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IN MEMORIAM

Stephanie Feldman Aleong
1972–2008

The legal writing community lost a great teacher, mentor, and friend on October 21, 2008, when Stephanie suddenly passed away during treatment for melanoma she had battled for several years. She was only 36 years old.

Stephanie was one of the “stars” on the Nova Southeastern University Shepard Broad Law Center faculty and was destined for great things. She had already accomplished so much in her short years at Nova, following her teaching in the legal writing program at Emory Law School. In addition to teaching legal writing, Stephanie served as Director of a masters program in health law, coached several moot court teams, and spoke around the country about her experiences prosecuting cases of pharmaceutical fraud, the latter of which was chronicled in a best-selling book—and all that was done between student conferences and grading papers.

Stephanie had just the right mix of toughness and caring that enabled her to bring out the best in her students. As a former prosecutor, she commanded the classroom and could be “a tough little bird” when she had to. But she was never too busy to offer
kind words, provide encouragement, or give the students whatever else they needed to succeed. She loved her students so much and it showed. And they loved her right back.

Stephanie was such a positive force in the lives of her colleagues and her students—the void that is left can never be filled. It is still difficult to comprehend that she is gone. We miss you Stephanie.

Professor James B. Levy
Nova Southeastern University Shepard Broad Law Center
I don’t remember the first time I met Debbie Parker. I bet a lot of people would say the same because Debbie always made you feel like you had known her forever. No one was a stranger to Debbie.

I do remember the day Debbie changed my life. It was at the ALWD conference in 1997. Debbie’s smile seemed even bigger and her eyes shined even brighter than usual. She had just returned from spending a semester in Ireland, teaching Legal Writing to college freshmen at University College Cork. Debbie talked as if it had been the experience of her career, and everyone who heard the joy in her voice as she talked about it was both excited for her, and a wee bit jealous. And then Debbie turned to me, “Steve, you would absolutely love teaching in Ireland. You’d be perfect!” It took five more years, but eventually, thanks to Debbie, I was able to follow in her footsteps and have my own Irish experience. It has turned me into an insufferable Celtiphile. For the next seven years, whenever Debbie or I was feeling weary of another dull, gloomy day in the middle of winter, we would talk to each other about the spiritually renewing power of the soft, gray weather in Ireland.

Most of us knew Debbie as a friend and colleague, but few of us were able to know her as teacher. Those who did knew that she was a remarkable mentor. Debbie seems to have been born to be a teacher. In high school, she was a popular summer camp
counselor, a role she relished for several years. After college, she
decided against pursuing a PhD. and instead began teaching his-
tory at Dudley High School, a traditionally black high school in
Greensboro, North Carolina. It was there that Debbie became
convinced that to teach her students, she had to know her stu-
dents. She did not just know her students at school. She visited
their homes. She went to their churches. She saw them on their
playing grounds. She pushed her students to believe in them-
and their many abilities. During her five years at Dudley,
Debbie became teacher, friend, and mentor to hundreds of stu-
dents, many of whom have kept in contact with her, sending her
pictures of college graduations, baptisms, and promotions. They
remembered that Debbie was one reason for their successes.

Debbie left Dudley to attend law school at Wake Forest and
after clerking for Judge Sid Eagles of the North Carolina Court of
Appeals, in 1988, she returned to Wake to teach Legal Writing.
There, her insistence that she needed to know her students in
order to teach them became legendary. She helped students get
jobs and told them when a firm would be a good fit and when it
would not. She prodded those that needed prodded, and slowed
down those that were overwhelmed. She was a mentor for stu-
dents’ lives, both professional and private, as this story from
Chris Coughlin, the current Legal Writing Director at Wake, and
Debbie’s former student reveals:

[A]t the end of my third year, she decided that she did not
like the boy I was dating. She called me in her office and
stated, “Suzanne and I have been talking. We have decided
that if you do not break up with ‘Bob’ we are going to tie you
to my car and drive you up and down Interstate 40 until we
can knock some sense into your head.” Debbie was right,
and Bob was history.

Debbie took her dedication to teaching across the Atlantic.
Her assignment in Cork was daunting: “Introduce the fundamen-
tals of legal analysis and writing to 200 college freshmen. You
have four one-hour classes over the course of the semester. Good
luck.” Undaunted by that challenge, Debbie insisted that to teach
her students, she needed to know them. So she conferenced with
every student. Twice. That’s 400 conferences in one semester.
Somehow, Debbie managed to do so without losing any of her grace, charm, or wit. In 2000, Debbie left Legal Writing to become Wake’s first Dean of Students. This was a natural progression for Debbie as she had been the Unofficial Dean of Students for years. Not surprisingly, she brought enthusiasm and compassion to the official role as well. As Professor Suzanne Reynolds recalls,

Debbie loved the care and nurture of law students, and they loved her right back. Debbie advised students about dermatologists and dentists. She brought them to her house to demonstrate how to tend to peonies. Never far away from her soap box, she lectured the students who drank too much at Barristers’ Ball, wagging her finger in faces of students twice her size, and asking them “what on earth their mothers would think?” At the same time, she picked up students for emergency trips to doctors’ offices and held the hands of students in the hospital after car wrecks . . . . She fought for students who were going to lose a scholarship, and she begged for understanding when students’ individual hardships did not match the official definition.

Debbie’s involvement with the national Legal Writing community dates back to the early years of LWI. Like many of us, she came to the early LWI conferences yearning for teaching tips, status updates, and most importantly, a sense of community. As usual, Debbie gave more than she took in all regards. We remember conversations about law and life on boat rides in Puget Sound with Debbie, Wilson, and their kids—regaling us with stories of living the progressive life with Jesse Helms as one’s Senator. Anne Enquist recalls a typical Debbie moment from an LWI Board meeting:

My favorite Debbie story is a simple one. We were on the LWI Board together when Seattle U. announced at a Board meeting that it was relinquishing the host school responsibilities. Debbie must have been taken by surprise because

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3. I fear that at least one visitor who tried to follow Debbie’s example was not as successful. After 35 conferences in one day, I was reduced to an exhausted, babbling fool. I remain in awe of Debbie’s energy and dedication to all of her students.

4. One of my favorite Parker memories is Jeffrey and Adam spending an afternoon explaining to Davalene Cooper how the New York Yankees were pure, unadulterated evil. Clearly, this reflects Debbie and Wilson’s superb parenting.
she asked in her usual charming way, whether if she got down on her knees and begged, would Seattle U. reconsider? When I told her that was a rather entertaining and tempting proposal, but no, we were still giving up the host school role, she was the one who laughed longest and hardest.

But most of all, we remember that Debbie never lost her focus. As the discipline of Legal Writing grew, we were pushing our schools for improved status. We were dipping our toes into the waters of scholarship. We were reaching out to audiences beyond the comfortable circle of our community. But Debbie made sure we never forgot our reason for being. First, we are teachers. And Debbie was the best of us.

Last summer, we finally had the Irish reunion that Debbie and I had talked about for years. As luck would have it, another Irish teaching alumnae, Katy Mercer, was also returning to the Emerald Isle. On a beautiful summer day, eight of us (Debbie, Wilson, Katy, her husband Guy, their daughters Cece and Nicci, my wife Lenore, and me) spent a day hiking across the spectacular Slea Head, the westernmost point of Ireland. Along the way, we met up with a young French-Canadian couple, Paul and Marie. As is the way in Ireland, we stopped to exchange hellos and a few pleasantries about how lucky we all were to be in that special place. For most folks, that would have been the end of it and we all would have continued on our walks. But Debbie wanted to get to know our new friends. Soon we were sitting down, sharing the snacks in our packs and learning all about the French-Canadian life. We talked until the sun was beginning to set over the Atlantic. By the time we moved on, I think Debbie had finagled an invite to Paul and Marie’s wedding, though before they met Debbie, they were not even engaged! That was fitting—yet another example of Debbie’s ability to connect with strangers, her zest for the personal story, and her ability to draw people into deep conversation.

We have all lost a friend and mentor. Our hearts go out to Wilson, the Parker family, and the rest of the Wake Forest community. We should honor Debbie’s life as she lived it. We should laugh more, hug more, and take time to find our own Irish sunset.
GOLDEN PEN AWARD ACCEPTANCE
REMARKS OF THE HONORABLE RUGGERO J. ALDISERT

I am truly honored that an organization as important as the Legal Writing Institute has chosen me as the recipient of this year’s Golden Pen Award. This called to mind a popular phrase of respect from our English brothers and sisters, originally penned in more elaborate form by Thomas Morton in 1797, “praise from Sir Hubert is praise indeed.”

Speaking as one who has been in the law as lawyer and judge for sixty years, and having written or read hundreds of thousands of pages of legal documents, I am most appreciative of the work of this fine international organization dedicated to improving legal writing. I not only appreciate those who teach legal writing in the law schools, I am indebted to all of you who seek to improve the quality of the briefs and petitions that I read every day, as well as the opinions of trial courts and administrative agencies.

This is a debt I owe to every one of you. You do not teach a graduate writing course in literary composition. Rather, you teach what J.L. Austin described in his book, *How to Do Things with Words*, as “performative utterances.” This is because legal writing is more than describing something. It is designed to produce action, that is to say, to perform. The ultimate object of a lawyer who writes is to have his or her opponent concede or settle, or that failing, to have a court issue an order in his or her favor.

Thus, legal writing is not designed to describe something like a journalist, to report what is true or false. It is not what Austin describes as “to constate” or to give information on an action that has taken place. Instead it is designed to convince, to deter, or to persuade. And all this means is to perform, and thus produce future action.

When you are a judge, or are a law clerk writing for a judge, every document you write is a “performative utterance.” It is writing that concludes with a definite performance, such as “Motion denied” or “Judgment for plaintiff” or “Affirmed” or “Reversed.”

Thus, when I say that as a judge I am indebted to you, it is because to the extent you produce lawyers with better writing
skills, the better we judges can properly understand the nuances of arguments presented. And the higher degree of understanding we acquire, the higher a quality of fairness and justice ensues.

Another word for those of you who teach: you play an extremely important role in the life of a law student. By virtue of your subjects, and personal nature of your instruction, you invariably become the professor who has the closest relationship with the first-year students. Thus, you are important not only for the subject you teach, but also for your role as a mentor. Very often, when your students apply for clerkships, they ask you to write letters of reference. Having chosen law clerks since 1961, as a state trial and federal appellate judge, I feel I have gotten to know so many of you from your letters.

Thus, you are not strangers to me. Tonight I feel that I am truly in the company of old friends. So, my friends, thank you for selecting me as this year’s recipient of the Golden Pen Award.
EDITOR’S NOTE

I am delighted to welcome you to the fifteenth Volume of Legal Writing: The Journal of the Legal Writing Institute, the nation’s premier journal about legal writing and communication and the official journal of the Legal Writing Institute.

In this Volume, the Journal’s Editorial Board is pleased to present Articles featuring a variety of perspectives and insights including several articles based on presentations at the 2008 Legal Writing Institute Conference, held in Indianapolis, Indiana, in July 2008. These Articles include the following: Professors Elizabeth Fajans and Mary R. Falk delve into the world of legal drafting and the tools that storytelling and narrative can provide for lawyers; Professor J. Christopher Rideout explores the concepts of “voice,” “self,” and “persona” in legal writing—particularly focusing on the counterintuitive notions involved; Professor Mark DeForrest analyzes the teaching of persuasion using Martin Luther King, Jr.’s famous Letter from a Birmingham Jail; and finally, Professor Suzanne E. Rowe examines accommodations for learning disabilities under the Americans with Disabilities Act—focusing primarily on dyslexia and requests for accommodations to provide additional time.

In addition to these Articles, this Volume contains three pieces from the 2008 Panel of the AALS Section on Legal Writing, Reasoning, and Research. Professor Andrea McArdle introduces the topic of Writing Across the Curriculum and professional communication. Professor Nancy Levit focuses her analysis on legal storytelling and its application to Writing-Across-the-Curriculum efforts, including the impact that storytelling can have on student learning; and Professor Carol McCrehan Parker reflects on all of the panel presentations and provides thoughtful consideration of the use of reflective writing in the law school curriculum. In addition to the articles from the AALS panel, this Volume includes remarks from the Honorable Ruggero J. Aldisert of the United States Court of Appeals for the Ninth Circuit upon receiving the 2008 Golden Pen Award.

Finally, this Volume contains the first of what we hope will become occasional essays reflecting on the experience of legal research and writing professors who have taught internationally.
In the first of these such essays, Professor Marilyn Walter reflects on her experiences teaching legal writing in India, and particularly on her use of Indian Dowry Death law as a vehicle for teaching Indian students legal analysis.

We are committed to providing our readers with broad coverage of interesting and important issues related to legal writing, research, analysis, and pedagogy, and we sincerely appreciate the continued support of contributors and readers alike. If you have feedback about this Volume, or would like to submit an article for publication, please contact the Journal at: www.journallegalwritinginstitute.org, or contact me at gerdyk@law.byu.edu or 801-422-9022.

Kristin B. Gerdy
Editor in Chief
UNTOLD STORIES: RESTORING NARRATIVE TO PLEADING PRACTICE

Elizabeth Fajans and Mary R. Falk*

One of the oldest stories known to the common law lies buried in the terms “pleading” and “complaint”: the plaintiff complains of ill-treatment at the defendant’s hands and pleads for relief.¹ Indeed, in medieval English courts, plaintiffs were required to plead their case (pro se or through a “pleader”) by way of detailed oral statement called “narratio” in Latin, translated as “tale” in English.² Over the centuries, this narrative aspect of the complaint, the telling of plaintiff’s tale through substantive allegations,³ has been eclipsed by the several instrumental functions of complaints even as those functions—involving the court’s jurisdiction, providing notice to the defendant, narrowing the issues, uncovering facts—have themselves waxed and waned in importance. In mainstream modern pleading practice, storytelling tends to be seen either as inimical to effective pleading or as applied decora-

* Elizabeth Fajans, Associate Professor of Legal Writing, Brooklyn Law School. Mary R. Falk, Associate Professor of Legal Writing, Brooklyn Law School. The Authors are grateful for the suggestions of friends and colleagues: Stacy Caplow, Ruth Anne Robbins, and Marilyn Walter. We also want to thank our research assistants, Naree Sinthussek and Jared Goodman, and as ever, Rose Patti, our assistant.

1. The complaint is not the only pleading document, of course. Though we focus on the complaint in this Article because it contains the central narrative of a civil action, there are other places for stories: affirmative defenses, cross-claims, counterclaims, and third-party complaints. Some states permit or even require defendants to tell their story in the answer. See e.g. Mich. Ct. R. 2.111(D) (requiring “the substance of the matters on which the pleader will rely to support the denial”).

2. Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I, vol. II, 605 (S.F.C. Milsom ed., 2d ed., Cambridge U. Press 1989) (originally published 1895). It was not sufficient, for example, to allege that defendant owed plaintiff money and had not repaid it; plaintiff was required to tell “how on a certain day came this William to this Alan and asked for a loan of fifty marks, how the loan was made and was to have been repaid on a certain day, and how, despite frequent requests, William has refused and still refuses to pay it.” Id.

3. Our concern in this Article is uniquely with the drafting of substantive allegations, not with allegations of subject matter jurisdiction, in personam jurisdiction, venue, or damages, the drafting of which is extensively covered elsewhere. See e.g. Roger S. Haydock et al., Fundamentals of Pretrial Litigation (2d ed., West Publg. 1992).
tion, rhetorical adornment to be reserved for compelling cases. But we think that this creates a false choice for practitioners and teachers alike, and that when narrative is seen as inherent in pleading, new methods of drafting and teaching follow. In short, the more useful question is not whether to tell a story, but how to tell it. Complaints are not any less the narrative because they succeed or fail within a web of conventional, statutory, and tactical constraints.

In this Article, we argue that practitioners whose skills do not go beyond bare-bones form-book pleading risk disserving their clients, because legal readers, judges included, are as responsive to the call of stories as other readers. Part I provides an overview of the evolution of pleading practice and the relation of pleading and narrative, concluding that even in courts and claims where such minimal pleading is permitted—fewer today than the drafters of the Federal Rules of Civil Procedure might have intended—the writer would do well to meld the skills of a storyteller with the skills of a tactician, balancing the instrumental and rhetorical functions of complaints. Part II gives an overview of basic narrative theory and narrative techniques and suggests how those techniques apply to complaint drafting. In particular, we discuss how storytelling techniques like character development, plot sequence, and detail can contribute to the creation of a complaint that has “narrative rationality.” Such a complaint tells a familiar “stock story” from the canon of legally cognizable wrongs, comports with the known facts, and provides a meaningful translation of the plaintiff’s experience, evoking in the reader a desire that justice be done. Finally, Part III offers suggestions for teaching ourselves to draft complaints that use narrative techniques to advance the client’s cause while remaining true to the client’s experience.

5. Some lawyers “argue that stories are fine for an argument to the jury, but misplaced in a pleading. . . . But they must stop and ask: Are judges any less interested than juries in the larger questions? And are juries more likely than judges to base their decisions on empathy? The available evidence suggests the answers to both questions is in the negative.” Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 Yale L.J. 763, 792 (1995).
I. THE STORY OF PLEADINGS

The story of pleading practice from the common law to the adoption of the Federal Rules of Civil Procedure and its many state analogues is a straightforward one complete with villains, victims, a hero, and a happy ending. At common law, every cognizable civil wrong was a separate “form of action” with its own intricate procedure.7 The slightest misstep in pleading could leave the plaintiff on the courthouse steps. In mid-nineteenth-century America, this “cumbersome system of specialized allegation”8 was supplanted by “fact” pleading, which granted access to the court by way of a generic civil “complaint” that typically contained only a “statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”9 Despite such plainly democratic rhetoric, fact pleading did not in fact open the courthouse doors much wider. Only “ultimate facts” could make out a cause of action; “evidentiary facts” and “conclusions of law” were not acceptable. The result was “a new quagmire of unresolvable disputes”10 as to whether allegations were indeed ultimate facts.11 In the middle of the twentieth century, “notice” pleading rode into town, rescuing litigants from “the hypertechnical categorization of fact pleading under the codes and the sluggish formalism of common-law pleading.”12 As typified by Rule 8 of the Federal Rules of Civil Procedure, notice pleading only requires that a complaint provide a “short and plain statement of the claim showing that the pleader

10. See Fairman, supra n. 8, at 555.
11. Evidentiary facts, ultimate facts, and conclusions of law can be defined with deceptive ease by way of example. One commonly employed example explains that “the roads were icy” is an evidentiary fact, “driving too fast for conditions” is an ultimate fact, and “breached his duty of care” is a conclusion of law. E.g. Mary Barnard Ray & Barbara Cox, Beyond the Basics: A Text for Advanced Legal Writing 263–264 (2d ed., West Group 2003). The real problem is that the categories in fact have no fixed boundaries; rather, a spectrum of infinite points runs from the plainest evidentiary fact to the baldest conclusion of law. See Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure vol. 5, § 1202 (3d ed., West 2004).
12. See Fairman, supra n. 8, at 551.
is entitled to relief.”\textsuperscript{13} In the words of the Supreme Court in \textit{Conley v. Gibson},\textsuperscript{14} this was famously interpreted to mean that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”\textsuperscript{15} Rule 8 not only radically simplified the complaint-drafting process, but also deemphasized pleading itself. At common law and under fact-pleading codes, the back-and-forth of pleading, the thrusting and parrying factual allegations of plaintiff and defendant in complaint, answer, reply, and beyond, served several purposes in addition to notice: narrowing the issues, uncovering facts, and revealing and disposing of meritless claims.\textsuperscript{16} These purposes were reassigned under the Rules, largely to the discovery and summary judgment processes.

That Rule 8 had a salutary door-opening effect is exemplified by \textit{Conley} itself, where African-American railroad employees alleging discriminatory discharge were permitted to bring their grievances to the federal courts despite what would have been insurmountable obstacles under fact pleading. Yet despite such happy endings and the broader and easier access to justice that notice pleading promises, the subsequent plot-line is unclear, with several threads to follow, all of them suggesting that good lawyers need to learn artful pleading.

First, notice pleading has not entirely triumphed; a sizeable minority of states, including Florida, Louisiana, Michigan, and Oregon,\textsuperscript{17} retain some form of fact pleading, thus requiring more skill and care on the complaint drafter’s part.

Second, notice pleading has given rise to a seeming backlash in the form of “heightened” pleading requirements imposed by

\textsuperscript{13} Fed. R. Civ. P. 8(a)(2). The basic rules governing the drafting of pleadings are contained in Rules 7 through 14. Rule 9 requires that fraud and mistake be pleaded “with particularity” and specifically permits “[m]alice, intent, knowledge, and other conditions of a person’s mind” to be pleaded “generally”; Rule 10(b) provides that “[a] party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”

\textsuperscript{14} 355 U.S. 41 (1957).

\textsuperscript{15} \textit{Id.} at 45–46; \textit{but see Bell Atlantic Corp. v. Twombly}, 550 U.S. 544, 556–557, 563, 570 (2007) (characterizing the language of \textit{Conley} as “an incomplete, negative gloss on an accepted pleading standard” and requiring a complaint to allege facts sufficient to show a “plausible” claim for relief, not merely a “conceivable” claim).

\textsuperscript{16} See Fairman, \textit{supra} n. 8, at 556.

Congress and by the federal courts. \textsuperscript{18} Despite two rebukes by the Supreme Court, \textsuperscript{19} some federal courts require plaintiffs in civil rights actions to plead with particularity matters ordinarily beyond the plaintiffs’ knowledge. \textsuperscript{20} A federal statute similarly requires plaintiffs in private securities fraud litigation to plead with particularity allegations concerning misleading statements and allegations concerning defendant’s state of mind, both very tall orders. \textsuperscript{21} Heightened pleading requirements, often “targeted” to a particular element of a claim or particular factual context, have also been applied by some courts to anti-trust and CERCLA actions and to claims of civil conspiracy, defamation, and even negligence. \textsuperscript{22} Some federal courts have even subscribed to the maxim, mind-boggling in a post-\textit{Conley} and \textit{Leatherman} age, that “[d]ismissal of a complaint for failure to state facts supporting each of the elements of such a claim is, of course, proper.” \textsuperscript{23} These heightened pleading requirements have been attributed to judicial and legislative perceptions that certain categories of claims are frivolous, vexatious, and expensive time-wasters to be discouraged. \textsuperscript{24}

\begin{footnotesize}
\textsuperscript{18} See generally Christopher M. Fairman, \textit{The Myth of Notice Pleading}, 45 Ariz. L. Rev. 987, 988 (2003); Richard L. Marcus, \textit{The Puzzling Persistence of Pleading Practice}, 76 Tex. L. Rev. 1749 (1998); see also Fairman, supra n. 8, at 567. Despite its recent retreat from the broad language of \textit{Conley} in \textit{Twombly}, the Supreme Court emphasized that it was not applying a “heightened” pleading standard. \textit{Twombly}, 550 U.S. at 569 n. 14.

