's main assumptions, to articulate what the consequences are of taking the author's line of reasoning seriously, and to articulate what the consequences are of *not* taking the author's line of reasoning seriously. In completing the summary, readers will shift from organizing their research by source to organizing their research by topic. Appendix V has a sample research summary.

## 3. The analytical framework

The *Guidebook* presents the analytical framework as a central, required component of any scholarly project. The *Guidebook* explains that "the analytical framework is simply a systematic method of inquiry or problem-solving."[6] The concept is framed accessibly for novice scholars, presenting frameworks as "different lenses through which to consider similar legal questions" or "a systematic approach to solving legal problems."[7]

6 *Id.* at 64.

7 *Id.* at 63.

The *Guidebook* provides explicit prompts to help readers critically evaluate the frameworks in sources upon which they rely. It also provides prompts to assist readers in identifying or creating an analytical framework for their own project. The prompts direct readers to determine, among other things, what the purpose of the writing is, what assumptions are being made, what inferences are being made, and whether there are opposing viewpoints. The prompts engage novice scholars in the methods of thought and inquiry that are second nature to experienced, disciplined scholars. For example, the *Guidebook* asks readers to explicitly identify their inferences, and it challenges them to consider whether there are other ways to interpret the information.

The *Guidebook*'s coverage of the analytical framework is particularly powerful for practicing lawyers who are new to academic legal writing. Vibrant practitioners spot problems and solve them deftly and efficiently for their clients: Problem produces solution. Without more mindful adjustment of role from practitioner to scholar, an article written as though it were client-centered work product can appear to be an advocacy piece or an undergraduate-style policy paper. Academic legal writing demands both more and less—more examination and questioning and less certainty that the writer's solution is *the* solution. Vibrant scholars spot problems, analyze them from multiple viewpoints, and produce a possible solution (with all of its limits and opportunities).

The *Guidebook* ensures that novice scholars follow the problem-analysis-solution approach instead of the problem-advocacy-solution approach. It does so through encouraging readers to adopt an analytical framework as one of the key components of the paper. The *Guidebook* identifies several frameworks from legal philosophy that legal writers can use, such as critical race theory. It explains the analytical frameworks in an accessible way, and it provides annotated examples from law review articles. Many of the analytical frameworks suggested are well suited to social justice issues. Indeed, I actually found myself wishing that there was a bit more explicit guidance for readers whose analytical framework comes directly from extant legal doctrine instead of legal philosophy.

The *Guidebook* also includes a section on the Universal Intellectual Standards that writers can use to assess their research and writing.[8] It identifies and explains each of the eight standards in a one-page graphic, and it encourages readers to follow the standards. The standards offer a useful lens through which to assess intellectual honesty and rigor, but their inclusion felt abrupt and, for a reader unfamiliar with them, potentially overwhelming without more explanation or guidance. In the second

8 *Id.* at 69–71; *see also* Richard Paul & Linda Elder, Critical Thinking: Concepts & Tools (2014).

edition of the book, I would want to see the section either developed more fully or removed, given that the book already includes the same type of guidance very accessibly in multiple places.

Ultimately, the *Guidebook* challenges readers to identify an analytical framework the reader wishes to use for their paper, and it provides a series of prompts to guide the reader in fully developing and evaluating the framework. A sample framework is available at Appendix VI.

## 4. Drafting

With a topic selected, research largely completed, preemption checked, and an analytical framework chosen, the reader is ready to write. The *Guidebook* provides organizational paradigms readers can use depending on the type of scholarly work they are writing. The *Guidebook* also provides organizational paradigms based on the type of analytical framework used. With an organizational framework in hand and the benefit of the *Guidebook*'s foundational assignments, the reader is well-prepared to create an annotated outline. The *Guidebook* provides advice on how to engage in a disciplined drafting process, with a schedule and a plan of attack. Finally, the *Guidebook* describes the mechanics of the drafting process and points readers to Appendix XI for a revising/editing/proofing checklist.

The *Guidebook* encourages readers to develop an annotated outline that readers will create from their working bibliography and their research summary. An annotated sample is available at Appendix VII.