\textsuperscript{19} See \textit{Swierkiewicz v. Sorema, N.A.}, 534 U.S. 506, 508 (2002) (holding that an employment discrimination complaint need not contain specific facts making out a prima facie case); \textit{Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit}, 507 U.S. 163, 164 (1993) (holding that federal courts may not apply “heightened pleading standards” in civil rights cases alleging municipal liability); see also \textit{Twombly}, 550 U.S. at 570 (reaffirming that \textit{Swierkiewicz} rejected a requirement of “heightened pleading” for Title VII cases).

\textsuperscript{20} See Fairman, supra n. 8, at 583–587.

\textsuperscript{21} The Private Securities Litigation Reform Act of 1995, codified in pertinent part at 15 U.S.C.A. § 78u-4(b) (Westlaw current through P.L. 111-4 (excluding P.L. 111-3) approved 2-11-09). Should defendant move to dismiss for failure to state a claim, the statute further provides that discovery will be stayed during the pendency of the motion. \textit{Id.} at § 78u-4(b)(3)(B).

\textsuperscript{22} Fairman, supra n. 18, at 1011–1059. In one recent high-profile case alleging that a fast-food restaurant chain knowingly sold unhealthy food that promoted childhood obesity, the complaint was dismissed for failure to comply with heightened pleading requirements. \textit{See Pelman v. McDonald’s Corp.}, 237 F. Supp. 2d 512, 519 (S.D.N.Y. 2003). The court was motivated to require heightened pleading by its concern that “McLaw suits” would proliferate, creating “crushing exposure to liability.” \textit{Id.} at 518; see also Christopher M. Fairman, \textit{No Mc Justice for the Fat Kids}, Leg. Times 42 (Feb. 17, 2003).

\textsuperscript{23} \textit{Iodice v. U.S.}, 289 F.3d 270, 281 (4th Cir. 2002); see \textit{e.g. Dickson v. Microsoft Corp.}, 309 F.3d 193, 213 (4th Cir. 2002) (citing \textit{Iodice}).

\textsuperscript{24} See Fairman, supra n. 8, at 617.
\end{footnotesize}
Third, there is resistance to minimalist one-form-fits-all pleading from a radically different quarter: practitioners and teachers who believe that such a practice often poorly represents clients' interests and some who believe, further, that it shows disrespect for the clients themselves and for their stories. Rote, generic pleadings “do not translate [plaintiffs’] stories in the fullness of their drama. Nor do they persuade with the full force of their potential.” Certainly, the drafters of Rule 8 did not intend to prohibit or even discourage fuller pleading. The Rule was intended to “liberate lawyers from code pleading. It is not intended to restrict how they may choose to plead.” Indeed, the drafters of Rule 8 “did not favor bare-bones complaints.” The “global vision” of the drafters of the Rules was that “litigants should have their day in court.” That means making access easier, of course, but surely, it also means ensuring that a litigant’s story is heard, so that justice can be done, but also out of simple respect. “Every client has a story that deserves to be told—from the corporate client trying to survive in a harshly competitive climate, to a spouse embroiled in a bitter divorce.”

25. See e.g. Bill Bystrynski, Drafting Complaints, Tr. Briefs 6 (Apr. 1999) (“[T]he complaint can be a time to put your best foot forward, to draft the document a judge will look at first to get a sense of your case. The drafting of your complaint can be one of the important times for gathering the relevant facts and applicable theories together.”); Eastman, supra n. 5, at 765–768 (expressing “frustration and disappointment” with traditional pleadings in civil rights cases, his own included, “sterile recitations of dates and events that lost so much in translation . . . los[ing] the identity of the person harmed . . . the fullness of the harm done . . . the significance of it all”); George G. Mahfood, Crafting Persuasive Complaints, Tr. 39 (Dec. 1992) (“[A]lthough attorneys no longer need to plead facts, this does not mean that they should eliminate them from complaints. Counsel’s duty to a client is to plead enough facts to tell a good story—however many facts it takes to advocate and persuade. Persuasion is impossible without sufficient, reliable, and material data.”); Stephen N. Subrin & Thomas O. Main, Honoring David Shapiro: The Integration of Law and Fact in Our Uncharted Procedural Universe, 79 Notre Dame L. Rev. 1981, 1998 (2004) (“The idea of a ‘plain and short statement of the claim’ has not caught on. Few complaints follow the models in the Appendix of Forms. Plaintiff’s lawyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to ‘educate’ (that is to say, influence) the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove.” (quoting Am. Nurse’s Assn. v. Ill., 783 F.2d 716, 723–724 (7th Cir. 1986))).

26. See Eastman, supra n. 5, at 808.


28. Marcus, supra n. 18, at 1768 (citing Charles E. Clark, Handbook of the Law of Code Pleading § 38, 244 (2d ed., West Publg. 1947)).

29. Fairman, supra n. 8, at 557.

30. Eastman, supra n. 5, at 768.
small percentage of suits filed are ever heard by a fact-finder, the complaint may be the plaintiff’s only opportunity to tell her story.\textsuperscript{31} Decrying the “thinness” of the language of pleadings that he believes Rule 8 has encouraged, civil-rights lawyer and teacher Herbert Eastman advocates “thicker,” more literary pleading, particularly in civil rights cases, incorporating devices such as client narrative, metaphor, irony, and the lawyer’s voice.\textsuperscript{32}

Where all these developments leave actual pleading practice in notice-pleading jurisdictions in the early twenty-first century is not clear. In the absence of empirical data, we make some tentative conclusions on the basis of our own informal, unscientific, anecdotal survey of pleadings. It would seem that although some federal statutory claims, in particular those alleging sexual harassment or violation of the Americans with Disabilities Act, are somewhat more carefully and “thickly” pleaded, rote form-book pleading is the norm in complaints alleging common-law tort and contract claims.\textsuperscript{33} Personal injury cases seem to elicit especially derisory pleading,\textsuperscript{34} and we noted that one type of complaint was routinely and distressingly bloodless: complaints alleging the injury and wrongful death of nursing home residents.\textsuperscript{35} At the oth-

\begin{footnotesize}
\textsuperscript{31} See Subrin & Main, supra n. 25, at 2001 (“Probably fewer than three percent of commenced civil cases reach trial . . . .”).

\textsuperscript{32} See Eastman, supra n. 5, at 800. He borrows the term “thinness” from James Boyd White, who applies it to legal discourse as a whole: “thinness—so little life; but part of it is too much life of a certain kind, an insistent assertiveness.” James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism 9 (U. Chi. Press 1990).

\textsuperscript{33} We consulted some 300 complaints in the course of this project, focusing first on common complaints like slip-and-fall, attractive nuisance, intentional infliction of emotional distress, and false imprisonment. We looked at both boilerplate forms and actual complaints in Westlaw and Lexis databases. Still other complaints were obtained from courts. We also looked at complaints posted online by organizations like the ACLU that involved less common claims and told more extraordinary tales.

\textsuperscript{34} A characteristic bare-bones slip-and-fall complaint filed in federal court. (The complaint from Breeden v. Hilton Hotels Corp., 2004 WL 3054743 (N.D. Ala. Mar. 19, 2004), is reproduced as Appendix A to this Article.)

\textsuperscript{35} The following is a typical allegation from such a complaint.

While under the exclusive care of the Defendants, individually and/or by and through their agents and/or employees and/or servants and/or officers and/or directors, Decedent HAROLD WRAY was caused to suffer numerous severe injuries, he fell numerous times as the direct and proximate result of the negligence of the Defendants, he was caused to suffer fatal injuries, he was permitted to become very ill, his illness was not treated properly, and his physical condition was permitted to deteriorate, he was not assessed properly, he was not diagnosed properly, he did not receive adequate care and treatment after he suffered injury, all as a direct and proximate result of the negligence and/or reck-
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The rare complaints of epic proportions, some written to function as press releases as well as pleadings, and some out of lack of skill or judgment; such complaints most usually evoke the court’s wrath and scorn and are subject to dismissal for “prolixity.”

As for contemporary textbook advice, its focus is largely on the tactical and instrumental aspects of pleading. Most texts


What conditions caused Wray to fall? For how long did he lie on the floor after a fall? What were his injuries? Were they painful? Was he seen by a licensed physician? What care was and was not given? Was he toileted, bathed, and fed? What improper assessments were made? Did attendants answer his calls for assistance and speak to him with respect or disdain? The generic allegations leave poor Mr. Wray’s story untold, and given that it is most likely the story of so many other nursing home residents, this seems especially sad. That the particulars would undoubtedly be gruesome and pathetic, assuming the allegations to be non-frivolous, does not seem sufficient reason to omit them. In fairness to the drafter, it could be that no one but the protagonist witnessed much of the story and that none of the other characters have come forward. But that, too, would be a story worth telling.

See e.g. Compl., Pelman v. McDonald’s Corp., 2003 WL 23474873 (S.D.N.Y. Feb. 19, 2003). The complaint in the civil lawsuit against Kobe Bryant for sexual assault is another example. The Bryant complaint and other public relations complaints are discussed in Samuel A. Terilli et al., Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion, 12 Comm. L. & Pol’y 143 (2007). The authors examine the legal ramifications of this practice and the doctrines of law that push lawyers to use pleadings as media tools and conclude that there are both adequate tools to punish those who write pleadings merely to defame and legitimate reasons in high profile litigation to write pleadings that promote public understanding.

See e.g. Gordon v. Green, 602 F.2d 743, 744–745, 746 (5th Cir. 1979) (noting that complaint and related papers “requir[ed] a hand truck or cart to move”); Bill Mears, CNN, Lawyer’s Complaint Is Too Long, http://cnnwire.blogs.cnn.com/2008/07/07/lawyers-complaint-is-too-long/ (posted July 7, 2007, 10:00 p.m. ET) (The Title was eight pages long, eighteen pages of defendants were listed, none of the relevant facts were alleged until page 30, and the whole document was characterized by the judge as an “odyssey” of “useless repetition.”)

focus on the complaint as tool of tactical advantage, providing savvy, if very general (and occasionally contradictory) advice. One suggests the “strategic advantages” of drafting allegations with “the maximum generality allowed,” because too much specificity “might prematurely commit the plaintiff to a particular factual theory of the case.” 40 Another concurs, warning that “[a]dding more than pleading rules require is usually surplusage that does not improve the legal adequacy of the complaint.” 41 A third text counters, however, that “generalities make it easy for defendant to deny allegations containing them.” 42 Its authors suggest that providing more information than notice pleading requires may “induce settlement negotiations and may require the defendant to admit or deny information that will assist you with discovery.” 43 Another text takes the middle road, explaining that a complaint will be judged adequate unless “the defendant can rightly ask, ‘Where’s the beef?’ or ‘What is plaintiff talking about?’ or ‘Do I know this character?’” 44 but conceding that there is a tactical role for particularized allegations, as they can be used to define the scope of disclosure and discovery and, by forcing specific admissions or denials, to seek discoverable information. 45

In addition to this focus on tactics, most texts also recognize that narrative has a role to play in complaint drafting. Complaints don’t just do things (e.g., provoke settlement, narrow or broaden discovery, force admissions, gain tactical advantage by withholding facts). They also say things; they tell stories. But of

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40. Calleros, supra n. 38, at 366.
41. See Mauet, supra n. 38, at 123.
42. See Ray & Cox, supra n. 11, at 263.
43. Id. at 255.
44. See Haydock, supra n. 3, at 89.
45. See id. at 90.
all the texts consulted, only one sees the complaint as first and foremost a narrative, and even there, the writers feel compelled to characterize this as no more than their own personal take on the matter: “[I]t is our view that a good pleading tells a complete, coherent story in a persuasive way, and gives the court solid perspective on [the] case.”46 “You will tell the story by arranging the facts in chronological order and presenting the sequence of events from [the] client’s perspective . . . [T]he reader of a well-drafted complaint should feel that a wrong has been committed, and that something should be done about it.”47

Narrative is generally consigned by texts to a limited role, however. Overall, there is a seeming mistrust of stories, a sense that the complaint’s ability to do things is inevitably compromised when it says things: telling the story may give the adversary some advantage. Thus, storytelling is most often characterized as an aspect of the drafter’s personal style or a drafting technique best saved for the exceptional case: “if the plaintiff has a compelling story to tell, setting that story out in the complaint for both the judge and later the jury to read can be an effective approach.”48

Another text notes, “some attorneys allege events with greater specificity than is required because they wish to present a more vivid and sympathetic story.”49 A third recommends that favorable facts be presented “precisely and graphically” and unfavorable facts be presented generally.50 Other than such recommendations on the level of detail, the only narrative techniques alluded to in the texts are chronology and tone, and those only very generally.51

46. Schultz & Sirico, supra n. 38, at 247.
47. Nancy L. Schultz & Louis J. Sirico, Jr., Legal Writing and Other Lawyering Skills 229 (3d ed., Matthew Bender 1998). Our own chapter on pleadings in Writing for Law Practice notes that “complaints have rhetorical as well as instrumental potential—that is, they can affect the course of litigation by persuasion as well as by legal effect,” and suggests that it may be “important, even vital, for the court to learn more than the bare outlines of the plaintiff’s story,” and that “respect for the plaintiff as a member of the human community suggests that his story should not be reduced to boilerplate.” Fajans et al., supra n. 38 at 37–38.
48. See Mauet, supra n. 38, at 124; see also Fajans et al., supra n. 38, at 37.
49. Calleros, supra, n. 38, at 367.
50. Child, supra, n. 38, at 43.
51. One text urges readers to remember that allegations should use chronological order. Brody et al., supra, n. 38, at 300. On tone in complaints, the texts speak with one voice: facts should be stated “precisely and unemotionally,” Ray and Cox, supra n. 11, at 263, using “objective” words. Child, supra n. 38, at 37 (adding the baffling thought that these objective words may be chosen with attention to their “positive or negative connotations”). They should be “quiet and understated” in order not to “alienate the court . . .
It is easy to criticize such advice, but very difficult to do better. Although notice pleading makes acceptable pleading easier, it does not, ironically, make the job of the careful pleader, new attorney, or teacher easier. Surely, drafting the substantive allegations in a complaint presents the drafter more contingencies (and imponderables) to negotiate than any other document lawyers are called upon to create. Once the facts have been gathered, the law researched, and the claims, defendants, jurisdiction, and venue settled upon, questions of what to say, how much to say, and how to say it remain. The need to advance some facts in a fact-pleading jurisdiction rules out one option—entirely conclusory allegations—but it leaves many choices still to be made. To plead not just adequately, but effectively, the drafter must consider all too many factors. The nature of the action is a consideration (sexual harassment, say, as opposed to a contractual dispute between buyer and seller of widgets), as is the nature of plaintiff (war widow or porn star) and defendant (debt collector or veterinarian). How well developed the facts are matters, as do the strength of the case on the known facts, the likelihood of settlement, the relative resources of the parties, and the relative uniqueness of the issues. The personality and preferences of the court matter. The personality and experience of opposing counsel matter. If the obstacle to effective pleading was once suffocating

[because] judges often view emotional language as a mask for a weak case.” Brody, supra, n. 38, at 292. “Draft pleadings in plain English.” Garner, supra n. 38, at 386. “[D]o not editorialize, or use unnecessary modifiers.” Schultz & Sirico, supra n. 47, at 228. “Write in short active sentences, eliminating adjectives and adverbs wherever possible.” Brody, supra, n. 38, at 305; see also Schultz & Sirico, supra n. 38, at 248 (“write short plain sentences”). In short, the consensus is that the good pleader’s literary canon begins and ends with Hemingway.

Yet Herbert Eastman has harsh words for exhortations to “plain” and “objective” prose.

We now find ourselves entering the era of plain writing . . . [but] “simple prose depends on concepts like ‘objective fact.’” These premises are assumptions about reality that we can no longer accept as true . . . . Most problematic of all for the plain speakers, this pretense of objectivity is not self critical, and it assigns to itself an undeserved neutrality of belief and values. In any case, plain writing must evolve in some direction, since it situates itself on untenable premises. While no one need defend the virtue of abandoning nineteenth-century legalese, it does not follow that plain writing is anything other than the twentieth century’s version of legalese, greatly improved, but still improvable.

See Eastman, supra n. 5, at 808–809 (quoting Garry Wills, Lincoln at Gettysburg: The Words That Remade America 148–149 (Simon & Schuster 1992)).
technicality, in a notice-pleading jurisdiction it is now oppressive freedom and mind-boggling contingency. Small wonder so many drafters give up and resort to boilerplate.

As noted at the outset, we believe that one way to ease the task of the practitioner, student, and teacher is to pay closer attention to the inherently narrative nature of pleading and to apply narrative theory and narrative drafting techniques in an attempt to reconcile the instrumental and rhetorical aspects of pleading. Because whatever else they might be or do, whatever the wrongs alleged, complaints are always themselves narratives in which a client’s troubles are folded into a cognizable legal claim. The plaintiff complains of the disruption of “an initial steady state grounded in the legitimate ordinariness of things” and seeks redress—restoration of the “old steady state.” The complaint ends with the plea for redress—the ad damnum clause—because a complaint is in fact an unfinished narrative, a half-told tale that awaits action by the court that will turn it into a comedy (if redress is granted) or tragedy (leading to the sacrifice and isolation of the plaintiff) if it is denied.

When the complaint is viewed in this light, as a plot line to be developed effectively, the careful drafter’s job is to use traditional storytelling techniques to the client’s advantage. How the drafter employs these techniques depends on the drafter’s analysis of the rhetorical situation—the exigencies of audience and purpose.

A complaint with allegations made in spare (but carefully wrought) prose with a minimum of (carefully chosen) detail is as much a narrative as a “thicker” pleading elaborately developing the plaintiff’s grievances and the defendant’s shortcomings. The former narrative style would be appropriate if the particular judge was known to disapprove of all but bare-bones pleading, if

52. One of the leading texts on legal storytelling characterizes pleadings as “[r]hetorical narratives,” that is, texts that “use a story rather than a set of propositional assertions to prove something persuasively.” Anthony Amsterdam & Jerome Bruner, Minding the Law 134 (Harv. U. Press 2000) (emphasis in original). Rhetorical narratives convince in part to the extent that they are “value-laden,” that is, they contrast the ordinary or expected state of things with “the precipitating incident that brings ordinariness into question.” Id. at 135; see also Jan Armon, A Method for Writing Factual Complaints, 1998 Det. C. L. Mich. St. U. L. Rev. 109, 120 (1998) (noting that the elements of a claim tell its “paradigmatic story”).

53. Amsterdam & Bruner, supra n. 52, at 113.

54. Id. at 114.

the defendant is believed to be stonily opposed to settlement, and if the pleader hopes to develop the facts further through broad discovery. In contrast, where the facts are already well-developed, where quick resolution would be in defendant’s as well as plaintiff’s interest, and where the issue is one of interest to the wider community, a story told with more incident, more detail, and more color would seem to be more effective.

Of course, these are easy examples, cases where audiences and purposes work in harmony. Very often there are conflicts—for example, a judge hostile to all but bare-bones pleading and a plaintiff with a story that cries out to be told in its fullness—and for this quandary there is no easy answer, just the careful, hopeful exercise of the attorney’s best judgment and craft in telling the tale.

II. THE NATURE AND PRACTICE OF NARRATIVE

Narrative can help complaint drafters avoid the simplistic (and inaccurate) dichotomy of default, minimalistic boiler-plate-driven pleading on the one side and, on the other side, the rare, more individualized pleading that tells the “exceptional” plaintiff’s story. Even in familiar and uncomplicated complaints, narrative techniques can capture a busy judge’s attention and shake opposing counsel’s confidence. Given the conventions of the form, however, drafting a cohesive and convincing narrative in a complaint is as challenging as it is desirable. Putting individual averments into numbered paragraphs that are gathered into counts too easily leads to a “syncopated rhythm that does not resemble a coherent narrative,” much less a persuasive one.

To conquer such an unforgiving form, lawyers first need to understand narrative and narrative technique. A review of legal writing textbooks suggests that students get little schooling in either. And what instruction on narrative there is usually focuses

56. Though we discuss only complaints, there are times when storytelling techniques are useful in answers, as well. Affirmative defenses are often their own narratives, and in a few fact-pleading jurisdictions, the defendants are required to give their side of the story when they deny allegations. See supra n. 1 and accompanying text. Affirmative defenses do not ordinarily lend themselves to the full range of narrative techniques described in this Article. For example, because in most jurisdictions, most defenses will be deemed waived if not raised in or before the answer, defenses should ordinarily be raised as generally and inclusively as possible. See Fajans et al., supra n. 38, at 71–72.

on statements of fact in appellate briefs. Texts tell students to develop a theory or theme—that is, to tell the story from the client’s point of view—but give little advice about how to accomplish this.58 Only a few texts explain what is involved in finding a theme or a story,59 developing character,60 or structuring a narrative creatively.61 Thus, we take some time here to discuss narrative theory and narrative techniques before suggesting how these techniques can be applied to complaint drafting.

A. The Nature of Narrative62

Perhaps the first point that needs to be made is that adding specific facts to a complaint—even those selected on the basis of their legal relevance—does not create a narrative. This is because stories are not just recipes for stringing together a set of “hard facts” . . . [instead] stories construct the facts that comprise them. For this reason, much of human reality and its facts are not merely recounted by narrative but constituted by it. To the extent that law is fact-contingent, it is inescapably rooted in narrative.63

And to the extent that a plausible story is the backbone of the theory of the case, lawyers must provide context and structure that organize the facts into a legally sufficient, plausible, and persuasive narrative.

58. What suggestions they give are sound but fairly general: humanize the client; emphasize favorable facts and de-emphasize or neutralize unfavorable facts (but do not omit or misrepresent significant facts); save the beginning and ending for favorable facts; use chronological or topical organization; and find vivid nouns and verbs (but sound reasonable and not too emotional). See Calleros, supra n. 38, at 385–387, 437–440; Dernbach et al., supra n. 38, at 279–289; Edwards, supra n. 38, at 323–139; Glaser et al., supra n. 38, at 358–367; Murray & DeSanctis et al., supra n. 38, at 379–389; Oates et al., supra n. 38, at 387–396; Ray & Cox, supra n. 38, at 167–192; Shapo et al., supra n. 38, at 410–420; Slocum, supra n. 11, at 472–473.