## 5. Examples

At 145 pages, the appendices containing examples make up over half of the book. I was initially taken aback at the text-to-appendix ratio. After reading the book, however, I think the appendices are one of its most valuable components. The appendices are heavily annotated to showcase the concepts explained in the text. The annotations are simple and clear, and they explicitly tie back to what readers learned in the text. They are a key component of the text's how-to approach.

For readers who need detailed examples of concepts in action in order to learn, the appendices will be the hero of the book. For practitioners undertaking legal scholarship for the first time on their own, without the support of a law school class or law review advisor, the appendices are a gift.

*The Legal Scholar's Guidebook* is an excellent how-to guide for creating legal scholarship. The text along with the appendices provide a level of guidance and detail that one would expect from a graduate-level scholarly writing seminar. I recommend *The Legal Scholar's Guidebook* to anyone who wants to transition from practical legal writing to scholarly legal writing or any other newcomer to scholarly legal writing.

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BOOK REVIEW

# Against the Wind

## James Boyd White and the Struggle to Keep Law Alive

*Keep Law Alive*
James Boyd White (Carolina Academic Press 2019), 184 pages

Todd M. Stafford, rev'r*

James Boyd White is a believer. A true believer. In the rule of law. And his most recent book, *Keep Law Alive*, is a call to the ramparts to defend and preserve the rule of law against the forces—various strains of creeping authoritarian corruption of our search for truth, democracy, and justice—that today threaten its very existence. In the United States, White holds, law and democracy are peculiarly combined, and this makes us who we are.[1] Thus, "when our law and democracy are threatened, everything we are and care about is threatened too."[2] For White, the rule of law is essentially a process, a continuous conversation, of which we're all a part, about what we are as a society. The book is an invitation to self-consciously engage in the law's conversation and, in so doing, to appreciate what the law is and what its institutions and actors do. But there's a tension in this book. White has been committed to his vision for over fifty years of law teaching, and this book walks a line between warning and elegy. There's an atmosphere of, if not panic, then urgency, the kind of urgency that sets in when one suspects that his dream may be dead or dying. But he hopes against hope. White is a towering figure in the legal academy, and, for those approaching his work anew, this is a good place to start. The book is a short, engaging read that pulls the reader with its compelling urgency. In it the reader will be treated to White's romantic vision of a grand constitutive conversation that is our American experiment, and the

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1 James Boyd White, Keep Law Alive xviii–xix (2019).

2 *Id.* at xix.

reader might be tempted to join in. But, in these times, one must remain sober, and White's essential optimism might feel misplaced.

Holding an M.A. in English as well as a J.D., White has spent his career "trying to connect the western literary and humanistic tradition with the teaching and study of law,"[3] and he's been a staple in the law and literature field since its inception. White published his seminal text *The Legal Imagination* in 1973. That work, which White said did not fit within any existing category, defined a new subject, which he described as "an advanced course in reading and writing, a study of what lawyers and judges do with words."[4] It's a sprawling text of nearly a thousand pages, populated with a cornucopia of excerpts from literary works, poetry, and other stuff, woven together with White's provocative commentary, questions, and suggested writing assignments. The work was reissued in 2018 with the subtitle "Studies in the Nature of Legal Thought and Expression," which only vaguely suggests the content of this provocative stew of jurisprudence, literature, history, rhetoric, and composition theory. I teach a course by the same title and inspired by White's project, and the book indeed "works" to stimulate students on a marvelous exploration of legal thinking and the role of imagination in the lawyer's life. In a testament to its richness, no two iterations of the course are ever the same. With that work as his foundation, White has written prolifically, with many books, book chapters, and articles in print. Indeed, part of each chapter in *Keep Law Alive* was previously published elsewhere, so the book is an excellent overview of and entrée to his work.

As such, the book is vintage James Boyd White: thoughtful and thought-provoking, drawing on a wide range of literary, philosophical, and legal sources and examples. Its sweep in its engaging 160 pages is breathtaking. For White, and this is a fixed star in all his work, law is not merely a system of rules or institutions, but "an activity of mind and language, a way of claiming meaning for experience and making that meaning real."[5] Law is a "living" thing, "an activity of the mind and imagination—a form of life—that has the value of justice at its heart."[6] He insists, "One thing that makes our law rare and precious is the way in which human minds and hearts can be engaged in its activities and processes."[7] It is a language into which we must translate people's problems. And it is, in White's view, always, an *art*—a conversation that is constitutive of our society. And by

3 James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 Theoretical Inquiries in Law 381 (2011).

4 James Boyd White, The Legal Imagination xxxi (1973).

5 White, *supra* note 1, at 85.

6 *Id.* at xvi.

7 *Id.* at 3.

"constitutive" he means that "it creates a world of power and meaning, through which conflicts can be adjudicated, the habits of thought and feeling we call 'norms' can be established, the government itself created and regulated."[8]

What makes White's work distinctive, though, is his signature effort to practically engage the reader. As the reader reads, White asks them to "pay attention to the questions you find yourself asking and the objections you are raising, for these are essential to the kind of engagement in legal thought I hope you experience."[9] And he asks the reader to consider "what does it mean that these issues are addressed in this way in our world? What kind of world does it make?"[10] In another signature aspect of White's style, he writes in two voices, which he describes as: (1) "the legal expositor and critic in the body of the chapters," where he mainly speaks of the reader in the third person, and (2) "the voice in the passages between chapters," where he asks questions of and invites responses from the reader, whom he there mainly addresses in the second person, as "you."[11] In other words, reading White is to *practice* the art in which he invests so much faith.

*Keep Law Alive* is a rich tapestry arranged in six chapters. The first two treat foundational aspects of "thinking like a lawyer": statutes and judicial opinions. White's effort here is not descriptive, but rather, as he usually does, he engages the reader in discourse, involving the reader in the art of reading and writing these things. Chapter 3 asks "What's Wrong with Our Talk about Race?" In that chapter, White conducts a "tentative exploration" of his intuition that there is a deep inadequacy with the way the law has imagined "race," particularly in the context of "affirmative action," and that that inadequacy lies in the "extreme generality and abstractedness" of the law's equal protection analysis.[12] Chapter 4 addresses law as language, discoursing on the many inherent tensions that define the art of law, such as that between legal and ordinary language, between competing but plausible readings of the law, between substance and procedure, between past and present, and between law and justice, and suggesting various consequences of these tensions. Chapter 5 takes a rather dark turn, identifying certain threats to the rule of law, namely,

8 *Id.*at 6.

9 *Id.* at 4.

10 *Id.*

11 *Id.* at xv.

12 The original version of Chapter 4 was published in the *Michigan Law Review*, and it shows its age a bit, with references to "blacks" and "whites" that are jarring to the contemporary ear. But its exploration remains intriguing and unfortunately relevant to our continuing national struggle with history, race, and inclusiveness.

the increasing disparity between rich and poor, what he calls "the disappearance of law," dehumanization, and the tension between democracy and empire. Closing the book is Chapter 6, which takes a literary turn, considering, among other texts, Augustine's *Confessions*, and musing on our responsibility in the face of evil. Throughout, and again in his signature fashion, he poses probing questions to bring the reader into the conversation. The book could be read cover to cover, or any chapter could profitably be studied on its own.

For White, no case is too small to sound a chord in the fugue of justice. Power works through conversation, through open argument and persuasion. To get the sweep of his vision, consider this: "Every case performs an answer to the question: What are our institutions of justice? How well—how justly—do they work? How should they work? And nothing is more important to a healthy community than justice."[13] In a legal hearing, "in principle at least," everyone gets the opportunity "to present the case in the best way possible, and to answer what was said on the other side."[14] And that conversation is important not only to the parties to a particular case but "to the world," as "it always matters very much to the world how such cases are debated and resolved."[15] White acknowledges that this describes law in abstract terms and at its best—it often falls short. But, as I said, he's a true believer, and that belief is palpable in all his work.