59. See Edwards, supra n. 38, at 327; Fajans et al., supra n. 38, at 174; see also Neumann, supra n. 38, at 372; Neumann & Simon, supra n. 38, at 199–202.

60. See Edwards, supra n. 38, at 328; see also Fajans et al., supra n. 38, at 187; Neumann & Simon, supra n. 38, at 202.

61. See Edwards, supra n. 37 at 325; see also Fajans et al., supra n. 38, at 181; Neumann & Simon, supra n. 38, at 208; Neumann, supra n. 38, at 374–375.


63. See Amsterdam & Bruner, supra n. 52, at 111 (emphasis omitted).
A plausible narrative also requires more than linear continuity. Simple succession is meaningless. It creates neither a story nor a lawsuit. As Northup Frye says, “At a certain point in narrative, our sense of linear continuity changes perspective and we see design or unifying structure.”

Thus, traditional narratives are built on the “philosophical error of post hoc, ergo propter hoc; narrative plotting makes it seem that if B follows A it is because B is somehow logically entailed by A. And certainly, it is part of the ‘logic’ of the narrative to make it appear that temporal connection is also causal connection.” In other words, “any narrative telling presupposes an end that will transform its apparently random details ‘as annunciations, as promises’ of what is to come, and that what-is-to-come transforms because it gives meaning to, makes significant the details as leading to the end.”

For a story to have narrative significance there must be a completed process of change. There is surprising agreement among narrative theorists about the elements of this process. As summarized by Amsterdam and Bruner, there is

(1) an initial steady state grounded in the ordinariness of things

(2) that gets disrupted by a Trouble consisting of circumstances attributable to human agency or susceptible to change by human intervention,

(3) in turn evoking efforts at redress or transformation, which succeed or fail


65. See Brooks, supra n. 64, at 94 (citing Roland Barthes, Introduction to the Structural Analysis of Narrative, in The Barthes Reader 266 (Susan Sontag ed., Richard Howard trans. 1982)).

66. Id. at 94; see also Steven L. Winter, The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning, 87 Mich. L. Rev. 2225, 2235 (1989) (“For an account to be perceived as a coherent narrative or story, it must be more than a ‘simple succession’ or ‘enumeration of events in serial order’; it must be ‘a configuration.’”)

so that the steady state is restored or a new (transformed) steady state is created,

and the story concluded by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some coda—say, for example, Aesop's characteristic moral of the story.68

Although the components of narrative are stable, the nature of the trouble or conflict varies. It may stem from conflict with another, from conflict within the self, or from conflict with society.69 But whatever the trigger, the conflict arises out of a disjunction between the “Agent, Act, Purpose (or Goal) and Agency (or Means) and Scene.”70 If, for example, a protagonist has the honorable goal of procuring food for hungry children, but accomplishes that goal by breaking and entering, the act inappropriately achieves the goal, and conflict and disorder result. A similar conflict arises from the disjunction of purpose and agency when the police, seeking to rid a community of drug dealers, act hastily and in reliance on anonymous tips, invading the apartment of a frail eighty-three-year-old woman.

This organization of events into a meaningful progression from steady state to conflict and then to resolution is one reason why narrative plays such a central role, and has such persuasive force, in the law. But narrative is also persuasive because “narrative forms are not only immediately recognizable, but . . . they

68. See Amsterdam & Bruner, supra n. 52, at 113–114 (emphasis in original); see also Winter, supra n. 66, at 2240 (“The antagonist is, typically, the agent that causes the imbalance. The protagonist meets the antagonist, and a struggle ensues. This provides an agon as the pivotal point of the narrative. Its resolution also restores the initial state of balance and provides a sense of closure.”); Brian Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections, 32 Rutgers L. J. 459, 466 (2001) (a story “focuses on a central character, the protagonist, who is faced with a dilemma; the dilemma develops into a crisis; the crisis builds through a series of complications to a climax; in the climax, the crisis is solved . . . [by the protagonist] “getting or not getting what he wanted”). Ruth Anne Robbins encourages lawyers to cast their clients as the heroes of their own lawsuit stories, heroes who are sufficiently imperfect to elicit audience identification, but who are also on a transformative journey that has the power to change the hero and potentially the hero’s society. Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using Characters and Paradigms of the Archetypal Hero’s Journey, 29 Seattle U. L. Rev. 767, 790–791 (2006).
69. See e.g. Foley & Robbins, supra n. 68, at 469 (quoting from a writing workshop by Josip Novakovich).
70. Amsterdam & Bruner, supra n. 52, at 130 (discussing Kenneth Burke).
allow us to assign meaning to events through ‘pre-given understandings of common events and concepts, configured into the particular pattern of story-meaning.’ Narratives strike us as natural ways of understanding experience.”71 “People, including judges and jurors, understand and restate events in terms of stories,”72 Amsterdam and Bruner posit two theories for why this is true. First is the endogenous theory, which holds that “narrative is inherent either in the nature of the human mind, [or] in the nature of language . . . .”73 Narrative structures might be, for example, some type of Kantian category that fashions our understanding and experience of the world.74 A second theory is that narrative structures model, are a reflection of, culturally shared forms of experience,75 perhaps because “humans experience social reality temporally or . . . the human life cycle itself contains the elements of a narrative structure—a beginning, middle, and end, to which we assign meaning.”76 But regardless of the theory adopted,

[t]raditional models of legal adjudication, which are based solely on informal or formal models of logic, are increasingly seen as incomplete, or inadequate, for fully describing the persuasiveness of legal arguments. The “deeper” logic of narrative structures adds to more traditional models for legal argumentation.77

72. See Eastman, supra n. 5, at 769 (quoting Michael E. Tigar, Examining Witnesses 5 (ABA 2003)).
73. Amsterdam & Bruner, supra n. 52, at 115.
74. Id. at 116.
75. Id. at 116–117. Steven Winter sees the role of narrative in the process of social construction as a link between experience and the effective crystallization of social mores. Winter, supra n. 66, at 2228.
76. See Rideout, supra n. 71 (providing a good summary of these theories in this Article).
77. See id. at 60. As Ruth Anne Robbins notes, much legal narrative theory is indebted in part to Carl Jung’s notion of the collective unconscious, anthropologist, Sir James Frazer’s observations on the similarity of tribal rituals throughout the world, and Joseph Campbell’s work demonstrating that “rituals mimic myths.” See Robbins, supra n. 68, at 773–775.
In other words, in addition to abstract logic, there is such a thing as narrative rationality, a rationality that sees paradigms in human stories that help to explain the meaning of those stories.\textsuperscript{78}

If these theories help to explain the centrality of narrative in law, they do not explain why one narrative might seem more rational, more credible, than another or how the audience of a story comes to believe one account of events rather than another. Some theorists think judgments about credibility depend on narrative coherence, correspondence, and fidelity.\textsuperscript{79}

Narrative coherence requires a story to be both internally consistent—that is, the evidence and the story must comport with each other—as well as complete—that is, there must be sufficient facts to ground whatever inferences need to be made.\textsuperscript{80} In a complaint, that means that there should be some specific support for the allegations, that the facts alleged must bear on, “go to,” the elements of the claim, and that every element of every claim must be alleged.

Narrative correspondence results when a party’s particular story corresponds with socially normative versions of similar stories. These normative versions have been described as “narratives,” “scripts,” or “stock scripts” and are immediately recognizable, allowing for easy generalizations about the story’s significance.\textsuperscript{81} Stock scripts enable us to organize experience, even when we have limited information, because

(1) they draw upon direct physical and cultural knowledge,
(2) they are highly generalized in order to capture and relate a broad range of particularized fact situations, (3) they are unconscious structures of thought that are invoked automatically and unreflectively to make sense of new information, and (4) they are not determinate, objective characterizations of reality, but rather idealized structures that effectively

\textsuperscript{78} See e.g. Rideout, supra n. 71 (tracing the development of narrative rationality in the works of Robert Burns, Walter Fisher, W. Lance Bennett and Martha S. Feldman, and Bernard Jackson).
\textsuperscript{79} Id. at 55.
\textsuperscript{80} Id. at 64–66.
\textsuperscript{81} Amsterdam & Bruner, supra n. 52, at 121–122; see also Rideout, supra n. 71, at 68–69. Rideout identifies the Conquering Hero turns Tyrant as one example of a stock script. The hero rescues the community and is rewarded with power. Then, because of some flaw or deception, he becomes a tyrant. The script can end either with his redemption or with his destruction.
characterize some but not all of the varied situations that humans confront in their daily interactions.  

Lawyers, of course, are familiar with stock stories peculiar to law. In civil actions, the stock story is one in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the defendant. The defendant must counter with a story in which it is claimed that nothing wrong happened to the plaintiff (or that the plaintiff’s conception of wrong does not fit the law’s definition), or, if there has been a legally cognizable wrong, then it is not the defendant’s fault.

This generic script is further particularized by the claims or causes of action in a complaint and the affirmative defenses in an answer. Some examples of common stock stories in complaints are “slip-and-fall,” “deadbeat dad,” “corporate greed,” “bait-and-switch,” and “predatory lending.”

In other words, a complaint achieves narrative correspondence by alleging a stock story that makes out a legally cognizable wrong. The writer taps into “stock” information and combines it with “new information,” information that is a particularization, concretization, or illustration of the stock story. Even then, the transformation or resolution and coda occur only when the dispute is resolved. In this sense, the complaint and answer together present a twice-told tale, but each is only half-told.

Finally, there is narrative fidelity, which persuades the audience to make a comparative judgment about the competing narratives based not just on stock scripts or abstract legal or moral principles, but on practical judgments about what the larger community would deem the right thing to do in that case. As Eastman explicates, as translators for our clients’ stories and voices

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82. Winter, supra n. 66, at 2234; see also Gerald P. Lopez, Lay Lawyering, 32 UCLA L. Rev. 1, 5–6 (1984). Stock structures form an interpretative network: “What goes on . . . is never approached sui generis, but rather is seen through these stock structures. Once the principal features of a given phenomenon suggest a particular stock story structure, that structure shapes our expectations and responses.”

83. See Smith, supra n 37, at 44.

84. Amsterdam & Bruner, supra n. 52, at 117.

85. See Smith, supra n. 38, at 45.

86. See Rideout, supra n. 71, at 69–86.
we have a responsibility to translate as truly as we can . . . . If language proves incapable of capturing the truth, if we cannot translate reality accurately, we can nonetheless translate meaningfully. Our language will be “judged by its coherence, by the kinds of fidelity it establishes with the original, and by the ethical and cultural meaning it performs as a gesture of its own.” 87

In pleadings, narrative fidelity is achieved when our clients can recognize their own stories and, as Winters explains, when the rest of our audience instinctively feels “that really happened and justice must be done.” 88 Fidelity depends upon “a sense . . . [that] certain outcomes seem more legitimate than others. If not for that sense, no legal system could survive without the constant exercise of raw, repressive society.” 89 A complaint that has narrative correspondence and coherence will be a competent, even effective pleading. But a complaint that achieves narrative fidelity is a far greater achievement in professional and human terms.

87. See Eastman, supra n. 5, at 856 (quoting James Boyd White, Justice as Translation 256 (U. Chi. Press 1990)).
88. See Winter, supra n. 66, at 2257 (quoting Guyora Binder, On Critical Legal Studies as Guerilla Warfare, 76 Geo. L.J. 1, 5 (1987)).

The action of comedy in moving from one social center to another is not unlike the action of a lawsuit, in which plaintiff and defendant construct different versions of the same situation, one finally being judged as real and the other as illusory. This resemblance of the rhetoric of comedy to the rhetoric of jurisprudence has been recognized from the earliest times. A little pamphlet called the Tractatus Coislinianus, closely related to Aristotle’s Poetics, which sets down all the essential facts about comedy in about a page and a half, divides the dianoia of comedy into two parts, opinion (pistis) and proof (gnosis). These correspond roughly to the usurping and the desirable societies respectively. Proofs (i.e., the means of bringing about the happier society) are subdivided into oaths, compacts, witnesses, ordeals . . . , and laws—in other words the five forms of material proof in law cases listed in the Rhetoric. We notice how often the action of a Shakespearean comedy begins with some absurd, cruel, or irrational law . . . , which the action of comedy then evades or breaks . . . . Thus the movement from pistis to gnosis, from a society controlled by habit, ritual bondage, arbitrary law and the older character to a society controlled by youth and pragmatic freedom is fundamentally, as the Greek words suggest, a movement from illusion to reality . . . . The watcher of death and tragedy has nothing to do but sit and wait for the inevitable; but something gets born at the end of a comedy . . . .

Id. Frye seems to be touching on something similar to narrative fidelity here.
B. Narrative Techniques and Their Application

In the course of a legal dispute, a client’s story is told and retold, and the audience (the parties, counsel, the court, and, in the rare case that goes to trial, the fact-finder) construct and reconstruct it as they try to make sense of the evolving and conflicting narratives put before them.\(^{90}\) Successful resolution of the dispute depends, in considerable part, on how well the storyteller imbues the client’s story with narrative coherence, correspondence, and fidelity. And these, in turn, depend upon the storyteller’s grasp of narrative theory and skillful use of the basic techniques of storytelling detailed below: sequence, characters, point of view and theory, scene, detail, and tone. For example, unless the allegations are supported by some specific detail—whether elaborate or spare, a litany of detail or just one telling quote—the story will lack coherence. Unless the plaintiff and defendant emerge as fully realized individuals, as characters rather than cardboard prototypes, the story will lack fidelity.

The techniques discussed below are all interrelated and often inextricably intertwined in practice. For example, we can create character through tone and detail, create tone through the use of detail, create point of view through sequence and tone. Nonetheless, we think separating out these techniques as discrete categories provides a useful structure for practitioners, students, and teachers, a way to talk about complaints, both in critiquing and in drafting.

1. Sequence

The ways to present the sequence of events in a narrative are as variable as the types of conflict and disjunction in that narrative. The easiest and clearest structure is straight chronology. The writer begins at the beginning by describing the steady state, then chronicles its disruption, the quest for redress or transformation, and the consequences of that quest. And, indeed, in the law, this type of chronology is often the organization that is the

\(^{90}\) Nancy Pennington and Reid Hastie’s work on jurors’ decision-making indicates that jurors construct stories as they hear testimony and ultimately pick the story that makes the most sense. Increasingly, story construction is seen as playing a central role in decision-making. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 520 (1991).
The most effective—in legal prose as opposed to more inventive Hollywood scripts that use flashbacks, interwoven plot strands, and the like—stories are best told chronologically. “Chronology is, then, the bread and butter of fact writers.”\textsuperscript{91}

There are, however, a number of reasons—persuasion being one of the most important—for abandoning a linear structure. As two experts warn,

chronology can become what we call a “default organization,” structurally similar to the automatic moves a computer program will make unless the user instructs it otherwise. Defaults can be quite dangerous. . . . Habitual chronology can distract us from telling an effective story that complements and enhances our legal argument.\textsuperscript{92}

Altering the normal past-to-present sequence with a deft flashback or flash-forward can be an effective way to focus the reader’s attention on a particular fact.

One of the most effective non-linear sequences begins \textit{in media res}—in the middle of the story—starting at a critical point in the narrative and then drawing back in time to describe the characters in the story and the events that brought them to that critical point. Opening in this fashion with a compelling scene is an excellent way to hook the reader. The novelist Alice Adams often uses this formula, which she labels ABDCE, for

Action, Background, Development, Climax, and Ending. You begin with action that is compelling enough to draw us in, make us want to know more. Background is where you let us see and know who these people are, how they’ve come to be together, what was going on before the opening of the story. Then you develop these people so we learn what they care most about. The plot—the drama, the actions, the tension will grow out of that. You move them along until everything comes together in the climax, after which things are different for the main characters, different in some real way. And then there is the ending: what is our sense of who these


\textsuperscript{92} Id.
people are now, what are they left with, what happened, and what did it mean?\(^93\)

A variation on this organization begins by compressing time: providing a dramatic summary of the story before going back to start at the beginning.

Still another type of narrative sequence is the convergent narratives structure. Here the writer follows different characters through a series of events in a parallel structure until their stories converge and their lives are changed.\(^94\)

Finally, in structuring a story, a writer must always think about where to begin and where to end it, a decision informed for lawyers by their theory of the case. Armstrong and Terrell give an example of how different beginning and ending points change the story of a juvenile accused of breaking and entering, the defense counsel and prosecutor would likely start their narratives at different points:

If we begin at the Smithville orphanage, as [defendant] G.L. runs away with only the clothes she is wearing, we tell one story. If we begin with a list of G.L.’s alleged crimes, followed by a vignette of the Barrs [complainants] returning from a PTA meeting to find their home violated, we tell a very different story . . . [as we do if we end] with an intruder running out of the house, or with a frightened child hiding in the bushes, then captured and “incarcerated” by the police.\(^95\)

Defense counsel would rely on the stock story of the abused orphan. That story goes back in time to humanize the protagonist and de-emphasize her supposed offenses. The prosecutor is telling more of a “home invasion” story. It begins in \textit{media res}, with the complainants’ return to their vandalized home, in order to emphasize the fear and sense of violation they experienced.

Like all storytellers, careful complaint drafters make conscious choices among these techniques for sequencing their narrative, suiting the technique to their audience and purpose. In a factually and legally complex case, more than one technique may


\(^{95}\) See Armstrong & Terrell, \textit{supra} n. 91, at 90.
be appropriate, especially when a sympathetic plaintiff complains of horrendous and protracted mistreatment. In such a case, the goals of narrative coherence, correspondence, and fidelity, and thus of persuasion, are well served by beginning the complaint, not with the expected jurisdictional allegations, nor with the beginning of the story, but *in medias res* with an “introduction” or “preliminary statement.” This statement “creates a good first impression and demonstrates mastery of the facts and the law. . . . The ultimate purpose of the preliminary statement is to persuade the judge of the merits of the plaintiff’s claim before he or she undertakes any lengthy review of the case.”  

This technique was used to good effect in a complaint in which an Ethiopian woman employed by a wealthy New Jersey couple alleges human trafficking and involuntary servitude, as well as many federal and state statutory violations and violations of New Jersey tort law.

1. In this action, Plaintiff Beletashachew Chere seeks damages from Defendants Fesseha Taye and Alemtashai Girma (collectively Defendants) under federal law, including the Fair Labor Standards Act and the Thirteenth Amendment to the United States Constitution; state law, including the New Jersey minimum wage and overtime laws and New Jersey tort law; and international law, including treaty and customary international law prohibitions against trafficking in persons, enslavement, involuntary servitude, and forced labor.

2. Defendants induced Ms. Chere to come to the United States from Ethiopia through fraudulent means and then held her as an involuntary servant for almost one and a half years. During this time, Defendants forced Ms. Chere to work in their home for as many as one hundred hours per week without pay. Defendants kept Ms. Chere in a condition of involuntary servitude and forced labor through threats of serious harm to her person and well-being and through a pattern of behavior that caused Ms. Chere to reasonably believe that harm would come to her if she failed to continue performing the household duties assigned by Defendants or if she otherwise reported Defendants’ conduct to responsible authorities. Ms. Chere was finally able to escape.

This compressed narrative engages the reader’s sympathies, establishes the drafter as a knowledgeable and skillful melder of law and fact, and provides a roadmap for the subsequent sixty-some paragraphs in which the plaintiff’s tale is told. Those detailed substantive allegations follow basic narrative chronology: a steady state of ordinariness (Ms. Chere’s life in Ethiopia with her family), disruption (her emigration and employment by the defendants, who enslave and abuse her mentally and physically), and efforts at redress (her escape and subsequent suit against her tormentors). The last two stages of the narrative, “redress/transformation” and the “coda” or meaning of the story, will depend on the outcome of the litigation. Helpful headings in the complaint emphasize the elements of the narrative. For example, the steady state comes first, under the heading “Circum-


98. Just as this introduction effectively begins the story of plaintiff’s misfortunes, many introductions to complaints are missed opportunities. A complaint alleging that plaintiffs were negligently exposed to toxic substances as they participated in rescue and cleanup activities after the September 11 attack on the World Trade Center is so mired in boilerplate legalese and redundancy that the extraordinary story is effectively lost to view.

1. Plaintiffs bring this action against the Defendants seeking redress for injuries they have suffered in the past, and will continue to suffer, as a result of the Defendants’ reckless, grossly negligent, and negligent operation, ownership, maintenance, control, supervision, and management of the premises or place of business known as and/or located at: [addresses]; all in the City, County and State of New York, following the terrorist attacks of September 11, 2001 (hereinafter referred to as “the locations”).

2. Because of the damage sustained in the attacks, the Twin Towers and Seven World Trade Center collapsed, spreading known and unknown toxic substances throughout the World Trade Center Site and the surrounding areas, including “the locations,” portions of which, although operated, owned, leased, maintained, controlled, supervised, and managed by the Defendants, remained dangerous, defective, hazardous, toxic, unguarded, unsupervised, and unprotected for multiple days, weeks, and/or months thereafter. The Plaintiff participated in rescue and/or recovery and/or construction, and/or excavation and/or demolition and/or clean-up operations at the buildings and/or place of business known as and/or located at the “locations,” on or about October 1, 2001, and during the days, weeks and/or months that followed.

stances Leading to Ms. Chere’s Employment with Defendants.” Succeeding headings describe the many varieties of disruption and trouble allegedly endured by the plaintiff. Her subsequent efforts at redress and transformation fall under the heading “Escape from Defendants.”

In a complex case like Ms. Chere’s, this detailed from-the-beginning telling of the tale is appropriately followed by the many separate claims that the allegations give rise to, with relevant paragraphs of the story realleged by reference. Thus, in such a case, the story is told and retold from the beginning multiple times: in the introduction, in a background narrative, and then in each of the separate counts. Realleging by reference saves the story from redundancy and tedium.

For a simple, familiar claim arising out of a familiar story, a slip-and-fall, for example, strict chronology is a good choice, but even with such a simple claim, there may be effective variations. The story might begin in media res with plaintiff innocently walking down the street, only to fall suddenly and violently on her back; the story might then flash back to the previous day’s ice storm. On the other hand, if the stock story is “slum landlord,” the chronology might begin earlier, with defendant’s radical downsizing of the janitorial staff in a cost-cutting measure.