I'm a believer too, but of a more tempered and suspicious sort. Of the sort that, under the influence of Nietzsche, Marx, Foucault, and others, is suspicious, because behind law lies power, and that power favors society's elite—such that, whatever the benefits of the rule of law, and there are many, it keeps the haves having, and the have nots having not, and it always will. To me, that's depressing. So, while I'm with White in fearing, lamenting the rule of law's perhaps imminent demise, I have a darker view as to its workings in society, and even as to whether it's ever really very robustly existed at all. In the end, I'm of the spirit of Winston Churchill's assessment of democracy as "the worst form of government, except for all those other forms that have been tried from time to time . . . ."[16] Give me the rule of law over whatever chaos might come next.

To be fair, White recognizes that our system is far from perfect and that it often fails to do justice. Indeed, in Chapter 5, titled "Law,

13 White, *supra* note 1, at 83.

14 *Id.*

15 *Id.*

16 Winston Churchill, House of Commons (Nov. 11, 1947), https://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill#:~:text=Many%20forms%20of,time%20to%20time.

Economics, and Torture," he hits some deeply critical, even radical, and ominous notes. However, that chapter was originally produced for a conference that asked speakers to address "[what] most needs to be said about law and democracy under the conditions in which we find ourselves,"[17] and its tone is decidedly darker than the rest of the book. But the mood of his work, even in this, for him, rather pessimistic book, is one of reverence for the law's conversation. And there's something that bothers me here. There's a bit too much reverence. A bit of the *Mr. Smith Goes to Washington* feel. Whatever he fears we're losing now, he seems sure we had it, as if times were better in an earlier age.

For my money, I'm not sure we ever had such a golden age. White always speaks of law as constitutive. But constitutive of what? It seems that, through history, this dialogue or conversation has actually been constitutive of some pretty ugly things: slavery, genocide, the Japanese internment, and mass incarceration, to name a few. Of course, one could argue that our ongoing legal conversation, although never perfect, has also been constitutive of unfolding progress, justice, and so forth. And that we must always strive to do better. And White often sounds in these tones. Indeed, White acknowledges that "our law is capable of great evil," and when things go wrong, he admonishes the lawyer to "reimagine if necessary both the world and the law."[18] But is this good enough? And does it portend continuing progress? Might it not as likely be constitutive of our path toward stolen elections and, perhaps, dictatorship? For undoubtedly, these will be accomplished "legally," by statutes enacted and legal remedies exhausted (courts will affirm results of crooked or doctored elections, with many citizens having been "legally" disenfranchised, and so forth). Indeed, I suspect that there will have been enough of a "legal" smokescreen to anesthetize much of the public. In other words, the conversation might as easily weave a dark future. Ultimately, White's faith seems grounded in people conversing in good faith. But that's precisely the problem. Without conceding that there ever was a golden era of good faith in abundance, it is today in decidedly short supply. The constitutive conversation, at least insofar as its progress toward White's ideals is concerned, would appear to be on ice.

Yet, and here I'm with White, any likely alternative, at least at present, is surely far worse—the authoritarian, strong-man adoring, fact-ignoring, dare I say it, "fascism," of the populist Right. At bottom, though, I just don't feel as warm and fuzzy about our rule of law as White does. He

17 White, *supra* note 1, at 108.

18 *Id.* at 10.

seems an unreconstructed romantic, an incurable, if somewhat tempered, optimist. And I just can't go along with him.

I think that what's missing in White's work is the contribution of critical and social theory. There's no hint of Marx or post-modernism. That's not necessarily a fault, but it is a lack, and it would seem to put his perspective in question. He doesn't seem to see that reason, too, has a tendency toward the totalitarian. And that any ideology, even rule of law and liberalism, tends to crowd out all opposition, to take up all of the air in the room—think Bush 41's so-called "New World Order," and his son's crusade against the "Axis of Evil." Ideology, any ideology, just can't be satisfied until everyone's on board, whether they want to be or not.

White is a marvelous interlocutor, and his book is well worth studying. His call to "keep law alive" is urgent because the current social and political climate threatens to destroy this conversation to which he's committed his life and on behalf of which this might be his parting appeal. Ultimately, and in keeping with the character of any genuine conversation, White invites disagreement, "so long as our argument with each other takes a thoughtful, open-minded, and good faith form, of the kind we can see in law at its best."[19] Would that his appeal hits home. For it's not too much to say that whether the body politic somehow comes to converse in that spirit will determine the fate of the rule of law and of our democracy.

19 *Id.* at 135.

BOOK REVIEW

# Words Matter

## Persuading with Classical Rhetoric in Modern Legal Writing

*Rhetoric, Persuasion, and Modern Legal Writing: The Pen is Mightier*
Brian L. Porto (Lexington Books 2020), 210 pages

DeShayla M. Strachan, rev'r*

It's not what you say, it's how you say it. The author of *Rhetoric, Persuasion, and Modern Legal Writing* enhances our understanding of classical rhetorical techniques through the words of five great U.S. Supreme Court justices. The justices featured ditched the style of eighteenth- and nineteenth-century opinions in favor of a modern, conversational, and more personal format. While this book is not meant to be a "how to" guide to legal writing, it certainly makes you look more closely at your own writing style. Law students, practitioners, judges, and legal academics could benefit from the opinions noted here. Rhetoric is an art of persuasion. As the author states in the book, and I must agree, "[T]he most persuasive [Supreme Court] writers are those who master the art of storytelling and the rhythm of legal prose."[1]

Featuring the writings of Justices Oliver Wendell Holmes Jr., Robert Jackson, Hugo Black, William Brennan, and Antonin Scalia, the opinion examples do not disappoint. The book devotes a chapter to each man's life, career, and writing on the Court. Honorable mentions go to Chief Justice John Roberts and Associate Justice Elena Kagan in the final chapter. Similar to the scholarship of Julie Oseid, which demonstrates the power of brevity, metaphors, clarity, and zeal in legal writing using examples from past presidents and other public figures,[2] this book shows the power of

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1 Brian L. Porto, Rhetoric, Persuasion, and Modern Legal Writing: The Pen is Mightier 11 (2020).

2 *See e.g.*, Julie A. Oseid, *What Lawyers Can Learn from Edgar Allen Poe*, 15 Legal Comm. & Rhetoric 233 (2018); Julie A. Oseid, *The Power of Zeal: Teddy Roosevelt's Life and Writing*, 10 Legal Comm. & Rhetoric 125 (2013).

classic rhetoric using examples from these justices. The book aims to show the reader the persuasive power of rhetorical mastery through the words used by justices known for their popular writing styles in their respective legal areas of influence. It does just that.

It begins with a discussion of classical rhetoric origins and its importance to persuasion. Rhetoric is the study and production of persuasion. It is the art of effective or persuasive writing or speaking, especially using figures of speech and other compositional techniques. Style, arrangement, and invention shape the core of written advocacy. Style relates to the choice and placement of particular words. Arrangement pertains to the effective and orderly organization of arguments. Invention concerns the creation or discovery of arguments. Over time, style has changed the most in legal writing. The tone of judges and justices is no longer detached, technical, or professional. Instead, it has been replaced with a conversational voice that shows the writer is communicating with the community.

Justice Oliver Wendell Holmes was the first to showcase this new conversational tone. Often using sharp, pithy language sprinkled throughout his opinions, he intertwined informal writing with "magisterial" writing, combining traditional and modern styles. A major issue of his time was freedom of speech. Writing for the majority in *Schenck v. United States*,[3] instead of stating that the most stringent protection of free speech does not permit someone to say whatever they want at any time or place, he wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[4] This vivid metaphor is still used in discussions of free speech today.

Similarly, a true literary stylist, Justice Robert Jackson's words were rarely dull and frequently memorable. The man "wrote with a golden pen," often employing figures of speech and other rhetorical devices in his writing. In *West Virginia State Board of Education v. Barnette*,[5] he wrote, "Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[6] This short passage is packed with rhetorical devices, using polyptoton, which is the repetition of words derived from the same root. It also contains a metaphor and figure of speech. We can look to Jackson's writing for creative and assertive word choices.