The “converging destinies” sequence can also be a useful technique in a complaint. The traditional introduction of the parties at the beginning of a complaint can be expanded to tell the story of the plaintiff and defendant up to the time of the disruption. Obviously, plaintiff has every interest in using this structure when plaintiff’s history enhances his credibility or defendant’s puts him in a bad light. For example, a plaintiff alleging police brutality might be introduced through his history as a recent immigrant, employed and supporting a family, with no arrest record, a man walking home from his night shift. The defendant, a relatively new officer, was discharged from the armed forces for undisclosed reasons, and has a history of disciplinary violations and civilian complaints, one of them alleging that the officer targets people from plaintiff’s ethnic group. On the day in question, shortly before he went out on foot patrol, he had been informed that one of those complaints was proceeding to a hearing. The destinies of plaintiff and defendant then converge in the rest of the allegations, as the officer approaches the plaintiff.
Similarly, in commercial litigation, the complaint can effectively lead up to the dispute in question by “describing the evolution and development of the client’s business or financial condition . . . [because t]he client’s behavior will be measured against his or her sophistication, wealth, and business practices.”99 Counsel should then “focus[ ] attention on the manner in which the defendant has institutionalized abusive practices to sustain wealth and to dominate the market . . . to convey to the reader that the defendant has made a practice of commercially unreasonable and exploitive conduct.”100 The stage is thus set for the story of the parties’ mutual dealings, the convergence of their destinies.101 Allegations concerning the claims themselves can also be organized around parallel stories. For example, a drafter can begin with an account of a plaintiff’s movements in the store and then cut to the movements of the store’s security guards as they become suspicious and begin tracking the plaintiff. These narratives converge when the guards confront the suspected shoplifter.

Finally, it should be noted with respect to chronology that rote, unthinking use of “on or about” or “at all times material and relevant to this case” in complaints neither enhances the credibility of the narrative in a complaint nor provides tactical advantage. As readers, we want to know when a significant event happened; if the narrator is not certain of the timing, perhaps the account is not to be trusted in other respects. We know that “once upon a time” introduces a fairy-tale; “on or about” is not much more credible. Alleging exact dates makes a story feel real. Although exact dates should not be alleged unless the drafter is certain of them,102 exact dates, or at a minimum, exact months, should ordinarily result from proper investigation of a client’s claim. Allegation of exact dates will both add credibility to the

99. See Mahfood, supra n. 25, at 39.
100. Id. at 40.
101. Converging destiny structure is also appropriate in a class action since, by its nature, a class action tells many stories.
102. This is because an allegation of a date or time is considered material, and by pleading the date or time, the pleader makes a judicial admission of that date, an admission that could prove damaging should the defendant advance a statute of limitations defense. Qualifying the date by adding “on or about” results in the pleading not constituting an admission. See Haydock et. al., supra n. 3, at 103. Moreover, the defendant may ordinarily deny an allegation containing the wrong date, even if the rest of the allegation is true.
story and render defendant’s eventual admission or denial more meaningful. As for the stale, legalese formulation “at all times material and relevant,” “[i]t is often unnecessary, because specific dates can be provided.” Moreover, it ill-serves the client’s interest, because “it is an open invitation to denial of the fact. Because the phrase has no precise or clearly understood meaning, no attorney could admit that a fact was true ‘at all times material and relevant to this case.’”

2. Characters

To achieve narrative rationality, characters need to be developed so that they feel real to the reader, not like cardboard prototypes. The reader must be persuaded to empathize with them or disapprove of them. That means that the writer must both understand the characters—their needs, dreams, fears, weaknesses, experiences, circumstances—and know how to convey that understanding.

Character can be established directly, by describing a protagonist’s thoughts or by describing physical “appearance, clothes, possessions, body language, etc. which act as indices of class, character, status and social milieu . . .” Describing body language is another effective way to suggest character. For example, there is a difference between persons making eye contact and a person becoming aware that he or she is the object of someone’s unblinking stare. The former suggests a moment of shared intimacy, the latter an uncomfortable intrusion.

Character can also be established indirectly through action and dialogue. In fact, dialogue is one of the best ways to show character. One writer of creative nonfiction reports the ancient Greeks to have said, “Speak so I may see you.”

In pleading practice, some practitioners think that establishing the characters of plaintiff and defendant is so important that it should be done up front, expanding the traditional identification of the parties in the beginning of a complaint into descriptions of them calculated to create sympathy for the plaintiff and

103. Id.
104. Id.
105. See Lodge, supra n. 67, at 204.
106. See Cheney, supra n. 94, at 137.
suspicion of the defendant from the first moment. If the client is a small-business woman . . . a thumbnail sketch of her business activities should be included. If the defendant is a large bank, insurance company, manufacturer, or publicly traded conglomerate, the size of its operations and assets are pertinent. Specific descriptions of a particular enterprise can build empathy for the client and set the tone for what constitutes commercially reasonable conduct.

When an organization or government entity rather than an individual is the plaintiff, it too can profitably be given a personality and characterized likeably at the outset of the complaint, as in the following description of the National Federation of the Blind, which goes well beyond the required jurisdictional information to create a character with a worthy mission.

4. The National Federation of the Blind, the leading national organization of blind persons, is a not-for-profit corporation duly organized under the laws of the District of Columbia with its principal place of business in Baltimore, Maryland . . . . The Federation is widely recognized . . . as a collective and representative voice on behalf of blind Americans and their families. The purpose of the NFB is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs held by sighted and blind persons concerning the limitations created by blindness that result in the denial of opportunity to blind persons in virtually every sphere of life . . . . The NFB and many of its members have long been actively involved in promoting adaptive technology for the blind, so that blind persons can live and work independently in today's technology-dependent world . . . .

107. See Mahfood, supra n. 25, at 39.
108. Id.
But a lengthy description of a party is not always necessary. Sometimes a single, well-chosen quotation can establish character in a complaint. In the involuntary servitude complaint of the Ethiopian immigrant described earlier, one can “see” the character of the defendant, plaintiff’s “employer,” when the defendant is quoted as telling plaintiff, “you are my punching bag—the one on which I can take out my anger and you have nowhere to go.”

Careful research, can also turn up telling statements recorded by respected journalists or historians, as in the following excerpt from a complaint filed by the ACLU in a “forced disappearance” case.

16. In providing its services to the CIA, Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine. Indeed, according to published reports, Jeppesen had actual knowledge of the consequences of its activities. A former Jeppesen employee informed The New Yorker magazine that at an internal company meeting, a senior Jeppesen official stated: “We do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these flights end up that way.” Jane Mayer, Outsourced: The C.I.A.’s Travel Agent, The New Yorker, Oct. 30, 2006.

Here, the quotation effectively counters any competing narrative Jeppesen may offer. The quotation also helps to establish narrative coherence, showing how the facts and the plaintiffs’ stories comport with each other.

Juxtaposition of quotations is another effective technique for establishing character, as demonstrated by the contrasting voices in the following excerpts from a civil rights complaint alleging racial discrimination. One of the defendants is alleged to have said, “I’m looking for a good colored leader who can control his people. Everybody looks for a good black these nowadays. You find one and you’ve got liquid gold.” In contrast, the following is attributed to the eighty-four-year-old African-American plain-

110. Compl. ¶ 47, Chere, No. 2:04-cv-06264-SRC-CCC.
112. Eastman, supra n. 5, at 846.
tiff: “I don’t see a bit of difference now than I did way back in ‘51 or ‘52 in the civil rights. It hasn’t reached us. I reckon it’s on its way, but it ain’t got here yet.” The defendant’s racism is reflected in his suggestion that good African-American men can’t be found and that a leader is good only if he “controls” his people. In contrast, the plaintiff’s statement establishes her patient, long-suffering character and seems like a reliable, unpretentious statement of the truth. This kind of juxtaposition helps the drafter to achieve narrative fidelity: the audience is not only convinced that the plaintiff’s suffering as a result of racial discrimination is real, but also desires redress for her injury.

It should be noted by way of caveat, however, that quotes should ordinarily be used judiciously in complaints—whether to establish character or for other purposes—and ideally, should be documented. Defendants will most usually deny uttering the precise words attributed to them. Moreover, since plaintiff’s specific allegations in a complaint will ordinarily be held to be admissions, quotations should be carefully vetted for unintended consequences. Finally, with the exception of claims that turn on words—libel, for example—no conscientious drafter would want to depend entirely on quotations to make out a claim. To do so could make proof of the claim depend on proof of the utterance. Yet despite these caveats, the drafter should not automatically rule out using quotations liberally to establish character. Only by careful analysis of the factual and legal specifics of the case, the nature of the audience, and the goals the drafter seeks to achieve with the complaint can the drafter determine whether or how to use quotes.

Details about plaintiffs’ backgrounds can also provide a vivid and sympathetic picture, as in the following excerpt from a complaint alleging discrimination based on sex-segregation in a middle school. The details that the drafter chose concerning plain-

113. Id. at 847.
114. The prevailing wisdom is, of course, that the drafter’s first concern should always be to frame allegations in such a way as to elicit the maximum of admissions. Yet some practitioners dissent, arguing that defendants will always find a way to deny allegations, no matter how carefully they are framed, and that “forcing” admissions is just one of the goals of an artfully drafted complaint. See Child, supra n. 38, at 34.
115. For example, a plaintiff suing a landlord for improperly securing the premises should not have her claim depend upon proving that the landlord said, “I’ll fix that lock when hell freezes over.” The addition of the more general allegation that the landlord, although aware of the faulty lock, failed to have it repaired, would be prudent.
tiff’s upbringing and avocations do more than just create a likeable character; rather, by challenging gender stereotypes, they relate directly to her sex discrimination “story,” thus enhancing the coherence of the narrative.

75. M.S. has grown up with role models that have shown her that females need not behave according to gender stereotypes. For instance, both her father and her mother have served in the military. Both her father and her mother are volunteer firefighters. . . .

76. M.S. herself has sought out activities that require physical exertion, strict discipline, performance under stress, quick decisions, and risk-taking. For instance, she has a purple belt in Shaolin Kung Fu. She is a certified scuba diver. She is a volunteer firefighter cadet. She is comfortable interacting with both boys and girls.¹¹⁶

Still another way to make plaintiff come alive is to allege thoughts and feelings, including, for example, plaintiff’s assessment of defendant’s mental state:

[P]laintiff was shocked, stunned, thought he was going to die right there, and was especially horrified by the deadly threat to his son. Plaintiff has no idea what was on the guard’s mind, and what was going to happen in the next moment. The exposure was multiplied by the sudden realization that the conduct of the defendant Doe 1 “Security guard” was irrational . . . .¹¹⁷

Since plaintiff’s counsel is rarely privy to defendant’s thoughts and feelings, defendants are inevitably known by their actions. In the following excerpt from the Ethiopian woman’s involuntary servitude complaint mentioned earlier, defendant’s actions are described with a clinical precision and simplicity that make them all the more chilling and credible. A quotation from

the defendant and a description of the plaintiff's feelings round out our knowledge of the characters in these skillfully drafted allegations.

43. In the fall or winter of 2002, Defendant Taye called Ms. Chere into his room and ordered her to massage his back, which he said was sore.

44. Approximately one week later, Defendant Taye again ordered Ms. Chere to massage his back but this time he told her to take off his pajamas and "go lower." He lifted his legs to touch her breast with his foot. While Ms. Chere massaged his back, Defendant Taye ejaculated on his blanket. Ms. Chere was horrified and afraid so she left the room.

45. On four or five subsequent occasions, Defendant Taye required her to "massage" him in this same manner. Ms. Chere was unable to refuse because she was frightened of the Defendants.118

Sometimes it is hard to make a client likeable. When the client is a convicted drug-dealer complaining of mistreatment by law enforcement, one approach might be to "downplay facts about the client, and instead make him a proxy for an 'ideal,'"119 such as the right to walk the streets unmolested by over-zealous police officers. Portraying the problem plaintiff as one embroiled in a "man against self" conflict is another option. For example, a recovering drug addict can be portrayed "as a hapless victim of drugs, a nemesis that is in essence a character in the case story."120 Similar techniques can be used in a civil case, such as a custody battle, where a father's participation in anger management counters prior abuse.

However, the pleader's efforts to make the client sympathetic and the adversary dislikeable should respect the reader's intelligence and capacity for empathy. Judges routinely see through obvious ploys for sympathy and even "[j]urors readily see through gratuitous praising of the virtues of the parties."121 There must

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118. Compl. ¶¶ 43–45, Chere, No. 2:04-cv-06264-SRC-CCC.
119. See Foley & Robbins, supra n. 68, at 473.
120. Id. at 474.
121. Gerald Reading Powell, Opening Statements: The Art of Storytelling, 31 Stetson L. Rev. 89, 94 (2001). It is easy for the zealous advocate to go over the top. A complaint alleging that a town engaged in a "blunderbuss effort to drive away [an] unwanted residence for
be narrative coherence, that is, “a fit between the character of a person and the relevant conduct of the person.” Moreover, if the pleader tells a credible and individualized tale of conflict and disjunction, the reader does not need to believe the plaintiff is a paragon of virtue in order to feel that he deserves to be made whole. None of the readers of a complaint, not the judge, not even the adversary’s counsel, could believe that it is right to throw a convicted drug dealer on the ground and stomp on his head.

3. Point of View

“Point of view concerns through whose eyes the reader views the action.” Artful exploitation of point of view is essential to effective storytelling. Fiction writers sometimes use omniscient narrators whose account of events the reader is intended to take as true. Sometimes the point of view is that of one character, whether told in the first-person or a third- (or even second-) person narrative. In other stories, point of view alternates among several characters, all with their own complementary or conflicting versions of events. In still other stories, point of view is subtly manipulated so that the reader comes to see that the narrator is unreliable and that the facts may well be other than as the narrator describes them. In short, point of view is intricately bound up with credibility or its absence.

recovering addicts’ tries too hard to make the plaintiffs appealing and to demonize the town. The opening paragraph alleges that the lawsuit

is about a Village’s . . . knowing, intentional, and deliberate discrimination against a protected class of individuals, recovering drug and alcohol addicted persons seeking nothing more than to reside within a community near to an addiction treatment center. This action seeks . . . to redress the egregious and un-constitutional efforts by the Defendant . . . to block Plaintiffs’ lawful and legally protected ownership and use of premises . . . as a residence . . . .”

Compl. ¶ 1, Woodfield Eq., L.L.C. v. Village of Patchogue, 2004 WL 2992172 (E.D.N.Y. Nov. 24, 2004) (emphasis added). Instead of convincing, the pounding legalese redundancy here alienates the reader. The qualifier “seeking nothing more than to reside” is particularly unsuccessful, in that it suggests that the reader might otherwise unfairly suspect plaintiffs’ motives.

122. Powell, supra n. 121, at 94.
123. See Cheney, supra n. 94, at 119–120.
124. Omniscient narrators are prevalent in the works of Jane Austen, Charles Dickens, and George Eliot. See, for example, Pride and Prejudice, Bleak House, and Middlemarch. Ford Maddox Ford’s The Good Soldier is a fine example of a first-person narrative, as is Laurence Sterne’s Tristram Shandy. Point of view shifts in the novels of Henry James,
In traditional complaints, the attorney is the narrator, telling plaintiff’s story from a lawyer’s point of view. (The introductory clause reinforces this, e.g., “Plaintiff Peter Pi, represented by his attorney, Alma Alpha, makes the following allegations against defendant David Delta.”) The voice is unmistakably that of a lawyer, and at best, the uninflected, unemotional language produces an appearance of objectivity that enhances credibility. Yet, thoughtlessly done, this point of view merely distances the reader from the narrative and induces her to withhold judgment as to the truth of the matter.

The allegations in a more artful complaint comprise a third-person narrative told from the plaintiff’s point of view and told, if not in the plaintiff’s own voice, at least, in a voice the plaintiff can recognize. The reader sees what plaintiff saw, hears what plaintiff heard, and feels what plaintiff felt. In order to persuade, however, the drafter must convince the reader that the plaintiff is a reliable source, that his or her “take” on events, reflected in the lawyer’s theory of the case, has narrative coherence. The drafter does that, first of all, by creating an individual and positive character for the plaintiff, using the techniques noted above, and by careful use of detail and tone, especially diction. The plaintiff’s story must also be supported with verifiable facts if the reader is to believe “this really happened” the way the plaintiff says.

For example, in the following allegations describing how a noise complaint escalated into a violent encounter between police and plaintiffs, the drafter shows us the event from plaintiffs’ perspective, successfully creating narrative coherence through the use of verifiable details. Despite one plaintiff’s explanation that he had long since turned down the volume, the police pushed into the apartment. When the plaintiff tried to write down the badge numbers of the officers,

Mr. Caraballo’s nephew Jose Anthony Montolio (a minor) was grabbed by the arm and neck by Officer Bolte. Jose Anthony Montolio was then slammed face-first onto the floor by Officer Bolte, and jumped on by other officers who kneed him in the back and forcefully pulled his arm up to his

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e.g., Wings of a Dove or The Golden Bowl, where competing interpretations of events are manifold. Kazuo Ishiguro’s The Remains of the Day is an excellent example of an unreliable narrator.

125 See infra pt. II(B)(6) (discussing “Tone”).
shoulders. Clariluz Caraballo, the mother of Jose Anthony Montolio, was peppersprayed by Officer Bolte when she ran toward her son asking Officer Bolte to release him. Clariluz Caraballo was grabbed and arrested by officers when she attempted to get to the bathroom to wash out the pepper spray. . . . Mr Caraballo, Clariluz Caraballo, Jose Montolio and the stereo were taken to the 46th Precinct. Ms. Caraballo’s eyes were treated by EMS for the harm caused by the pepper spray.\textsuperscript{126}

Given the large cast of characters and the specific details given in this account, the mayhem described seems entirely credible. (Mentioning that the stereo was taken to the 46th Precinct along with the plaintiffs was an especially nice touch.)

This account would have been less credible had a less able drafter qualified the specifics of the narrative, as too many do, with the disclaimer “on information and belief.” This formulation is rarely necessary, since there is no requirement that pleadings be made on personal knowledge. By signing the complaint, the attorney warrants only that there is a good faith basis for its allegations. Although appropriate only in affidavits, “on information and belief” is too often sprinkled on complaints like magic dust, where it has only the effect of distancing the reader from the narrative by suggesting that the facts are not necessarily as represented.\textsuperscript{127}

4. Setting a Scene

“A scene makes the past present.”\textsuperscript{128} It lets the reader see the event unfold, and this can be very effective in a complaint. For example, in the forced-disappearance case mentioned earlier, one alleged terrorist “was kept in near permanent darkness. His cell was pitch black for twenty-three hours a day. There was a bucket in the corner for a toilet, but it was difficult to use in the dark


\textsuperscript{127} The phrase is only appropriate when the complaint is “verified,” that is, the truth of the allegations is sworn to by the plaintiff, thus converting the complaint in effect into an affidavit. Some courts require verification by the plaintiff when particular claims are raised, for example, defamation. Plaintiff also often has the option of verifying the complaint. The advantage of verification for the plaintiff is that the defendant must then verify the answer and is thus exposed to the penalties of perjury.

\textsuperscript{128} See Cheney, supra n. 94, at 54.
without spilling the contents over his only blanket.”129 This description succeeds through its evocation of visual (darkness), tactile (feeling around in the darkness, cold enough to need a blanket), and olfactory (the spilled bucket) phenomena. In a similar example from the involuntary servitude complaint,

Ms. Chere was required to sleep on a thin mat on the floor in Kaleb’s room throughout the length of her employment. During the last nine months of this period, no rug covered the hardwood floors on which she slept. Every night, Ms. Chere rolled out her mat and covered herself with the gabi (light blanket) she had brought with her from Ethiopia, because Defendants did not provide other bedding. Each morning she was required to roll up the mat and put it away.130

But a case need not be extraordinary to set a scene well, as in the following excerpt from a garden-variety slip-and-fall case.

4. On March 5, 2002, plaintiff was on the campus of Haskell Indian Nation University in Lawrence, Kansas, when she slipped and fell on clear ice or packed snow on a sidewalk. The snowy ice she slipped on was relatively clear and colorless and was in a location where it was shaded by a building most of the day. Therefore, it was not readily noticeable to the plaintiff or those similarly situated walking towards that area.

5. Snow on all of the sidewalks not located in the shade of the building had melted or been cleared at the time plaintiff fell.

6. The packed snow or ice had not been cleared from the sidewalk despite the fact that the precipitation that resulted in the accumulation of icy snow on the sidewalk, had stopped a few days previously.131

129. Compl. ¶ 78, Mohamed, 2007 WL 2227631.
130. Compl. ¶ 35, Chere, No. 2:04-cv-06264-SRC-CCC.
We see the scene as we imagine the plaintiff saw it, and we are inclined to believe that she slipped on almost invisible ice that defendant had inexcusably neglected to remove.

5. Detail

Detail is crucial to effective narration. Details elicit emotion, create mental pictures, stimulate associations, and lend coherence and fidelity to narratives. “If the selection of event and detail is good, it won’t need much commentary from the author to show what it means.”\textsuperscript{132} There is no rule of thumb about how much detail to use. “Sometimes a litany of details will be effective in their cumulative power; sometimes a single detail will suffice; other times, the best method is to weave the details into the description or the narratives as they come up, logically.”\textsuperscript{133}

In a complaint, the decision to use just a single, telling detail, several details, or even elaborate detail, is dictated for the drafter by the intersection of the reasonably certain facts with the claims asserted, the audience, and the goals the complaint is intended to achieve. This is not always an easy decision.

A practitioner who has a client who tells a credible and compelling tale of wrongdoing and injury, a story that cries out to be told, may nonetheless conclude that the judge’s known hostility to anything but the dry bones of a case makes it imprudent to file a complaint that details the allegations in a way that truly allows the plaintiff to be heard. Similarly, a practitioner who does not wish to trigger the mandatory disclosure provisions of Federal Rule of Civil Procedure 26(a) or who wishes broad discovery will do best not to allege with particularity facts likely to be disputed—although the drafter should be sure to bear in mind the countervailing consideration that disclosure will be triggered for the defendant as well. Facts that have the ring of truth but which cannot be verified, or even investigated, should likewise be omitted, for fear of invoking Rule 11 or its state analogues.\textsuperscript{134} Moreover, minutely detailed allegations run the risk of minute inaccuracies and are likely to elicit only denials. In short,

\textsuperscript{132} See Cheney, supra n. 94, at 52.
\textsuperscript{133} Id. at 39.
\textsuperscript{134} Fed. R. Civ. P. 11; e.g. Wis. Stat. § 802.05 (2008).
[t]o change the story through a happy ending, we need to win. That means omitting from our thicker pleadings facts we may not be able to prove. It means omitting facts we prefer to conceal until the most strategic time. . . . We may sacrifice creativity in situations where translation matters less than persuasion, and persuasion may demand resort to plainer language. For some audiences (in some cases, on some occasions), we aim . . . to persuade by ordinariness instead of outrage.\(^{135}\)

Fortunately, a single descriptive detail can have enormous impact. For example, the allegations in an age and disability discrimination complaint against a restaurant recount how a middle-aged woman who had undergone a mastectomy was told a new uniform policy required her to wear one of two bathing suit tops. She “tried on the tops in the restroom and was dismayed to see that her surgical scars were visible from various angles.”\(^{136}\) The single detail that it was in the restaurant restroom that she tried on the tops, rather than in the privacy and comfort of her home, lends poignancy and vividness to the story. The reader can see her standing there and sense her misery as she watches herself in the mirror. Simply noting that “she tried on the tops and was dismayed to see . . .” would not have been nearly so effective. A telling detail, like a single telling quote, can be extremely effective.

But whether the drafter chooses a single detail or many, the important thing is to choose details that not only capture the essence of the person, place, or event, but that also establish narrative coherence and fidelity. In the sex discrimination complaint mentioned earlier, plaintiff’s claim gains strength as the drafter provides a litany of quotes from psychological works, one more ridiculous than the next, that the defendants relied upon to justify sex-segregated classrooms.

58. In *Why Gender Matters*, Dr. Sax [one of the school’s experts] explains that because of sex differences in the brain, girls need real world applications to understand math, while boys naturally understand math theory. For instance, girls

\(^{135}\) Eastman, *supra* n. 5, at 858.  
\(^{136}\) Compl. ¶ 12, EEOC v. Mears Marina Assoc. L.P., 2007 WL 3124273 (D. Md. Sept. 20, 2007). This complaint is reproduced as Appendix C to this Article.
understand number theory better when they can count flower petals or segments [sic] of artichokes to make the theory concrete.

62. In Why Gender Matters, Dr Sax explains that “anomalous males”—boys who like to read, who don’t enjoy competitive sports or rough-and-tumble play, and who don’t have a lot of close male friends—should be firmly disciplined, should spend as much time as possible with “normal males,” and should be made to play competitive sports.

70. In The Action Guide, Mr. Gurian [another of the school’s experts] explains that when young male elephants are brought up without parents, they begin killing rhinoceroses and trying to mate inappropriately, until alpha male elephants are introduced into their group. Mr. Gurian concludes that “alphas” must be brought in to manage students seeking to dominate.137

The cumulative effect of absurd, even sinister, gender stereotyping comes from both the type and number of details. The image of rows of girls sitting at their desks, artichokes before them, counting leaves is so unexpected, but so laughable, that a school’s reliance on this authority elicits wonderment. The analogy between young teenage boys and orphan male elephants killing rhinoceroses and (in a phrase heavy with innuendo) “mating inappropriately” until set straight by “alpha” males is also bizarrely laughable. More disturbing, however, is the image of “anomalous males” who prefer reading to rough-housing and need to be “disciplined” and subjected to the enforced company of “normal males.” Here, the drafter uses the technique of the telling quote within the technique of massed details. The quotation marks around “anomalous males” and “normal males” makes clear that this is the language of the school’s expert, Dr. Sax. The number and selection of details in this complaint make the school’s reasons for single-sex education seem no more than bizarre pretexts for sex

discrimination, effectively reinforcing the credibility of plaintiff’s story.

The drafter who, after analyzing the case in the context of audience and purpose, chooses to make highly detailed, “thicker,” allegations faces yet another tactical and stylistic choice: whether to allege details in many separate paragraphs, or to aggregate them in longer paragraphs. In notice-pleading jurisdictions, Federal Rule 10(b) and its state analogues require only that “so far as possible” the contents of each numbered paragraph be limited to a “single set of circumstances,”138 giving the drafter much latitude in this respect. At the extremes, a drumbeat of paragraphs each containing one short sentence and a fugue of long paragraphs would seem inappropriate to most stories—yet in rare cases, even those techniques are appropriate. For example, where repeated acts of physical abuse are alleged, describing each blow and each injury in its own paragraph can be effective. In contrast, some cases may lend themselves to longer paragraphs of detail, for example a civil rights claim painting the historical background to a claim of racial discrimination. The prevailing wisdom is that paragraphs should be quite short, for readability and in order to make denial harder.139 Certainly, as a “default” strategy, this makes sense, but a more individualized strategy that finds the rhythms of the particular story and varies the paragraph lengths to suit will produce a more readable and effective narrative.

6. Tone

All the techniques discussed thus far help a writer to create tone. For example, we can hear outrage or sincerity in a quote and catch irony in the juxtaposition of events. Yet diction—word choice—is perhaps the best way of conveying tone. And poor word choice—empty legalese, redundant synonyms, tired verbs—can spoil the narrative’s effect and destroy credibility, even though the complaint otherwise has a sympathetically drawn plaintiff, graphic action, and telling details.

The following paragraph is from a complaint alleging that the eighty-three-year-old complainant was brutalized and trauma-
tized when police burst into her apartment in the middle of the night based only on an uncorroborated, anonymous tip alleging that drugs were sold from that address.

44. The Plaintiff suffered serious and severe psychological and physical trauma, mental anguish and emotional distress, humiliation and embarrassment, bruises and contusions to her face, legs, back and upper torso, soreness to her legs, back and upper torso, aches and pains, chest pains, dehydration and low blood sugar, including the loss of her independence and her ability to participate in the activities of daily living, the loss of her ability to ambulate without assistance, persistent fear, inability to sleep, inability to eat, nervousness, anxiety and exacerbation of a pre-existing heart condition, diabetes and arthritis.140

This is an example of the “thinness” of traditional legal rhetoric that James Boyd White and Herbert Eastman deplore.141 The tone is overly insistent, yet lifeless and unconvincing. The reader’s reaction is, “Well, yes, that’s lawyer talk all right; might be true, or it might not.” The plaintiff herself is entirely out of the frame. The litany of redundant pairs—“serious and severe,” “mental anguish and emotional distress,” “humiliation and embarrassment,” “bruises and contusions”—turn the allegations into a lifeless ritual. The pretentious Latinate diction—“ambulate without assistance” for “walk without help,” for example—also keeps plaintiff’s injuries conjectural.

These allegations could easily have been given a more credible tone and one more faithful to plaintiff’s story.

The midnight “no-knock” entry by the police into her home was physically and mentally traumatic for Ms. Kirkland. It left her with bruises over much of her body. It also left her so terrified that she did not eat, sleep, or leave her apartment for a week, becoming dehydrated and confused. Her diabetes and heart condition also worsened as a consequence, and she is no longer able to live on her own or to walk without using a walker.

141. See e.g. supra n. 32.
This simple account told in words the plaintiff can understand tells the story credibly from her point of view, conveying her experience with an immediacy entirely lacking in the legalese version.

Often one word can set the tone of a complaint. Verbs are particularly useful. In one false imprisonment complaint, the plaintiff alleges that she was “handcuffed and paraded back and forth in the Mall.”¹⁴² Not “walked.” Not “taken through” the Mall. But “paraded”: put on public display and humiliated. Similarly, in the “forced disappearance” complaint, one alleged terrorist “was stripped[] [and] diapered.”¹⁴³ His mortification is captured in the second verb.

Adjectives, though discouraged in many legal writing texts, can be put to good effect in a complaint. One of our clinical colleagues tells the story of a complaint drafted by her students in a prisoners’ rights case. The plaintiffs complained of the conditions of their pre-trial detention in a local jail. Among other allegations, the complaint alleged that the air in the facility was “malo- dorous.” Our colleague was convinced that it was the addition of that single adjective that lifted it above the ordinary pro se inmate complaint and helped it to survive a motion to dismiss.

Finally, punctuation helps to create tone. When a store “loss prevention” guard (a job description noteworthy for its own point-of-view) “barks” (a vivid verb) at a suspected shoplifter, “Go up the stairs! I said go! I said move!” the reiteration and exclamation marks convey the bullying hostility.¹⁴⁴

These, then, are some of the techniques that can be used to transform a complaint, even one in a garden-variety civil case, from a generic “stock story” into a narrative that carries the reader along from the introductory clause to a plea for redress that appears logically entailed. Such a complaint can incline the judge to believe that events transpired as related; it will almost certainly create respect for the drafter and induce opposing counsel “to be afraid, very afraid” of plaintiff’s story. Form-book complaints achieve none of this. Thus practitioners and law students have every interest in mastering the basic narrative techniques that turn a complaint into a persuasive rhetorical tool.

¹⁴³. Compl. ¶ 10, Mohamed, 2007 WL 2227631.
III. (RE)LEARNING THE LANGUAGE OF NARRATIVE

In order to represent our clients not just acceptably, but fully—that is credibly, artfully, authentically—we need not only to learn how narrative works, but also, to relearn the language of storytelling. Understanding the rhetorical force of narrative, recognizing storytelling techniques, and developing a vocabulary for describing them—the focus of the preceding sections—is just the beginning. The most difficult part of the process lies in accepting the uncomfortable truth that the syllogistic analysis and “objective” language we absorbed in law school, which for many of us all too quickly became our first language,145 is not the only discourse we need to use as practitioners and teachers, “and that others may more fully translate the reality of clients and persuasively advance the legal argument . . . .”146 So the first step in our re-education is to remind ourselves how far we have traveled as professional writers and of the return trip we must make before we can claim not just competence, but true mastery of the discourse.147

145. Our own experience as teachers has shown that by the second year of law school, many students have already developed a resistance to telling stories. We often assign an exercise in which we ask our upper-class students to draft an affidavit for a divorced mother petitioning for permission to move out-of-state with her minor child. A simulated interview with the “client” gives them a compelling story to work with. Some students frame the client’s request unhelpfully in generalities and conclusions of law, as though afraid they might be giving something away or behaving unprofessionally by telling the judge their client’s story.

146. Eastman, supra n. 5, at n. 453.

147. One good way to begin the return trip is to read Ruthann Robson’s article Notes from a Difficult Case, in In Fact: The Best of Creative Nonfiction 226 (Lee Gutkind ed., Norton 2005). This essay chronicles Robson’s ordeal when she was misdiagnosed with terminal cancer. In the essay, she shuttles between medical discourse, legal discourse, and personal experience. What makes this essay so instructive is watching Robson translate her experiences into different discourses. We were directed to this article by Andrea McArdle, who suggests that law teachers assign it to help students understand how and when to speak with a personal voice in the law. Andrea McArdle, Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice, 12 Clin. L. Rev. 501 (2006). This skill “presupposes an ability to understand and then reframe formal language, an ability that novice legal writers are still developing . . . . especially law students . . . [who] are still struggling to make legal language a part of their ‘lexicon.’” Id. at 534. To this same end, Herbert Eastman suggests using a famous civil rights case to sensitize students in a simulation pre-trial practice course to the complexity of clients’ real-life stories. Students begin by reading and briefing a casebook version of Walker v. City of Birmingham, 388 U.S. 307 (1967). Students are then exposed to the real-life context of the case by watching a portion of the PBS television documentary, “Eyes on the Prize,” focusing on Martin Luther King Jr.’s campaign to desegregate Birmingham. See Eastman, supra n. 5 at n. 453 (crediting David B. Oppenheimer, Martin Luther King,
Another important step in the process is to become a close and critical reader of pleadings, analyzing how they succeed—or fail—as narratives. The Appendices to this Article reproduce three complaints—a pair of slip-and-fall complaints, Breeden v. Hilton Hotels148 and Bork v. Yale Club,149 and an age-discrimination complaint, Equal Employment Opportunity Comm. v. Mears Marina Associates, L.L.P.150 The two slip-and-fall complaints, both filed in federal court, are in sharp contrast one to another. The Breeden complaint seems straight from a notice-pleading form-book while the Bork complaint makes plaintiff’s tumble from a speaker’s dais almost filmic in its narrative impact. The third complaint, Mears Marina, is an example of narrative pleading at its very best, a complaint that has correspondence, coherence, and fidelity.

We offer the following narrative analyses as sample readings. They are indeed, samples, not models, and by no means exhaust the potential lessons to be drawn from these complaints. It is in the nature of narrative that our take on it varies with the life experience we bring to it.

A. Bare-bones “Slip-and-Fall”

The bare-bones complaint in Breeden never goes beyond the “stock story” level; it has the correspondence to the basic negligence schema that conforms it to the minimal requirements of Rule 8, but it has little else. The drafter makes no attempt at character development, providing only jurisdictional information—“The plaintiff, MARY SUE BREEDEN, is a resident citizen of Morgan County, Alabama . . . .”151—and the conclusory generic description “business invitee.”152 There is similarly no attempt to set a scene. The only visual detail in the entire complaint is “a dangerous condition in the form of water on a tiled surface.”153 The reader’s expectation of finding out where this water was (public restroom? pool area? bathroom? lobby?) is frus-
trated, and narrative coherence suffers. As to the action of the story, we learn only that the plaintiff “was caused to slip and fall, and to incur . . . injuries and damages.”\textsuperscript{154} She “incurred hospital, doctor and medical expenses, and suffered physical pain, permanent disability and impairment, and mental anguish.”\textsuperscript{155} But because Breeden’s actual injury, pain, impairment, and disability and their impact on her life remain abstract, the reader’s sympathy is not engaged, and the reader has no opinion about the truth of the accident and injury allegations.

Moreover, her story is told from the lawyer’s point of view in language both verbose and generic, replete with redundancy and legalese: “at all times relevant hereto,”\textsuperscript{156} “exercised control, maintenance, supervision, and/or management,”\textsuperscript{157} “aforesaid.”\textsuperscript{158} The narrator appears remote from the story, unconversant with its details, neutral as to its truth or falsity.

In brief, the complaint entirely lacks narrative coherence and fidelity—unnecessarily so, since it is difficult to see how context could require a complaint this bare. Although the incident took place at a hotel in Egypt, surely some verifiable facts could have been provided about the plaintiff, about the location of the slippery tile, and about plaintiff’s injury and disability, without requiring expensive investigation or incurring tactical disadvantage.

B. “Slip-and-Fall” as Narrative

In contrast, the \textit{Bork} slip-and-fall complaint goes beyond the stock story to tell an individual tale that is surprisingly compelling and credible, despite its familiarity. Character development begins with the identification of the parties:

2. Plaintiff Robert H. Bork is a resident and citizen of Virginia. He was injured while visiting the Yale Club in New York, New York, to give a speech at an event there on June 6, 2006.\textsuperscript{159}

\begin{flushleft}
\footnotesize{154. \textit{Id.} at ¶ 12.}\\
\footnotesize{155. \textit{Id.}}\\
\footnotesize{156. \textit{Id.} at ¶ 10.}\\
\footnotesize{157. \textit{Id.}}\\
\footnotesize{158. \textit{Id.} at ¶ 12.}\\
\footnotesize{159. \textit{App. B, at ¶ 2.}}
\end{flushleft}
Even if the reader never heard of Bork’s controversial nomination to the Supreme Court, the paragraph introduces the plaintiff as a figure of enough gravitas to be a speaker at an event at an elite venue. Moreover, unlike Mary Sue Breeden in the previous complaint, he remains an individual throughout—“Mr. Bork,” not “plaintiff.”

The factual allegations are detailed; the scene is carefully set.

7. The New Criterion hosted the event in a banquet room at the Yale Club. As the host of the event, the Yale Club provided tables and chairs where guests could sit during the reception and the evening’s speeches. At the front of the room, the Yale Club provided a dais, atop which stood a lectern for speakers to address the audience.

8. Because of the height of this dais, the Yale Club’s normal practice is to provide a set of stairs between the floor and the dais. At the New Criterion event, however, the Yale Club failed to provide any steps between the floor and the dais. Nor did the Yale Club provide a handrail or any other reasonable support feature to assist guests attempting to climb the dais.\(^\text{160}\)

With the banquet room visualized, the narrative commences with the incident that disrupted the steady state. The reader is put at the scene: “When it was his turn to deliver remarks to the audience, Mr. Bork approached the dais.”\(^\text{161}\) But because there was no support, “Mr. Bork fell backwards as he attempted to mount the dais, striking his left leg on the side of the dais and striking his head on a heat register.”\(^\text{162}\) The reader sees him falling, as though in slow motion.

The aftermath of this incident is vividly depicted. The plaintiff developed a “large hematoma” that “burst” (a forceful verb) and required “surgery, extended medical treatment, and months of physical therapy.”\(^\text{163}\) He experienced “excruciating pain.”\(^\text{164}\) Because it is the only emotionally charged adjective in the complaint, “excruciating” is effective. The injury’s effects are spelled

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\(^{160}\) Id. at ¶¶ 7–8.

\(^{161}\) Id. at ¶ 9.

\(^{162}\) Id.

\(^{163}\) Id. at ¶ 10.

\(^{164}\) Id. at ¶ 11.
out: it kept him “immobile,” interfered with “his typical schedule,” and “weakened Mr. Bork’s legs so that he still requires a cane . . . [and] continues to have a limp.” All his efforts to return to the steady state he enjoyed before his injury are as yet unrealized.

Although Mr. Bork is clearly able to understand traditional legal discourse, his attorneys wisely chose to retranslate his story into everyday language that makes this stock slip-and-fall individual and real. Possessed of all the characteristics that create narrative rationality, it is a credible story.

C. A Well-Told Tale

Underlying the complaint in *E.E.O.C. v. Mears Marina* is the explicit stock script of “cancer survivor.” The term evokes the scenario of a fighter trying to rise above the trauma of life-threatening illness, mastectomy scars, and hair loss. This script is combined with another prototypical story, that of the “loyal employee” and the “sexist boss from hell” who uses unlawful employment practices to rid himself of a middle-aged convalescent whose appearance he deems detrimental to business. The scripts resonate with the reader, establishing narrative correspondence. Life experience makes it easy to believe that an employer would rather hire an attractive young waitress than retain a battle-scarred cancer survivor.

The narrative rationality of this story is further enhanced by storytelling techniques. Ms. Finley is not a prototype but a person earnestly trying to resume her livelihood and her life. She assures her supervisor she has “been building up her strength in preparation for the season.” The drafter’s choice of words—she “was sure that she could handle it”—reveals a distinctive individual voice.

In addition to being conscientious, Ms. Finlay is fair-minded: she does not want to believe that her employer is discriminating

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165. *Id.*
166. *See supra* n. 147 (discussing an article by Professor Ruthann Robson and explaining her use of different types of discourses to describe her ordeal after being misdiagnosed with terminal cancer).
168. *See id.* at ¶¶ 8–9, 14, 16.
169. *See id.* at ¶¶ 10–11, 15–16
170. *Id.* at ¶ 9.
171. *Id.*
against her and does everything she can to comply with demands that (in a narrative tour de force) the reader is led to find unacceptable even before she does. Despite suffering hair loss as a result of chemotherapy, she agrees to comply with the new “no hat” rule—although this must have been distressing. In a restrained but deft choice of adjective, she is merely “taken aback”—not “appalled,” “devastated,” or “outraged.”172

In a finely set scene using spare but telling details, she gamely tries on the restaurant’s swimsuit tops in the facility’s restroom: but this proves too much—the tops expose her surgical scars “from various angles,” and she urges her supervisor to reconsider—albeit unsuccessfully.173 These carefully chosen details about Ms. Finley and her plucky attempts to comply with management’s punitive dress codes are so skillfully individualized that her story is both real and moving.

In contrast, Ms. Finley’s supervisor appears to be a weasel. We know him only through his actions, but that is sufficient. Unmoved by Ms. Finley’s reassurances that she is able to perform her duties, he imposes a series of obstacles intended to discourage her. The “no hat” and “swim suit top” rules target her post-treatment appearance in the most humiliating way.174 That these policies are scams masking discriminatory animus becomes even more apparent when he rehires a younger woman who refuses to comply with them, but he never returns Ms. Finley’s calls.175 Through the use of character development, tone, detail, and point of view, narrative coherence, correspondence, and fidelity coalesce in this complaint.

*     *     *

The final step in the [re]learning process is to take the plunge and start telling stories in our pleadings, honing our skills case-by-case as we learn to adapt narrative development to audience and purpose. For many practitioners, and even law students, storytelling is a childhood language buried under the successive discourses that adulthood imposes, most totally by traditional legal discourse. Indeed, in time, this comes to seem the only language

172. Id. at ¶ 10.
173. Id. at ¶¶ 12–13.
174. Id. at ¶¶ 10–11.
175. Id. at ¶¶ 15–19.
at a practitioner’s disposal. But to serve our clients well, we lawyers must become bilingual and [re]learn the language of narrative.

**IV. CONCLUSION**

By their nature, the pleadings in a civil action tell stories, but too often the stories are buried, barely discernible stock scripts, “thin” discourse mired in legalese. Such pleadings are missed opportunities for the advocate, not only because this is the plaintiff’s first, and perhaps only, opportunity to tell her story, but also because readers—judges included\(^{176}\)—instinctively look for stories when they read, and credible stories have great rhetorical power.

Thus, we have tried in this Article to show how traditional narrative techniques can be used to enhance all complaints, not just those telling extraordinary tales. Whether litigating a civil rights, sexual harassment, negligence, or contract claim, a lawyer ought to be able to tell a story that engages and convinces the reader—a story that has the narrative rationality that comes from the presence of correspondence, coherence, and fidelity. We have also attempted to show how specific techniques such as character development and detail can be used in complaints to achieve narrative rationality. Sometimes, as in the story of the Ethiopian woman lured into domestic slavery, the tale cries out for a full panoply of narrative techniques. At other times—as in the story of Ms. Finley, the cancer survivor—a few well chosen techniques quietly, but effectively, convey the plaintiff’s experience. In addition, we have endeavored to show that narrative is not simply a persuasive tool or a literary enhancement, but has tactical advantages as well. It can, for example, trigger or foreclose immediate disclosure, or narrow or broaden discovery. Thus, we have tried to harmonize instrumentality with the narrative aspect of pleadings. Finally, we have made an effort to provide some practical guidance on the [re]learning that is necessary

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176. Judge Patricia Wald writes, “[J]udges react negatively to the ‘gotcha’ lawsuit... based on some technical nonobservance of a law or regulation where consequences are undocumented... . We judges want to know the facts, the real-life conditions, the actual practices underlying a legal challenge... . Judges search for meaning in what we do. You need to convince us that the law or the regulation is important in poor people’s lives.” See Eastman, *supra* n. 5, at 771 (third set of ellipses in original) (citing Patricia M. Wald, *Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation*, Clearing-house Rev. 11, 13 (May 1993)).
if we are to restore narrative to its central place in pleading practice.