3 249 U.S. 47 (1919).

4 Porto, *supra* note 1, at 6 (citing *Schenck*, 249 U.S. at 52).

5 319 U.S. 624 (1943).

6 Porto, *supra* note 1, at 78 (citing *Barnette*, 319 U.S. at 641).

A champion of criminal procedure and First Amendment law, Justice Hugo Black's opinions reflect a major lesson learned from his studies: "[T]he best way to tell any story is to tell it as simply as possible, in the simplest words possible, and in the shortest way possible."[7] This style is highlighted in his majority opinions in *Gideon v. Wainwright*[8] and *Chambers v. Florida*.[9] For example, in *Gideon*, Justice Black uses storytelling techniques and colloquy in the opening paragraph of the opinion when he says, "Mr. Gideon, I am sorry but I cannot appoint counsel to represent you in this case." The defendant then said, "The United States Supreme Court says I am entitled to be represented by Counsel."[10] This method tells the story and highlights Gideon's predicament. It goes on to vividly state the inherent difficulties of self-representation. In *Chambers*, Justice Black again uses storytelling techniques when he writes, "About nine o'clock on the night of Saturday, May 13, 1933, Robert Darcy, an elderly white man was robbed and murdered in Pompano, Florida . . . ." He continued, quoting the lower court, "'It was one of those crimes that induced an enraged community . . . .'"[11] Justice Black was an able storyteller who could persuade the reader by the way he presented the facts. Legal writers favoring a plain, straightforward style with occasional flare of figures of speech should look at the writings of Justice Black.

Like Justice Black, Justice William Brennan had a talent for arranging an opinion to tell a clear and compelling story. In *Malloy v. Hogan*,[12] he writes in the very first sentence of the opinion, "In this case we are asked to reconsider prior decisions holding that the privilege against self-incrimination is not safeguarded against state action by the Fourteenth Amendment."[13] The word "safeguarded" was a stylistic choice that showed the value he placed on this privilege. His prose should be studied by those looking to craft a clear, concise, and coherent legal argument that informs, persuades, and inspires.

Justice Antonin Scalia is remembered for his vividness and creative use of figures of speech. Writing for the majority in *Vernonia School District 47 v. Acton*,[14] Scalia wrote, "School sports are not for the bashful. They require 'suiting up' before each practice or event and showering and

7 *Id.* at 102 (citing Roger K. Newman, Hugo Black: A Biography 19 (1997)).

8 372 U.S. 335 (1963).

9 309 U.S. 227 (1940).

10 Porto, *supra* note 1, at 106 (citing *Gideon*, 372 U.S. at 337).

11 *Chambers*, 309 U.S. at 229.

12 378 U.S. 1 (1964).

13 Porto, *supra* note 1, at 126 (citing *Malloy*, 378 U.S. at 2).

14 515 U.S. 646 (1995).

changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford."[15] Using aphorism and a bit of wry humor, Scalia gets his point across—there is a reduced expectation of privacy for high school athletes.

To sum up, the author recounts the value of rhetoric to legal persuasion by comparing the unique contributions each justice made to legal writing. My one critique would be the failure to mention diverse voices on the high court, such as Justices Ruth Bader Ginsburg and Sonia Sotomayor, who have offered clear, direct language in important opinions and dissents. Nevertheless, these justices' opinions could serve as instructional materials for legal writing professors and as models for students, practitioners, and judges. *Rhetoric, Persuasion, and Modern Legal Writing* gives us a look back and into the future. It shows us how the tools of rhetoric can still be a powerful resource in persuasive legal writing.

15 Porto, *supra* note 1, at 159 (citing *Vernonia*, 515 U.S. at 657).

BOOK REVIEW

# Why Are You Whispering?

*Her Honor: My Life on the Bench . . . What Works, What's Broken, and How to Change It*
LaDoris Hazzard Cordell (Celadon Books 2021), 294 pages

Carolyn V. Williams, rev'r*

> "I refuse to give up on our legal system, and I will *never* give up on our judiciary—hopefully neither will you."[1]

I'm a sucker for a good story. *Her Honor* is full of them.