In short, we have tried to show that pleadings are narrative and can and should be artfully drafted. However, because the contextual variables are so numerous—jurisdiction, court, judge, adversary, plaintiff, defendant, and claim are just the beginning—it is difficult to come to a single resolution and coda here. What we can do is aspire to positive transformation.
APPENDIX A: BARE-BONES “SLIP-AND-FALL”

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT, ALABAMA

MARY SUE BREEDEN,
Plaintiff, 

v. 

HILTON HOTELS CORPORATION,
a Delaware corporation; et al.
Defendants.

COMPLAINT

*     *     *

Plaintiff MARY SUE BREEDEN hereby complains of the defendants HILTON HOTELS CORPORATION, a Delaware corporation, [and other named defendants]. . . . The claims, actions and causes of actions [sic] described herein arise out of a March 21, 2002, injury event occurring in Alexandria, Egypt.

JURISDICTION

*     *     *

IDENTIFICATION OF PARTIES

4. The plaintiff, MARY SUE BREEDEN, is a resident citizen of Morgan County, Alabama, residing at 2805 Lexington Avenue, SW, Decatur, Morgan County, Alabama 35603.

5. Defendant HILTON HOTELS CORPORATION is a Delaware corporation whose principal place of business is located in the State of California (hereinafter “HILTON HOTELS”)—HILTON HOTELS, however, conducts business in at least two locations within the Northern District of Alabama.
FACTS

9. On March 21, 2002, the plaintiff was a business invitee on the premises of the Hilton Borg El Arab Resort, Matrouh Desert Road, Borg El Arab, Egypt, in or near Alexandria, Egypt (hereinafter, “the Premises”).

10. At all times relevant hereto, . . . [the Defendants] were the owners of; through their agents, the possessors of; and otherwise through such agents and employees, exercised control, maintenance, supervision and/or management over the Premises.

11. On March 21, 2002, the Defendants negligently and/or wantonly caused, permitted, allowed, or created a dangerous condition to exist on the Premises in the form of water on a tiled surface over which pedestrian traffic was allowed. The Defendants had actual notice and/or had constructive notice of this condition and/or failed to exercise reasonable care with respect to their maintenance of the Premises, thereby negligently and/or wantonly failing to discover and remove this condition.

12. As a proximate consequence of the aforesaid negligence and/or wantonness, the plaintiff was caused to slip and fall, and to incur the following injuries and damages:

   She sustained personal injury, incurred hospital, doctor and medical expenses, and suffered physical pain, permanent disability and impairment, and mental anguish.

WHEREFORE, . . . the plaintiff MARY SUE BREEDEN demands judgment against the Defendants, jointly and severally, in the amount of FIVE HUNDRED THOUSAND AND NO/100 DOLLARS ($500,000.00), plus costs.

* * *
APPENDIX B: “SLIP-AND-FALL” AS NARRATIVE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------------------

ROBERT H. BORK,

Plaintiff,

v.

THE YALE CLUB OF NEW YORK CITY,

Defendants.

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*     *     *

NATURE OF THE ACTION

1. This is a personal injury action brought against Defendant Yale Club of New York City (the “Yale Club”) for its negligent and grossly negligent failure to maintain reasonably safe facilities.

PARTIES

2. Plaintiff Robert H. Bork is a resident and citizen of Virginia. He was injured while visiting the Yale Club in New York, New York, to give a speech at an event there on June 6, 2006.

3. Defendant Yale Club of New York City is a private club with its principal place of business at 50 Vanderbilt Avenue, New York, New York 10017. The Yale Club offers guestrooms, restaurants, athletic, banquet and meeting facilities for its members and their guests.
VENUE AND JURISDICTION

FACTUAL ALLEGATIONS

6. On the evening of June 6, 2006, the New Criterion magazine held an event (the “New Criterion event”) at the Yale Club. The New Criterion invited Mr. Bork, among other guests, to deliver remarks at the event.

7. The New Criterion hosted the event in a banquet room at the Yale Club. As the host of the event, the Yale Club provided tables and chairs where guests could sit during the reception and the evening’s speeches. At the front of the room, the Yale Club provided a dais, atop which stood a lectern for speakers to address the audience.

8. Because of the height of this dais, the Yale Club’s normal practice is to provide a set of stairs between the floor and the dais. At the New Criterion event, however, the Yale Club failed to provide any steps between the floor and the dais. Nor did the Yale Club provide a handrail or any other reasonable support feature to assist guests attempting to climb the dais.

9. When it was his turn to deliver remarks to the audience, Mr. Bork approached the dais. Because of the unreasonable height of the dais, without stairs or a handrail, Mr. Bork fell backwards as he attempted to mount the dais, striking his left leg on the side of the dais and striking his head on a heat register.

10. As a result of the fall, a large hematoma formed on Mr. Bork’s lower left leg, which later burst. The injury required surgery, extended medical treatment, and months of physical therapy.

11. Mr. Bork suffered excruciating pain as a result of this injury and was largely immobile during the months in which he received physical therapy, preventing him from working his typical schedule before the injury. The months of relative inactivity weakened Mr. Bork’s legs so that he still requires a cane for stability. In addition, Mr. Bork continues to have a limp as a result of this injury.
FIRST CAUSE OF ACTION
[Negligence]

12. The allegations set forth in paragraphs 1 through 11 of this Complaint are re-alleged and incorporated by reference as if fully set forth herein.

13. The Yale Club had a duty to provide reasonably safe facilities in its reception and meeting rooms, including providing a safe dais of reasonable height and with stairs between the floor and the dais and a supporting hand-rail.

14. At the New Criterion event, the Yale Club breached its duty to provide reasonably safe facilities by failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount that dais.

15. It was reasonably foreseeable that, by failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature, a guest such as Mr. Bork attending the New Criterion even would be injured while attempting to mount the dais.

16. The Yale Club's negligent failure to provide reasonably safe facilities, and in particular, its failure to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount the dais, caused Mr. Bork to fall while attempting to mount the dais and caused his extensive and continuing injuries.

17. As a result of the Yale Club's negligence in failing to provide reasonably safe facilities, Mr. Bork has suffered actual damages. These damages include pain and suffering, a continuing leg injury, medical bills and related costs of treatment, and lost work time and income. The long-term effects of his injuries continue to manifest themselves.
SECOND CAUSE OF ACTION
[Gross Negligence]

18. The allegations set forth in paragraphs 1 through 11 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

19. The Yale Club had a duty to provide reasonably safe facilities in its reception and meeting rooms, including providing a safe dais of reasonable height and with stairs between the floor and the dais and a supporting handrail.

20. The Yale Club breached its duty to provide reasonably safe facilities by wantonly, willfully, and recklessly failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount that dais.

21. It was reasonably foreseeable that, by failing to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature, a guest such as Mr. Bork attending the New Criterion event would be injured while attempting to mount the dais.

22. The Yale Club’s wanton, willful and reckless disregard for the safety of its guests, and in particular, its failure to provide a safe dais and stairs between the floor and the dais, a supporting handrail, or any other reasonable support feature to protect its guests attempting to mount the dais, caused Mr. Bork to fall while attempting to mount the dais and caused his extensive and continuing injuries.

23. As a result of the Yale Club’s gross negligence and wanton, willful and reckless disregard for the safety of its guests, Mr. Bork has suffered actual damages. These damages include pain and suffering, a continuing leg injury, medical bills and related costs of treatment, and lost work time and income. The long-term effects of his injuries continue to manifest themselves.

24. Because the Yale Club’s gross negligence was wanton, willful and in reckless disregard for the safety of its guests, punitive damages should also be awarded against it in an amount to be determined at trial.

*   *   *

PRAYER FOR RELIEF
WHEREFORE, Plaintiff demands the following relief against Defendant:

A. Awarding actual damages resulting from Defendant’s wrongdoing in excess of $1,000,000.
B. Punitive damages in an amount to be proven at trial;
C. Pre- and post-judgment costs, interest and attorney’s fees;
D. Such other and further relief as this Court may deem appropriate and equitable.

*   *   *

*   *   *
APPENDIX C: A WELL-TOLD TALE

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMN.,
Plaintiff,
v.
MEARS MARINA ASSOCIATES LIMITED:
PARTNERSHIP d/b/a Red Eye’s Dock Bar,
Defendant,
Margaret Finley, Intervener,

*     *     *

Introductory Matters

1. The Equal Employment Opportunity Commission (“EEOC”) has previously brought an action under Title I and Title V of the Americans with Disabilities Act (“ADA”) to correct unlawful employment practices on the basis of disability and retaliation and to provide appropriate relief to Margaret Finley (“Ms. Finley”), a 55-year-old breast cancer survivor, who was adversely affected by such practices.

2. In addition to being adversely affected by defendant’s violations of the ADA, Ms. Finley was subjected to illegal discrimination and termination on the basis of her age in violation of the federal Age Discrimination in Employment Act (“ADEA”). As a result of the illegal discrimination, Ms. Finley brings this action for all of the foregoing and to seek the full measure of relief provided for under the ADEA, including but not limited to double damages for defendant’s willful actions.

3. The causes of action which form the basis of this matter arise under the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 et seq. (“ADEA”).
4. The District Court has jurisdiction over this matter under

5. Venue is proper in the District Court under 28 U.S.C. §
1391(b).

* * *

Factual Allegations

7. Ms. Finley was a seasonal employee at the Red Eye’s Dock
Bar beginning in 1995, working as a bartender.

8. Ms. Finley was diagnosed with breast cancer and under-
went treatment, including surgery, chemotherapy and radiation,
in 2005, causing her to miss the entire 2005 season.

9. In May, 2006, Ms. Finley sought to return to work as she
had in the past. Robert Wilson, (“Wilson”) her direct supervisor,
expressed concern that she would not be able to perform her job
duties. Ms. Finley assured him that she had been building up her
strength in preparation for the season and was sure that she
could handle it.

10. Wilson also informed Ms. Finley that there was a new
policy prohibiting employees from wearing hats. In the past, Ms.
Finley and others had been allowed to wear hats at work. Ms.
Finley, who had lost all of her hair as a result of her chemother-
apy and radiation, was taken aback by this new rule, but complied.

11. On or about June 24, 2006, the assistant manager told
Ms. Finley that there was a new uniform policy in effect, and
handed her two bathing suit tops. Up to that point, Red Eyes
bartenders had worn shorts and a Red Eyes’ T-shirt or sweatshirt,
depending on the weather.

12. Ms. Finley tried on the tops in the restroom and was
dismayed to see that her surgical scars were visible from various
angles.

13. Ms. Finley put her Red Eyes’ T-shirt back on and ex-
plained why she could not wear the top. She was sent home for
refusing to wear the new “uniform.”

14. Ms. Finley returned to work the next day, certain that
management would reconsider making her wear a top that ex-
posed her surgical scars. Ms. Finley offered to wear something
under the top, or alter the top with additional material to provide
proper coverage. Wilson refused and ordered that Ms. Finley and
another employee, Tiffin Lilly, who also objected to wearing the bathing suit top, be fired immediately and escorted from the premises.

15. Two days later, Ms. Lilly was called back to work, and was told that the new bathing suit top would be optional, not mandatory.

16. Ms. Finley was never called to return to work. When she called Red Eyes to see if she, too, could have her job back, her calls were not returned.

17. Ms. Finley was 54 years old at the time of her termination.

18. Tiffin Lilly is substantially younger than Ms. Finley, and is believed to be in her mid-twenties.

19. Ms. Finley’s age was a motivating factor in connection with Defendant’s termination and failure to rehire Ms. Finley.

20. Upon information and belief, Defendant has a pattern and practice of discriminating against older women.

21. As a direct and proximate result of Defendant’s unlawful, improper, and discriminatory conduct, Ms. Finley has incurred and continues to incur, a loss of earnings and/or earning capacity, loss of benefits, pain and suffering, humiliation, and mental anguish, and has incurred attorney’s fees and costs associated with bringing this claim.

22. Defendant’s conduct, as set forth above, was willful, intentional and outrageous under the circumstances.

COUNT I

23. Plaintiff-Intervener incorporates by reference all of the above paragraphs as if set forth herein in their entirety.

24. By committing the foregoing acts of discrimination against Ms. Finley, Defendant has violated the ADEA.

25. Said acts were intentional and warrant the imposition of liquidated damages.

26. As a direct and proximate result of the Defendant’s violation of the ADEA, Ms. Finley has sustained the injuries, damages and losses set forth herein and has incurred attorneys’ fees and costs associated with bringing this claim.

27. Ms. Finley is now suffering and will continue to suffer ir-reparable injury and monetary damages as a result of Defend-
The Journal of the Legal Writing Institute

ant’s discriminatory and unlawful acts unless and until this Court grants the relief requested herein.

**Relief**

**WHEREFORE**, Plaintiff-Intervener respectfully requests that this Court enter judgment in her favor and against Defendant:

a) declaring the acts and practices complained of herein to be in violation of the ADEA;

b) enjoining and restraining permanently the violations alleged herein;

c) awarding compensatory damages to make Plaintiff-Intervener whole for all past and future lost earnings, benefits and earnings capacity which Plaintiff-Intervener has suffered and will continue to suffer as a result of Defendant’s discriminatory and unlawful conduct;

d) awarding liquidated damages to Plaintiff-Intervener;

e) awarding Plaintiff-Intervener costs of this action, together with reasonable attorney’s fees;

f) awarding Plaintiff-Intervener such other damages as are appropriate under the ADEA; and

g) granting such other and further relief as this Court deems appropriate.

* * *
VOICE, SELF, AND PERSONA IN LEGAL WRITING

J. Christopher Rideout

Voice, in writing, implies words that capture the sound of an individual on the page.

— Peter Elbow

A great lawyer said two thousand years ago, ‘The law is a voiceless magistrate, and a magistrate is the voice of the law.’

— Judge Wilkin, U.S. v. Offutt

There are no voiceless words . . .

— Mikhail Bakhtin

Were we to break it down, the list of what we teach in legal research and writing programs is long—from case and statutory analysis, to legal research, to written patterns of legal analysis, to more discrete topics like persuasive headings, readable sentences, or citation form. Somewhere on that list, I would put voice. In fact, were I to list those topics in order of importance, I would place voice fairly high. Why? Because in teaching novice legal writers, we are not only teaching voice, but in that process we are also constructing a self—the self of a legal writer.

Teaching voice in legal writing may strike some as odd because voice in legal writing is not readily apparent. In fact, I regularly hear people say that legal writing has no voice. While I

* Professor of Legal Writing, Seattle University School of Law. In the run-up to this Article, I had several conversations with Jill J. Ramsfield, whom I thank for helping me with “the view from within.” This Article is based off of a presentation at the Thirteenth Biennial Legal Writing Conference, Does Legal Writing Have a Voice?, on July 17, 2006, in Indianapolis, Indiana.
was working on this paper, a neighbor (and practicing lawyer) asked me about the topic. As soon as I replied, she told me—with raised eyebrows—“legal writing has no voice.” But upon further reflection, as is often the case, the raised eyebrows came down, and she amended her response. “Well, yes,” she said, “it does have a voice—the voice of the law.” I find this type of response fairly common. When people claim that legal writing has no voice, they usually mean that it lacks what could be called a personal voice.

To support my initial proposal, then, that voice belongs high on the list of things that legal writing professionals teach, I need to tackle the question of what voice is—in particular, for legal writing. Does legal writing have a voice? If so, is there a place for the personal in that voice, or is the voice of legal writing more appropriately a professional voice? Or is the question of voice in legal writing more complex than this common dichotomy between the personal and the professional? To answer these questions is to dig deeply into the self of a legal writer and to explore what I would call the persona that legal writers must construct for themselves. If teaching voice in legal writing entails the construction of a particular kind of self, a persona, then for our students, the topic of voice is indeed important. That should make it important to us as well.

Voice. Self. Persona. Where to begin with such abstract and complex concepts? In discussing voice recently with a group of legal writing professionals,4 I started by presenting them with a series of voice samples. Here is the first sample, which I chose for its lack of personal voice—and seeming lack of any human presence whatsoever.

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4. J. Christopher Rideout, Presentation, Does Legal Writing Have a Voice? (Indianapolis, Ind., July 17, 2008).
Voice Sample A
Parking Regulation

No person shall stop, stand, or park, or permit a vehicle within his control to be parked in any parking meter space while the parking meter for such space displays the words “Violation,” “Expired,” or the international symbol for “No Parking,” or otherwise indicates that the meter is out of order; provided that this section does not apply to a vehicle properly displaying an unexpired valid proof of payment receipt issued by a parking pay station.  

I thought most people in the room would have said this passage contains no voice, but a majority indicated that it did. It did not surprise me, however, to hear that no one thought the voice was personal. When I asked them to characterize it, they called it “mechanical” or “robotic”—certainly impersonal terms. I believe that the voice in this passage could fairly be called an example of “the voice of the law.” In addition to being impersonal, the voice in this sample is formal, general, and distant—the opposite of a voice in which we might hear a person speaking. I would also say that the voice in this passage is discoursal—it is situated almost exclusively within the discourse features of statutory regulations. No one would expect to hear a human voice in statutory regulations. In fact, having one would undermine their appearance of neutrality and, thus, their textual authority.

To say that a text speaks with the voice of the law is, of course, to say that metaphorically that text has a voice. In this sense, every text can be said to have a voice—all texts “speak” in some metaphorical way. But metaphorical voice may not be the same thing as human or personal voice, the voice that people most often mean when they talk about voice in writing. What about “professional voice” in the law, something different from the “voice of the law” but acknowledged by a number of commentators? Is it metaphorical and impersonal only? At first glance, it

6. I believe that the title of my presentation, supra n. 4, posed as a rhetorical question—“Does Legal Writing Have a Voice?”—probably skewed the response.
would seem to be. The following voice sample strikes me as representative.

Voice Sample B
Argumentative Point and Case Discussion

The veracity prong of the *Aguilar-Spinelli* test is met because the informant would have been booked into jail if the information that he gave turned out to be inaccurate.

An informant’s tip satisfies the veracity prong of the *Aguilar-Spinelli* test when the informant has a track record or when the informant makes statements that are against his or her penal interests. *Id.* at 437. Furthermore, courts attach greater reliability to an informant’s admission against penal interest in post-arrest situations. *State v. Estroga*, 60 Wash. App. 298, 304, 803 P.2d 813, 817 (1991). In this case, the veracity prong is met because the informant made statements against his penal interest.

Courts conclude that an informant is reliable when he or she makes statements against interest; statements against interest demonstrate that the informant has a strong motive to be truthful. For example, in *Estroga*, the court determined that the criminal informant was reliable when he implicated himself in a marijuana growing operation in exchange for not being prosecuted for possession of amphetamines and marijuana. The court held that the credibility requirement of the *Aguilar-Spinelli* test was satisfied because the informant could have been charged and prosecuted for the crime he was in custody for. *State v. Estroga*, 60 Wash. App. at 305.\(^9\)

When I asked that same group of legal writing professionals, mentioned above, about this sample, they characterized the voice in it, too, as impersonal. They also grudgingly admitted that this is the type of professional voice we commonly teach in legal research and writing programs.

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\(^9\) From a student’s motion brief (Manuscript on file with the Author).
In addition to its impersonality, I would say that the voice in this sample, like the voice in Sample A, is largely discoursal. That is, it too is situated within the features of its discourse type, although that discourse type (a pre-trial motion) is different from that of the first voice sample (statutory regulations). Nevertheless, the voice here is still general and distant. For example, the agents in this passage are either the “informant,” an abstracted role, or “the court,” an institutional actor. Neither is situated very close to the reader or writer. The voice is also fairly formal, something that is reinforced by the citations for any extra-textual references. Few could argue that this voice is personal, or that it offers evidence of human presence.

But this next sample comes from the same student brief, following on the heels of the passage in Sample B.

Voice Sample C

Application of Case Discussion to Argument

The informant in our case had everything to lose if he lied to the Seattle Police. Similar to the criminal informants in Estroga and Bean, the informant in our case was charged with a crime, and a deal was arranged where he would be offered leniency for providing accurate information about the defendant’s drug operation. The informant in our case was in custody throughout the duration of the investigation. Being in custody the entire time provided the informant with a constant reminder that the police were relying on the information he was providing. Although he had no track record, he had a motivation to provide accurate information because, if he did not, then he would be booked into jail. Thus, like the informants in Estroga and Bean, the informant had a strong motivation not to lie or state mere rumors because if the detailed information he provided about the defendant’s active methamphetamine lab was false, then he would have lost his freedom by being placed in jail.10

Although at first this voice largely sounds like a continuation of the voice in Sample B, I hear a shift—and more of a self in the voice. The most obvious change comes with the use of the first-person pronoun “our,” repeated three times in the phrase “our

10. From a student’s motion brief (Manuscript on file with Author).
case.” Now the voice is tied to the author of the passage and, thus, is less distant. The discussion is positioned differently as well. Instead of offering a general discussion of the law on the reliability of informants, the discussion now focuses on a specific case—“our case.” In doing so, the passage—and its voice—are again less distant, and less general. Finally, the passage no longer makes extra-textual references to the corpus of the law, but rather applies those references to the present case—again, “our case.” This grounds the passage more in the world of the author and the case at hand, less in the world of the law at large. And with no extra-textual references, the passage contains no citations, one of several features that made Sample B above seem more formal.

I am not arguing that the voice in this passage is a personal voice. I do not think it is. But I am trying to demonstrate not only that legal texts, including the kind that we teach our students to write, can contain what might be called a professional voice, but also that this professional voice might offer evidence of a writer’s self. How the professional voice of the law might do so, however, and what the nature of this self might be, is complex and something I hope to untangle in this Article.

This Article has already stumbled into the complexities that occur in discussions of voice, including voice in legal writing. For one thing, the discussion quickly breaks down into polarized categories—for example, between personal voice, professional voice, and no voice. In this breakdown, personal voice, or authorial presence, becomes the touchstone for “real” voice. Peter Elbow, quoted at the beginning, states the commonly-held view: “[v]oice, in writing, implies words that capture the sound of an individual on the page.” But such dichotomies between personal voice and professional voice, or between voice and no voice, quickly truncate any discussion of voice in legal writing. Although legal prose may contain a professional voice, that professional voice rarely includes a personal voice and thus, under the commonly-held view mentioned above, would be regarded as incomplete or limited.

11. The “author” may not quite be the same as the student writing the passage; I will discuss this later in the Article.
12. Elbow, supra n. 1, at 287.
13. Supra n. 8 (citing almost all of the commentators).
And then there is the matter of no voice, at least in certain legal documents—like contracts, for example. A recent manual on contract drafting explicitly advises against including any voice: “Contract prose is limited and highly stylized—it’s analogous to computer code. It serves no purpose other than to regulate the conduct of the contract parties, so any sort of writerly ‘voice’ would be out of place.”14 Documents like contracts indeed seem voiceless, offering little sense of human agency behind them, especially when the language is boilerplate. It is difficult to find any voice in them whatsoever, except in the general metaphorical sense of the voice of the law.

If personal voice, or human voice, is the touchstone for voice in writing, then voice in legal writing—whether the professional voice of certain legal writings or the apparent voicelessness of others—seems problematic. Either way, there is little room for the individual writer and that writer’s sense of self. Perhaps this discussion of voice in legal writing should appropriately end here, but I think not. Behind the dichotomies lies something rich and important, having to do with the rhetorical stance that we ask legal writers to assume and with the identity that we ask writers to adopt within that stance. This Article will pursue that below.

Part of the complexity to discussions of voice may also lie in some slippage in what is meant by voice. Although the voice of the law and professional voice in the law may both be metaphorical descriptions, they may not be metaphorical descriptions of the same thing. And although professional voice in the law may not be the same as personal voice, the contrast between them seems starker than is perhaps necessary when personal voice remains the touchstone for voice in writing. It may be that professional voice and personal voice are simply two manifestations of a writer’s self—or, to put it slightly differently, two different forms of a writer’s self-representation. This Article will pursue this idea below as well.

In my view, sorting out the complexity of voice—and discussing voice in legal prose—requires a rethinking of who the writer is in legal discourse and, importantly, how that writer is represented in legal prose. It becomes a question not of self-expression, but of self-representation and persona. In this Article, I will first look

at discussions of voice in writing—beginning with what we might mean by voice, then with discussion of personal voice, and then of professional voice. I then offer another model for looking at voice—a discoursal model—and use that model to reconstruct the idea of a professional voice in the law, using the idea of discoursal identities, or persona. Finally, I will discuss the implications of this for those who write in the law and for us—those who teach in legal writing programs.

I. WHAT DO WE MEAN BY VOICE?

Anyone who surveys the available literature will discover that voice is difficult to define. In a prominent collection on voice in writing, Kathleen Blake Yancey admits as much in her opening chapter: “[A]s I sought to identify what voice is, . . . the more I seemed to know about it, the less certain I became, and the less I actually knew.”

Why this difficulty?

First, although there is a literal, physical voice in speaking, there is no such literal voice in writing. As mentioned earlier, then, any discussion of voice in writing is of something that is necessarily metaphorical—or even, according to Yancey, fictional, figurative, or mythical. Nevertheless, voice is one of the most frequently employed metaphors in the field of rhetoric and composition.

Second, voice—even when used metaphorically—can mean many things, some of them mutually exclusive or even contentious with one another. For example, voice in writing has been discussed in the following ways:

- as a reference for human presence in a text;
- as a reference for multiple, often conflicting selves in a text;
- as a source of resonance, for the writer or the reader;
- as the appropriation of other writers or texts;
- as a synecdoche for discourse;

16. Id. at vii.
17. Id. at xviii–xix.
18. Id. at vii.
19. That is, voice is the “part” that stands in for the “whole,” the discourse.
• as a reference for truth, or for the self;
• as a myth.²⁰

Yancey herself admits that the term “voice” has multiple meanings, but after considerable discussion, and like others, she finally settles on the idea that whatever else can be said, voice is best viewed as a metaphor.²¹

In Rescuing the Subject, Susan Miller traces these difficulties with written voice to the shift from orality, in classical Greek and Latin rhetoric, to written rhetoric, or what she calls “textual rhetoric.”²² In oral rhetoric, voice was the literal, speaking voice of the orator. With the shift to writing, the concept of voice—and its source in a self—had to shift to something else. And in the process, rhetoric had to redefine itself. For example, “elocution, which for decades had been an embarrassment both to rhetoricians and to historians of composition, begins to acquire an easily explained importance when it is placed against the growing eighteenth- and nineteenth-century possibilities that words that had never been heard would have to be read to revive their formerly assumed human ‘voices.’”²³ Voice in textual rhetorics was still primarily characterized by its contrast with spoken voice, and those textual rhetorics never fully re-established voice as something present in the text itself.

Like Miller, Darsie Bowden sees the origins of the metaphorical sense of written voice in the literal notion of speaking voice and also looks back to classical rhetorics and the concept of ethos. “Much of what we understand about voice today is rooted in Classical definitions and debates about the pragmatic and ethical dimensions of rhetorical ethos.”²⁴ Bowden sees ethos as central to the shift in voice from the literal to the figurative. Ethos was originally a feature of spoken rhetorics, and part of the ethos of the spoken word would literally be the actual voice of the speaker. But ethos also included a sense of a figurative, or constructed, voice—closely tied to the literal voice, but not quite the same—

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²⁰ Id. at xviii.
²¹ Id. at vii–viii; see also Jane Danielewicz, Personal Genres, Public Voices, 59 College Composition & Commun. 420 (2008).
²³ Id. at 6 (emphasis in original).
because of the need for the orator to manipulate the actual speaking voice. Because of the need for the orator to manipulate the actual speaking voice. Thus, the classical concept of *ethos* helped to open the way for a dual concept of voice and of the self that lay behind it.

Classical notions of *ethos* are still closely tied to oral rhetoric, however, and so the broader notion of voice that Bowden describes still relied on the presence of an actual orator for its metaphorical underpinnings. The writer as a subject was still linked closely to the physical author. Miller suggests that Western rhetoric may have taken a step toward the freeing of that writing subject in the Middle Ages, with the development of medieval formalism. She observes that medieval writers “created elaborate conventional formats for sermons, letters, and legal documents. These documents began to legitimately stand in for oral voices, who may never be heard and whose possessors may be irrelevant to the text’s truth.” With this shift, texts, not people, could possess rhetorical authority, and the sources of that authority could shift, at least in part, from the attributes of the speaker to the conventions of the text itself. The question remains in Miller’s analysis as to whether the concept of voice was freed from the idea of physical presence as successfully as was the concept of the writing subject. Many recent commentators suggest not.

In a survey of recent scholarship on voice, Freisinger finds that the terms “voice” and “self” are still almost automatically linked to a third term, “authentic voice.” Voice remains a matter of authentic voice, and of presence in the text, because of the enduring appeal of the idea of the writer as an independent subject, autonomous and unshaped by the text or its discourse conventions. Freisinger traces this link to a long-standing tradition in Western humanistic thought, at least since time of the Oracle at Delphi. Central to the Western liberal tradition is a sense of human agency within history: “[T]he Western liberal humanist

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25. *Id.*


27. *Id.*

28. Miller observes that the beginnings of a natural writer’s voice lie in this “textual self-effacement” of the physical author, and I agree, but the idea of the privileging of authorial presence over the text has persisted to the present. For the quintessential treatise on presence and the privileging of speech, see Jacques Derrida, *Of Grammatology* (Gayatri Chakroverty Spivak trans., Johns Hopkins U. Press 1976).


30. Over whose entryway was inscribed “Know Thyself.” *Id.* at 244.
tradition has accepted belief in a central core of stable, unified, transcendent, even transcultural self, a belief which served as a matrix out of which definitions of citizenship and ethical behavior and creativity are thought to evolve.” A writer's voice, even if it is inescapably metaphorical, remains well-anchored in the idea of a real self and in voice as the authentic expression of that self.

II. PERSONAL VOICE AND SELF-EXPRESSION

In the contemporary literature, much of the discussion of voice in writing has focused on personal voice, partly because of this continuing link between voice and presence. Voice continues to be seen as a way of asserting the presence of the “real” writer in the text. For a certain school of thought in composition studies, voice also becomes central. When tied to process pedagogies or to student-centered pedagogies, the teaching of personal voice becomes one of the primary goals of the classroom.

This school of thought goes back to the 1960s, as part of a shift from product to process approaches to writing instruction and to notions of writing as an act of self-discovery. Some date the shift to a prominent conference on college writing instruction at Dartmouth in 1966. In a prominent textbook that followed that conference by a few years, Donald Stewart affirms the link between these approaches and voice when he advocates “authentic voice”—a product of the focus on self-discovery in writing. “The development of an authentic voice is a natural consequence of self-discovery. As you begin to find out who you are and what you think and to be comfortable with the person you are, you learn to trust your own voice in your writing.”

One of most prominent of the voice advocates has been Peter Elbow, who sees each writer as having his or her own unique

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31. Id.
32. Whether they support personal voice or question its utility, personal voice remains the touchstone for these commentators. See e.g. Bowden, supra n. 24, at 39–62.
33. Yancey, supra n. 15, at ix.
34. Freisinger, supra n. 29, at 248.
35. See Bowden, supra n. 24, at 49.
36. Freisinger, supra n. 29, at 248; see Donald C. Stewart, The Authentic Voice: A Pre-Writing Approach to Student Writing (W.C. Brown Co. 1972). Another important textbook in the emergence of voice in American writing instruction was Ken Macrorie's Telling Writing (Hayden Book Co. 1970).
37. Stewart, supra n. 36, at 2.
38. Elbow advocated developing one’s personal voice in two popular textbooks, Writing
voice. In describing that unique voice, Elbow—not surprisingly—uses speech metaphors: “In your natural way of producing words there is a sound, a texture, a rhythm—a voice—which is the main source of power in your writing.”

The goal for the student writer, and the writing classroom, is to draw this voice out. If the writer can do so, the effect will be to inject a kind of “magic” into that person’s writing. The magic comes from an authenticity to writing that has found that resonating voice. By the early 1980s, Elbow had become the leading spokesperson for a movement that links voice to self and that finds “real voice” and “real self” to be almost synonymous.

Because of the link of voice to self and to the expression of that self, this school of writing instruction became known as expressivism. It encouraged writing that “resonates” with the individual, “real” voice of the author, partly because writing like this would be empowering. Voice, in writing, was an engaged personal voice. Voice Sample D, below, although perhaps not a prime example, seems closer to this kind of voice than any of the other voice samples mentioned above. It is more personal.

Voice Sample D
Student Note

Dear Professor Rideout,

I have attached revision assignment two. I used a sample of a motion I wrote in legal writing two last semester. In revising the sample, I did my best not to change the sample’s original meaning. However, I did have to make some changes in certain sections because what I originally wrote seemed to make no sense. As with revision assignment one, I priori-

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40. Elbow, supra n. 1, at 282.
41. Id. at 286.
42. Id. at 293; see also Freisinger, supra n. 29, at 250–251.
43. Danielewicz, supra n. 21, at 423. This school of thought is sometimes also known as “expressionism.” See also Susan L. DeJarnatt, “Law Talk”: Speaking, Writing, and Entering the Discourse of the Law, 40 Duq. L. Rev. 489, 509 (2002).
tized increasing cohesion and clarity in the passages, and then subsequently worked to revise the structure of each sentence. I hope that I have clearly and coherently identified my revisions and my reasons for making them. If you have any questions or are unclear about any of them, please let me know. Thank you.44

This voice sample comes from an explanatory note that was attached to the same motion brief that I excerpted for Voice Samples B and C. Although the content of the note is fairly prosaic, I find the voice in it more striking, especially in contrast with the voice in Samples B and C—written by the same author. The voice here seems more authentic and natural, and it sounds as if it is attached to the “real” author. I admit that I find it more engaging. But if Sample D is the one that expresses the real author, where is the real author in Voice Samples B and C? Do writers possess no self when they write legal prose?45

Expressivism has been subject to critique since the late 1980s or early 1990s, partly because its proponents seemed to inadequately respond to questions like the ones above. If voice is linked to self and if writing like that in Samples B and C lacks a voice, then it follows that such non-personal, non-expressive writing also lacks a self. Certainly in non-expressive prose, like the prose in Samples B and C, what we would call the real author is effaced. But that does not mean that the real author is absent, or that the author—in these samples, a law student—is not struggling to establish some relationship between himself and the text, and perhaps even to locate himself in that text.

Philosophically, the critics of expressivism point out that the self in an expressivist view is overly simplified. Expressivism seems to presume a stable, unitary, and unchanging self, one that is independent of the discourse and bears no necessary relationship to it. Locating voice in this central self, then, relies upon a false epistemology.48 The author’s self is independent of and prior to the text, and that author can choose—or choose not—to

44. Note attached to student’s revision of his motion brief (Manuscript on file with Author).
45. I believe that they do, but we will have to come back to that.
47. Danielewicz, *supra* n. 21, at 423.
48. Freisinger, *supra* n. 29, at 257.
“voice” herself in the text. But perhaps part of this “voicing” occurs, not independently of the text, but through the text itself, and through the discourse in which the text is located.

For example, the student author in Sample D above notes that he worked to increase “cohesion and clarity,” but I doubt very much that this phrasing is original with that student. In class, we used this phrase repeatedly as a theme to guide our initial approach to revision, and I am sure that the student is using those words for that reason. He is not “voicing” those words, words that might originate from an autonomous self, but rather is “revoicing” them from the class and from the language that we used there. I would argue, then, that his language and voice are constituted by the language of the class as much as they are a reflection of a self independent of the class, or are independent of what he has written for that class. In that sense, the self and voice in Sample D are “discoursal”—they are a product of the discourse in which that writing is located as much as they are a product of an independent, a priori self.

Similarly, the words in Samples B and C are a “revoicing,” this time of the language of legal texts. Here, the revoicing is positioned more fully in the language of legal discourse, and so we hear much less of a personal voice. But the process is no different, and in that sense, Samples B and C, like Sample D, contain a voice—also a discoursal voice. That voice may not be the personal voice allowed by the expressivists, but viewed differently, it is a voice. Given its close relationship to the language of the law, it may be what is meant by professional voice in legal discourse.

III. PROFESSIONAL VOICE AND PERSONAL VOICE

Although the literature on voice in legal discourse is limited, what literature there is, not surprisingly, discusses voice in terms of a professional voice. In a colloquy on voice in legal discourse,49 Julius Getman observes that establishing this professional voice is a primary goal of law school. “The great bulk of legal education is devoted to inculcating ‘professional voice.’ The magical moment at which the ‘light dawns’ and bewildered first-year students are transformed into lawyers occurs when this voice becomes the stu-

49. Getman, supra n. 8.
dent’s own.” Getman does not use the term “revoicing,” but the process that he describes sounds remarkably similar.

Getman lists some of the features of this professional legal voice: it is objective and registers at a high level of generality; its style tends to be formal, erudite, and “old-fashioned”; it contains both terms of art and Latin phrases; and it situates itself at a distance, “as though its user were removed from and slightly above the general concerns of humanity.” All of these features entail an erasure of the personal from what we would consider professional voice in the law.

Elizabeth Mertz mentions voice in her discussion of legal language, but she takes her analysis one step further than Getman, tying the features of a professional legal voice such as those of objectivity and generality, above, to what she describes as the underlying epistemology of legal discourse and to the legal persona that emerges from that epistemology. The core trope of most legal discourse, according to Mertz, is that of argument. Accordingly, the legal narratives contained within that trope convert the persons involved in those narratives into “speaking subjects whose primary identity is defined by their location in an argument,” or defined by the doctrinal requirements of that argument. The roles of these speaking subjects, or characters, within the argument are narrowly shaped by the limits of the corresponding legal doctrine, and speaking about them requires distance and a stripping away of emotional and moral content. In the role-playing setting of law school, law students in turn internalize the limits of those roles, learning themselves “to speak in the voices of persona defined by the demands of . . . legal discourse.” They acquire the professional voice of a lawyer, and doing so is a powerful measure of their success at learning “to be and think like a lawyer.”

Both Mertz and Getman acknowledge the importance of acquiring the professional voice of a lawyer, but both also lament the narrowness of that voice. Mertz calls the process “double-

50. Id. at 577.
51. Id. at 578.
53. Id. at 100.
54. Id. at 126.
55. Id. at 127.
She acknowledges that stepping into the legal persona of a lawyer, including its professional voice, can be “liberating” for students in that it allows for a more neutral and objective approach to human conflict. But at the same time, that objectivity can erase some of the more important emotional and moral underpinnings to such conflict. This, in turn, can be alienating. In a somewhat cruel twist, the very process of acquiring the voice of a legal professional can also unavoidably alienate the student from some other, more personal voice.

Getman offers a similar analysis. He admits that it is “desirable, indeed crucial, that legal education teach professional voice.” Doing so allows for a voice that focuses on general rules and distances students from feelings and empathy, and Getman observes that such a voice is one of the “trappings” of legal professionalism. Yet that same professional voice distances lawyers not only from the concerns of “ordinary people,” but also from themselves. “[T]oo exclusive a focus on professional voice is dangerous to the lawyer’s psyche.” Getman adds that this distanced professional voice even detracts from some of the most important activities that lawyers undertake, such as counseling and negotiating. He concludes that legal education, and the law, undervalue what he calls “human voice,” a voice that would analyze legal issues using “ordinary concepts” and without “professional ornamentation.”

In a companion piece to Getman’s, Elizabeth Perry Hodges agrees that the professional voice of the law overshadows a more human voice and calls for more attention to that voice in legal education. By “human” voice, both Getman and Hodges seem to advocate something more authentic and personal, perhaps akin to the expressivist voice mentioned above. Neither,

56. Id. at 101.
57. Id. at 133–134.
58. Getman, supra n. 8, at 578.
59. Id.
60. Id.
61. Id. at 579.
62. Id. at 582. Getman does not elaborate specifically on what human voice is, and he does not address the problem of how a legal analysis could employ ordinary concepts and still remain legal analysis. He seems, unlike Mertz, to separate legal epistemology from voice.
63. Hodges, supra n. 8, at 639–640. Hodges seems to recommend that these more human voices be “integrated within a legal style,” although like Getman she does not elaborate more specifically.
however, offers a model for capturing this kind of voice within the law and legal discourse.

More recently, Andrea McArdle argues that law students need to “preserve some sense of individual voice and ownership of their writing” as they enter into the professional voice and idioms of the law. \(^64\) Like Getman and Mertz, she acknowledges the importance of acquiring a professional voice and ties this voice to the formation of a professional identity. But McArdle, too, observes that in developing a professional voice as a legal writer, students lose something in the process. In her view, students lose a part of their writing self—the very personal voice that Elbow and others, mentioned above, try to inculcate in their student writers. “In my own teaching, I have been struck by the disjunction between first-year law students’ struggles to write in a professional voice and the vibrancy of their reflective writing about professional tasks.” \(^65\) In response, she advocates that students engage in reflective writing assignments as well as in professional writing assignments, as a way of negotiating between professional voice and personal voice and of “maintain[ing], or recaptur[ing], a sense of individuality.” \(^66\)

McArdle offers the most direct call for inculcating personal voice in the writing of law students, and her article describes a rich set of assignments that engage students in reflective writing as a way of enlivening this voice in her students. I am not sure, however, that her methodology fully bridges what I see as an inevitable gap between the more individual voice allowed by expressive or reflective writing and the professional voice that we almost universally encourage in our students’ legal writing and that lawyers uniformly adopt in practice. In my view, this gap is difficult and problematic because the different voices that I have discussed so far—personal and professional—emerge, in a sense, from different selves, or different identities. That is, from a cer-

\(^{64}\) McArdle, supra n. 8, at 501.

\(^{65}\) Id. at 504.

tain perspective, it is not just one unitary self that is negotiating back and forth between these personal and professional voices.

I would call this perspective “discoursal.” In the next section, I develop this perspective more fully and suggest that it can provide a model for understanding what we are teaching when we teach our students to write in a professional voice. And I hope, in the end, to use that model as a way of enriching what we can mean by professional voice.

Kathryn Stanchi offers another recent critique of professional legal voice in her article, Resistance Is Futile. Like Getman, Hodges, and McArdle, above, she finds that in the process of becoming socialized into law and legal writing, law students lose their opportunity for “the development of a personal, original voice.” And like Mertz, Stanchi views this loss as having larger implications for the self. Likening the learning of legal writing to “assimilation” into a new language, she notes that “the goal of assimilation carries with it the consequence that some part of one’s self is replaced or lost.”

Stanchi carries her analysis one step further, however, by noting the effects of this assimilation on marginalized groups and “outsider” voices. For them, the loss of voice—and of self—in legal discourse is even more alienating because, as Stanchi describes it, legal language is the language of power, dominance, and privilege. For students who are situated outside the dominant group, and outside the cultural experiences of that group, the gap between the personal and the professional becomes even wider.

The existence of a wide gap between personal and professional opinion means that the part of the writer’s identity that causes the gap is not “professional” and has no place in the law. When that part of the writer’s identity is the writer’s outsider status, whether race, ethnicity, gender, or sexual orientation, the outsider status is what is devalued—it is that part of the writer’s “I” that is expunged. The teaching of objective writing exacerbates this because it teaches that the information that belongs in the memorandum is profes-

67. Stanchi, supra n. 8, at 7.
68. Id. at 22.
69. Id. at 21–22.
70. Id. at 9–10.
Stanchi acknowledges that part of the process of becoming a legal writer entails socialization of the writer into the culture and language of the law, but laments the concomitant loss of the unique voices that outsiders can bring to the law. She calls this the dilemma that legal writing teachers face. In response, she advocates ways of introducing critical theory into the law school and legal writing curriculum, as a way of educating students into the limitations and biases of legal language.

Stanchi’s article is part of a larger effort to broaden the character and composition of the legal profession. Of course all students, in acquiring the professional voice of the law, lose some part of their “personal” voice as they acquire the professional voice of the law. McArdle, while acknowledging Stanchi’s position, even argues that all law students (and even most beginning lawyers) are outsiders to legal discourse. Stanchi seems to argue that the outsider positioning of marginalized students is sufficiently different as to warrant special consideration.

Of interest to me is the fact that both McArdle and Stanchi join Getman and Hodges in calling for greater attention to personal voice, but without fully examining or defining what personal voice is. They, like the expressivists, seem to imply that a personal voice is a more authentic voice, and therefore of value. By “authentic,” at times they seem to mean “real,” or “true,” or something that comes from inside. And even when outsider voice is discussed as emerging from the different experiences and values of an outsider group—as being situated differently—it still seems valued in part for being a more personal voice. But so long as authentic voice means personal voice, and vice versa, then any discussion of professional voice in legal discourse will be problematic.

71. Id. at 37–38.
72. Id. at 9–10.
73. Id. at 54–56.
74. McArdle, supra n. 8, at 503–504.
and, in my view, incomplete. In the next section, I look more closely at what we might mean by voice and at how, if voice is viewed as a social and discoursal phenomenon, this dichotomy between professional and personal voice may begin to collapse. In doing so, I hope to enlarge the possibilities for professional voice.