This book begins with an elucidating account illustrating the need for diversity in our judiciary. Judge Cordell, a Black woman, presided as a judge pro tem in a California municipal court where litigants represent themselves in small claims court. Her first case involved a hairdresser demanding payment for braiding cornrows in her Black client's hair. The client refused to pay because the cornrows were poor quality. Judge Cordell understood, and explains to the reader, the importance of hair to Black women and the hours and skill involved in braiding a Black woman's hair. Judge Cordell knew how to examine the braids and roots to determine the work's quality—the most important factor in ruling for one side or the other. If this case had been given to a White male judge, chances are he would know nothing of "roots, braids, cornrows, and matted hair."[2] Without saying diversity in the law matters, Judge Cordell shows the reader why it does. And this technique—showing versus telling—flows through the entire book.

Judge Cordell manages a perfect balance of deeply moving narratives, impersonal statistics, a little history, and suggestions for change. In *Her Honor*, Judge Cordell recounts almost twenty years of memories from her time on the bench as the first Black female judge in Northern California.

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1 LaDoris Hazzard Cordell, Her Honor: My Life on the Bench . . . What Works, What's Broken, and How to Change It 294 (2021).

2 *Id.* at xviii.

After beginning with her first experience as a judge pro tem, the book details her appointment by Governor Jerry Brown in 1982 as a judge of the Municipal Court of Santa Clara County and concludes with her pro bono work after she resigns as an elected judge from the Santa Clara County Superior Court.

The book is not strictly chronological. Instead, Judge Cordell groups her stories into four categories. First, she talks about the history and workings of juvenile court, sentencing juveniles, and the felony murder rule in juvenile court. Dotted amongst her story of a fifteen-year-old boy who killed his own brother are statistics regarding children of color in the juvenile system,[3] statistics of adults executed for crimes they committed as children,[4] and explorations of case law concerning life-without-parole sentences for juveniles.[5] She recounts convicting a fifteen-year-old girl of felony murder without a jury because juries are not available in California juvenile court.[6] Judge Cordell's meticulous recitation of her real-time analysis during the trial and sentencing of a girl who had not killed anyone, was not there when the killing occurred, and did not know her associates were planning on killing anyone, is a glimpse into the humanity of judges.

In the next section, Judge Cordell describes how she saw the law affecting families. She talks about performing marriages in various circumstances and revisits her violation of the law that banned her from presiding over same-sex marriages.[7] She recounts instances that illustrate the dilemma judges face during divorces when determining what custodial arrangement is in "the best interest of the child" because "[n]o matter how diligently judges consider and apply the relevant best interest factors, and no matter how much evidence is thrown at them in embattled courtrooms, judges have only secondhand information to work with."[8] She relays a heartbreaking story where the psychologist appointed to evaluate the parents recommended the father receive custody simply because the mother "didn't identify with her African-American heritage" based only on the White psychologist's feeling that the mother should have drawn a self-portrait with hair that was "more coarse and curly."[9] Judge Cordell also describes when she ruled on contested wills,[10] oversaw adoptions,[11] and granted name changes.[12] Each time she gives insight into little recognized

3 *Id.* at 3–4.
4 *Id.*
5 *Id.* at 4.
6 *Id.* at 19–34.
7 *Id.* at 44.
8 *Id.* at 51.
9 *Id.* at 55–56.
10 *Id.* at 65–77.
11 *Id.* at 78–99.
12 *Id.* at 100–05.

aspects of these cases, such as describing the importance of name changes to transgender people.

In the third section, Judge Cordell touches on jury duty[13] and judicial misconduct.[14] And in addition to documenting her own election to the Superior Court of California, she gives statistics regarding the problems that stem from special interest groups funding elections for judges who are supposed to rule impartially.[15] She also describes how individuals who are disgruntled with judges' opinions often respond.[16] Although she was never the subject of a recall election, Judge Cordell details the recall of a California judge who sentenced a defendant according to the sentencing guidelines and the probation officer's recommendation; because of the *California Code of Judicial Ethics*, the judge could not defend himself against those who "deliberately misconstrued and distorted" his sentencing track record.[17] The circumstances of that judge's recall led to the revision of the *Code*.[18] Judge Cordell also describes complaints about herself to the Commission on Judicial Performance.[19] This section serves to highlight the need for judicial oversight and the problems with the way it occurs now.

In the fourth section, Judge Cordell focuses on stories that concern "hot-button issues." She recalls how the punishment of drunk drivers evolved in California. Specifically, she talks about her efforts to require those convicted of drunk driving to install ignition lock devices—devices individuals blow into to prove they have no alcohol in their system before their car will start.[20] In another chapter, Judge Cordell posits how unprepared judges are for cases involving involuntary commitments of patients who are mentally ill.[21] Judge Cordell also tackles the issues surrounding judicial discretion[22] and how plea bargaining sometimes results in incarceration of innocent people.[23]

Rather than generally describe problems the judiciary and the legal system face, Judge Cordell's memories are specific, riveting examples. For example, in the chapter on jury duty, she describes a one-week trial, from jury selection through the jury's verdict.[24] Using this trial as the narrative framework, she addresses issues such as when juries are or should be required in a trial; the types of questions allowed during voir dire and who should ask them; the racist results of preemptory challenges and how

13 *Id.* at 109–41.
14 *Id.* at 159–74.
15 *Id.* at 142–58.
16 *Id.* at 175–90.
17 *Id.* at 177.
18 *Id.*
19 *Id.* at 183–90.
20 *Id.* at 193–204.
21 *Id.* at 205–24.
22 *Id.* at 225–45.
23 *Id.* at 246–64.
24 *Id.* at 109–41.

attorneys can get away with it; the need for judges to check their facial expressions and body language so as not to influence juries; the pitiful compensation offered jurors around the country; jury instructions that are too complicated for the jury to understand; and the various ways a juror's misconduct can lead to a mistrial.[25]

Judge Cordell also intersperses her memoir with a little legal history by explaining the origins of various practices within the legal community. These short divergences from her own story often highlight problems that have developed over time in the legal system. Take the chapter "Making a Murderer" that discusses the felony murder rule. She explains the evolution of pre-sentence probation reports, from its original 1880s purpose—examining a defendant's background to determine the defendant's potential for rehabilitation—to its current focus on mitigating and aggravating circumstances to justify the probation officer's recommended punishment.[26] This history highlights the problems with the informal partnership that has grown up between the probation officers and the prosecutors.

For the most part, Judge Cordell's stories in the first four sections raise the issues but leave the "fixes" for them until the end of the book. In this way, *Her Honor* keeps its narrative flow and memoir-feel by focusing on Judge Cordell's feelings and perspective during each event. The final section contains ten suggestions Judge Cordell has for reforming legal problems that she highlighted earlier in the book through her experiences.[27] She suggests actions that legal educators, legislators, judges, lawyers, and the general population can take to improve the legal system. One problem she highlights is the selection and retention of judges. The fix that she suggests is to replace judicial elections with independent nominating commissions. She sets out her plan for how these nominating commissions would work and rebuts counterarguments to her plan. In addition to the entertainment value of seeing into the mind of a judge and learning about the inner workings of the law, every reader finishes the book with a concrete way they can help improve it.

At its heart, *Her Honor* uses narrative to expose injustice and absurdity. In the concluding chapter, Judge Cordell relates a disagreement in a staff meeting between herself and a White male judge about including a statement encouraging cultural and gender diversity in the court's search for commissioners.[28] The other judges of color and the female judges did not voice their support in the meeting, but as they were dispersing afterward, one judge quietly encouraged Judge Cordell not to give up

25 *Id.*

26 *Id.* at 27–28.

27 *Id.* at 267–94.

28 *Id.* at 288.

on the fight.[29] "Why are you whispering?," she responded. In *Her Honor*, Judge Cordell does not whisper. After hearing her accounts of the state of the law in this country, the reader feels compelled to do something more than whisper, too.

29 *Id.*

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