IV. THE SOCIAL VIEW AND DISCOURSAL VOICE

Another way of looking at voice is to view it not as personal, or as the expression of an individual, or as coming from within, but rather as social, as coming from outside the writer—from the discourses and the uses of language in which the writer is embedded. Earlier in this paper, I began calling this voice “discoursal.” In this view, voice in writing is not so much a matter of looking within and trying to express what is there, but rather of trying to control or appropriate the voices that surround the writer in a given writing context.75 This view, I think, has promise for looking at the voice of legal writers.76

In this more social view,77 voice in writing is intertextual.78 That is, the language that a writer uses—the words and phrases—do not spring from within, but rather are a “revoicing” of other words and phrases that the writer has encountered. All uses of language are a borrowing from other uses of language, prior uses that the writer has encountered and appropriated for a new writing occasion. In this sense, language becomes “dialogic”—any effort to produce a piece of written discourse is influenced by prior, similar discourses that the writer has encountered and through which those discourses are mediated, as well as by the immediate context for the writing task.79 This is by now a well-rehearsed view of language, most usually associated with the work of Mikhail Bakhtin and what is known as “dialogism.”80

76. The implications of this view for legal writing will be discussed later in this Article.
78. See e.g. George Kamberelis & Karla Danette Scott, Other People’s Voices: The Coarticulation of Texts and Subjectivities, 4 Linguistics & Educ. 359, 363 (1992).
80. See e.g. Mikhail Bakhtin, The Dialogic Imagination: Four Essays (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., U. Tex. Press 1982), and M.M.
Because most of us are attached to personal, individualistic notions of voice, the social view can be disconcerting at first. Prior notes that it entails a more collective sense of voice that carries over into individual written texts:

It should be clear that romantic notions of voice as the expression of an autonomous individual are not the only notions of voice available to us, whether in everyday or specialized usage. Notions of collective or social voices also exist.

Prior takes this even further, claiming that voice in written texts is what he calls “typified voice.” The voice in a written text is typified in that it derives not from that particular text (for text he uses the word “utterance”), but rather from the chain of texts (utterances) that typify that type of discursive practice. Bakhtin called the chain of utterances that typifies a particular discursive practice “speech genres.”

Speech genres are central to a dialogic view of language and discourse because they embody the prior discursive practices of a particular type of utterance. Any individual utterance is constructed not from words and phrases, but from speech genres. Thus, the typification of voice relies on an interplay—or “intertextuality”—between a given text and other texts within that discursive practice—the speech genre to which it corresponds. For example, all the appellate briefs that have been written in modern American appellate law practice could be said to comprise a speech genre. Through typification, a particular, individual text—say, an individual writer’s appellate brief—acquires the voice of other texts like it—the voice, say, of appellate briefs. In that sense, the voice of any individual text is social, or dialogic, rather than personal. The voice of an appellate brief is more the typified voice that belongs to appellate briefs than it is a personal voice that belongs to the individual lawyer who wrote the brief.

Bakhtin, Speech Genres and Other Late Essays, supra n. 3.
81. Prior, supra n. 79, at 62.
82. “Utterance,” for Prior (who follows the usage of Bakhtin) means either a spoken or written use of language. See id. at 71.
83. Bakhtin, supra n. 3, at 78.
84. Kamberelis and Scott, supra n. 78, at 366.
85. Prior, supra n. 79, at 64.
Although not writing primarily about the dialogic nature of legal prose, Robert Ferguson offers a short account of what could be called typified voice in judicial writing.\textsuperscript{86} Judges “explain every action with an individual writing, which then becomes the self-conscious measure of their performance.”\textsuperscript{87} As Ferguson acknowledges, however, the voice within that opinion is complex and “profoundly monologic.”\textsuperscript{88} By monologic, Ferguson means that the voice of the judicial opinion is not the personal voice of the individual judge writing the opinion, but rather — in the appellate context — a compilation of the voices of the individual judges who decided the case.\textsuperscript{89} The task of the writing judge is to appropriate those individual voices, including his or her own voice, into the single authoritative voice of the court—the typified voice of the court. In fact, the individual, subsumed voice of the writing judge may not belong to that judge at all, but rather to the judge’s clerk.\textsuperscript{90} No matter. All voices merge into the voice of the written opinion, typified in that it has the authority and characteristics of a judicial opinion. Its voice draws upon the voice of that speech genre. The voice is “enmeshed within the social machinery of decision-making,” so that the voice does not sound like it is acting on its own, but rather is forced to the decision by the logic of the situation—the “perceived boundaries, compelled narratives, and inevitable decisions” that typify a judicial opinion.\textsuperscript{91}

Ferguson also calls the voice in a judicial opinion “self-dramatizing.” That is because the meaning in a judicial opinion must be absolute and authoritative, the voice in the text must speak wholly for itself and allow for no slippage between that voice and the conclusions of the text.\textsuperscript{92} For this reason, the voice within a judicial opinion will often inject a judicial persona, a rhetorical feature of the judicial voice that can give a reassurance of authority.\textsuperscript{93} This judicial persona, however, is still different from the personal voice of any individual judge.

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\textsuperscript{86} See generally Ferguson, \textit{supra} n. 8.
\textsuperscript{87} Id. at 202.
\textsuperscript{88} Id. at 205.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 202 n. 5.
\textsuperscript{91} Id. at 207.
\textsuperscript{92} Id. at 206–207.
\textsuperscript{93} Id. at 206.
\end{flushright}
So far, the discoursal view presents a promising, although more complex, account of professional voice in the law. If dialogism offers a social, collective, and intertextual notion of voice, however, the question remains—what about the individual writer and his or her role in the construction of voice? Bakhtin may offer help here as well. According to Prior, too many of those who read Bakhtin overemphasize Bakhtin’s notion of language as being social, and thus of voice as being an act of appropriation only (appropriation of prior utterances). Prior notes, however, that Bakhtin also emphasizes particular people and their intentions. In this notion of voice and writing, the individual act of writing and the context in which it takes place are “co-constitutive.” Any individual act of writing takes place within a speech genre (e.g., an appellate brief) and a context (e.g., a law school course, or law practice), but the act of writing that individual appellate brief is not merely a rote exercise in creating a typical appellate brief—or, in Bakhtin’s terms, a mere “instantiation” of a genre. Rather it is also a situated occasion that generates, along with all the other instances of writing of appellate briefs, the genre of the appellate brief. In Prior’s words, in any individual instance of writing, “the person is socialized and the social is personalized.” In this way, despite the seeming turn away from the individual and the personal, voice is not merely a mechanical or rote echoing of prior discoursal voices, but also a product of the relationship between those prior voices now embedded within the discourse and the specific, individual act of writing. The individual act of writing, in other words, represents an instantation of those voices in a particular moment and context, and through a particular subjectivity.

Under the social view, then, voice includes the personal or the individual, but the personal or individual as redefined. If the individual act of writing and the context in which it takes place are co-constitutive, then the subject at the center of this act (and the

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94. Prior, supra n. 79, at 71.
95. The “utterance,” using Bakhtin’s term, which may be spoken or written. See id.
96. Id.
97. See id. at 72.
98. Id.
voice that metaphorically represents that subject) is also both constituting and constituted.\textsuperscript{100}

[The subject] is a particular configuration of discursive and material practices that is constantly working on itself—constructing, deconstructing, and reconstructing itself in and by multiple discourses and social practices, their effects, and the ways they intersect, transverse, and challenge one another. The self is continually created in the integration of one’s discourses, experiences, and practices into a single social being.\textsuperscript{101}

Under this view, the writer’s self is discoursal—a product of discourses and discursive practices.

Kamberelis and Scott point out that this co-constitutive relationship between the self and discourse, between the writer and the text, distinguishes this view from Cartesian, or expressivist accounts of the writer’s self—where the self is autonomous and unitary—and from postmodern or deconstructionist accounts of the writer’s self—where the subjectivity of the writer is extinguished, the writer being entirely a product of text and discourse.\textsuperscript{102}

\textbf{V. DISCOURSAL VOICE AND SELF-REPRESENTATION}

Kamberelis and Scott offer a discoursal view of the writer’s self, as both constructed and constructing, but they do not break down that discoursal self any further. To what extent is the writer’s self constituted, or typified—a product of prior discursive practices? To what extent is that self resisting, the personal pressing back against the social, the situation of the writer pressing back against the genre and the discourse? Another literacy researcher, Roz Ivanic, offers a model for this discoursal self, using the work of Erving Goffman as a model.\textsuperscript{103}

Ivanic briefly summarizes the history of voice in modern composition scholarship, from expressivism through social views,
noting the limitations of an expressivist sense of voice and its rejection by the social-constructionists.\textsuperscript{104} In her opinion, however, some social-constructionist accounts of writing go too far in the other direction, claiming the “death of the author” in writing and overlooking the conflicts of identity that real writers experience.\textsuperscript{105} She also points to the revival of interest in voice in scholarship, drawing upon Mikhail Bakhtin. In doing so, she notes the “multiply ambiguous” sense of the word “voice”: on the one hand, as a socially-shaped, or typified, voice upon which a writer can draw, but on the other as the voice of the individual writer, drawing upon that individual writer’s history and sum of experiences and adding them to the discoursal voice of the text.\textsuperscript{106} “The idea of writers conveying, intentionally and unintentionally, an impression of themselves through their writing is not incompatible with a social constructionist view of writing, but complements it. . . .”\textsuperscript{107} Ivanic injects the individual writer back into the social view of writing and voice.

The key is through her model of the writer, in which she sees the “writer-as-performer,” or what expressivists might call the “real” writer, engaging in an act of self-representation, presenting herself or himself as the “writer-as-character” in the text.\textsuperscript{108} When we encounter what we think of as the real writer within the words of the text, we are actually encountering a discoursal self-representation, the “writer-as-character,” a complex portrayal of the writer’s self that is just as much a product of the text (and the forces that compose that text) as is the subject matter of the text.\textsuperscript{109} This distinction, between the “real” writer and the writer portrayed in the text, is in her view a crucial oversight in expressivist views of the writer.\textsuperscript{110}

As noted above, in making this distinction Ivanic is drawing upon the work of Erving Goffman and his social-interactionist model for social identity.\textsuperscript{111} Goffman saw social identity, not as

\begin{thebibliography}{9}
\bibitem{104} Ivanic, \textit{supra} n. 99, at 94–97.
\bibitem{105} \textit{Id.} at 97.
\bibitem{106} \textit{Id.}
\bibitem{107} \textit{Id.}
\bibitem{108} \textit{Id.} at 96-97.
\bibitem{109} \textit{Id.} at 94–95.
\bibitem{110} \textit{Id.} at 95.
\bibitem{111} On Goffman’s work, see Erving Goffman, \textit{The Presentation of Self in Everyday Life} (2d ed., Allen Lane 1969), and Erving Goffman, \textit{Forms of Talk} (U. Pa. Press 1981). For a study of legal identity that also draws upon Goffman’s work, see Gregory M. Matoesian,
an intrinsic characteristic of individuals, but rather as something that was constructed and then portrayed. His model for the portrayal is important to Ivanic, who adapts Goffman’s model to social-constructionist views of writing.112 For Ivanic, drawing upon Goffman, a writer’s self exists in the portrayal of that self within the writing—its self-representation—distinct from the writer’s “real” self. This distinction mirrors Goffman’s distinction between the self as performer and the self as character. Ivanic uses different terms for these aspects of a writer’s self, however, and breaks down the self-representation of the writer, the “writer-as-character,” more fully.

In Ivanic’s model, the writer’s “real” self is what she calls the “autobiographical self.”113 This autobiographical self is what we commonly assume to be the writer’s self and what a writer would regard as his or her “real” identity. The autobiographical self, however, is situated prior to the act of writing and any portrayal of the self in the text; it corresponds to Goffman’s “performer.” Thus, although the autobiographical self is closely tied to who a writer thinks he or she is, no direct evidence of the autobiographical self exists in the written text. It is the self that Ivanic defines as shaped by a writer’s “prior social and discoursal history,”114 and it is the self that produces the self-representation of the writer in any given text. It is not, however, the same self as the self that is discoursally portrayed in the text. Hence, this self has no direct voice in the written text.

The voice in the text that is most self-evident is the second aspect of a writer’s identity, what Ivanic calls the “discoursal self.”115 This self, and its voice, is directly represented in the text, corresponding to Goffman’s “character.” The discoursal self is the self-representation, or portrayal, engaged in by the autobiographical self. It would be a mistake, however, to equate the discoursal self with the autobiographical self.116

112. See Ivanic, supra n. 99, at 19–23. Ivanic also notes the shortcomings of Goffman’s model for a social-constructionist model of a writer’s identity and addresses those in her adaptation of it. Id. at 20.
113. Id. at 24–25.
114. Id. at 24.
116. This, broadly speaking, is the mistake made by the expressivists.
A writer’s discoursal self, in this model, corresponds to the discoursal self noted above in the work of Kambrelis and Scott, and thus it is the product of the discursive practices that define and shape any given act of writing. The discoursal self of a legal writer clearly manifests itself in Sample B above, as the voice of legal analysis. When the author of Sample B writes, “Courts conclude that an informant is reliable when he or she makes statements against interest; statements against interest demonstrate that the informant has a strong motive to be truthful,” we hear the general voice of the law and the discoursal voice of legal analysis. But in Ivanic’s model, we also hear a self behind those words, although a self represented as a particular manifestation of a discoursal self, not a “real” self. Nevertheless, it is the representation of that writer’s constructed self.

To the extent that the writer of Sample B followed and appropriated the conventions and practices of legal analysis, those conventions and practices shaped both his discoursal self and the voice of his text. Ivanic notes that the discoursal self is constructed through both the discourse characteristics of the text and the social context in which that discourse is located, including its web of values, beliefs, and power relations. She also notes that this aspect of a writer’s self can be multi-voiced and even contradictory.

Ivanic breaks down Goffman’s model more fully, however, by positing a third aspect of a writer’s identity, what she calls the “self-as-author.” With this third aspect, Ivanic’s model accounts for the co-constitutive nature of the writer’s self, mentioned above, and also presents a fuller notion of a writer’s voice. Ivanic observes that writers have a sense of themselves as authors, a sense that they will often establish through an authorial presence in the writing itself. The degree to which writers will assert this type of authorial presence in their writing varies. In some writing, writers will not assert their authorial presence at all, as in Sample B. The extent to which writers will assert their authorial presence is also in part a matter of how much au-

117.  Id. at 25.
118.  Id.
119.  Id. at 26–27.
120.  See supra nn. 103–115 and accompanying text.
authority they claim. “[S]ome attribute all the authority in their writing to other authorities, effacing themselves completely; others take up a strong authorial stance. Some do this by presenting the content of their writing as objective truth, some do it by taking responsibility for their authorship.”\textsuperscript{122}

Because the self-as-author is a matter of authorial presence, I would say that this aspect of a writer’s identity is what we often regard as voice in writing. As Elbow notes, when we hear the sound of an individual on the page, we hear a voice. But in fact, that is only one part of a writer’s voice. The discoursal voice, a representation of the writer’s discoursal self, is also an important part of a writer’s voice, and in many ways is the central self-representation of the writer in a piece of writing.\textsuperscript{123} Were an appellate brief not to sound like an appellate brief, or were it not to appropriate the discourse conventions and voice(s) appropriate to an appellate brief, it would not be an appellate brief.\textsuperscript{124} That is, a legal writer must construct a discoursal self that is the discoursal self and voice appropriate for an appellate brief. Nevertheless, the self-as-author also represents an important aspect of the writer’s self and voice, especially in that it often is the voice that concerns the writer’s positions, values, and beliefs.\textsuperscript{125}

Like the discoursal self, the self-as-author is also still a self-representation, manifested in the text. It is not the direct expression of the autobiographical self, as expressivist theories would imply, although it may be a product of the autobiographical self.\textsuperscript{126} It may also, however, be a product of the discoursal self,

\begin{footnotes}
\footnotetext[122]{Id.}
\footnotetext[123]{Ivanic confirms the need for these two aspects of voice in writing, corresponding to the two aspects of a writer’s self to be found in written texts. \textit{Id.} at 331.}
\footnotetext[124]{It would still, of course, be something and have the voice of something, depending upon the context from which it emerges: perhaps, for example, a parody of an appellate brief, or (given the situation) a pro se appellate brief—something that many lawyers would deny is a proper appellate brief, but that appellate courts receive regularly.}
\footnotetext[125]{\textit{Id.} at 26.}
\footnotetext[126]{Ivanic notes,}

The self as author is likely to be to a considerable extent a product of a writer’s autobiographical self: the writer’s life-history may or may not have generated ideas to express, and may or may not have engendered in the writer enough of a sense of self-worth to write with authority, to establish an authorial presence.

\textit{Id.} I would add that writers establish an authorial presence not only as a result of their sense of self-worth, but also as a product of their position in the context within which they are writing and the authority that that position offers them. First-year law students writ-
especially insofar as “one characteristic of a writer’s discoursal self which can be discoursally constructed is authoritativeness.”¹²⁷

I find Ivanic’s model important for legal writing and voice in two ways. First, it accounts for part of the struggle that law students encounter in our classes when they enter into them and attempt to “become” a legal writer. That “becoming” is in part an effort on our students’ part to negotiate with the available discoursal voices of legal writing and to construct a new identity—a new self-representation for themselves, one as a legal writer.¹²⁸ That self-representation must include the voice of a legal writer, and, as is emerging in this discussion, that voice is largely the product of a discoursal self that must be constructed and then represented. Second, her model is sufficiently well-articulated and detailed to allow for a discussion of the co-constitutive nature of voice (the role of the writer’s “real” self in voice). Both of these considerations lead me to the concept of persona.

VI. VOICE, PERSONA, AND PUBLIC VOICE

So the concept of voice is complex. Voice in writing appears to be a matter, not so much of self-presentation, but of self-representation. That self-representation may be largely submerged into the discoursal self and a discoursal voice—a common voice in legal writing, represented, for example, by Voice Sample B. But that self-representation may also allow for an authorial presence as well, the voice of what Ivanic calls the “self-as-author.” If voice, then, is a matter of the writer’s self-representation, discoursally, how can we readily talk about the relationship between the writer and the voice in a text? Borrowing from what she says is the only other preceding work that directly discusses self-representation in writing, Ivanic suggests the concept of “persona.”¹²⁹

Persona is generally regarded as a literary concept, originating in Latin as a theatrical term meaning, roughly, “mask,” but

¹²⁷ Id.
¹²⁸ This construction of a new identity, as a legal writer, is the focus of another project in which I have been engaged with Jill Ramsfield.
¹²⁹ Id. at 89. On persona, she points to an article by Roger D. Cherry, Ethos Versus Persona: Self-Representation in Written Discourse, 5 Written Commun. 251 (1988).
then extending in usage to the broader notion of “role.”130 In the twentieth century, literary critics appropriated the term for a more specialized usage in which they distinguished between a literary author and that author’s presence in a literary text.131 The term also started to carry over into composition studies, most notably in the late 1960s with the publication of Walker Gibson’s textbook *Persona: A Style Study for Readers and Writers*.132 “Persona” as a composition term never quite caught on, however, I suspect in part because the expressivists who followed preferred to focus on the “real” writer and saw writing as self-presentation (or self-expression), not self-representation.

The concept of persona, and the voice of that persona, is perhaps easier to see in narrative fiction. Consider the fifth sample of voice below, from the Preface to Charles Dickens’s novel *Bleak House*, in which the narrator vouches for the veracity of the novel’s portrayal of the mid-nineteenth-century Chancery Court:

Voice Sample E

**Literary Narrator**

I mention here that everything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth. The case of Gridley is in no essential altered from one of actual occurrence, made public by a disinterested person who was professionally acquainted with the whole of the monstrous wrong from beginning to end. At the present moment there is a suit before the Court which was commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a friendly suit; and which is (I am assured) no nearer to its termination now than when it was begun.133

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130. *Id.* at 256–257.
131. *Id.* at 257; see also Robert C. Elliott, *The Literary Persona* (U. Chi. Press 1982).
In this sample, the author of the novel seems to be speaking directly to the reader. The voice of the passage appears to be the voice of the actual author, Charles Dickens—an act of self-presentation. But anyone assuming that direct relationship between the author and the voice of the passage would no doubt be mistaken.

Dickens is in fact inserting a literary persona into the Preface to his novel, an act of authorial presence that is not quite the same as Dickens inserting himself directly into the Preface. Although Dickens himself was well aware of the inequities that took place in the Chancery Court and wrote other pieces about them, the prefatory statement above, and its persona, are part of the fictional technique of the novel. The persona refers confidently and directly to an actual Chancery case from which the fictional case in *Bleak House* is “in no essential altered” as a way of underscoring the verisimilitude of the work. But the voice of that persona—presumably, but not really, the voice of the author—is just as effective an artifice of fiction as is the reference to an actual, although unnamed, case. It establishes an authorial presence through an act of self-representation.

What about legal texts? Do they contain a persona, and what of the voice of that persona? I would argue that they do, although that persona may be largely discoursal—through the voice of Ivanic’s discoursal self, or through what Bakhtin calls a “monologic” voice. Voice Sample B, quoted above, offers a good example of that discoursal voice in law student writing and is worth revisiting. Remember that when I read this passage out loud at a conference, the idea of its having a voice made some uneasy because it could not be said to contain a personal voice. But the passage definitely contains a discoursal voice, and, importantly, this student had to construct it.

Voice Sample B


135. Wayne C. Booth has written extensively about the manner in which literary authors construct a presence in the text, through the device he calls the “implied author.” *See The Rhetoric of Fiction* (2d ed., U. Chi. Press 1983). Cherry also discusses the relationship between persona and Booth’s implied author. Cherry, *supra* n. 129, at 260–263.

136. Cherry makes a similar argument for scientific and technical writing. *See id.* at 266–267.
Argumentative Point and Case Discussion

An informant’s tip satisfies the veracity prong of the Aguilar-Spinelli test when the informant has a track record or when the informant makes statements that are against his or her penal interests. Id. at 437. Furthermore, courts attach greater reliability to an informant’s admission against penal interest in post-arrest situations. State v. Estroga, 60 Wash. App. 298, 304, 803 P.2d 813, 817 (1991). In this case, the veracity prong is met because the informant made statements against his penal interest.

Courts conclude that an informant is reliable when he or she makes statements against interest; statements against interest demonstrate that the informant has a strong motive to be truthful. For example, in Estroga, the court determined that the criminal informant was reliable when he implicated himself in a marijuana growing operation in exchange for not being prosecuted for possession of amphetamines and marijuana. The court held that the credibility requirement of the Aguilar-Spinelli test was satisfied because the informant could have been charged and prosecuted for the crime he was in custody for. State v. Estroga, 60 Wash. App. at 305.137

Every year, thousands of law students write passages similar to the one above, as do thousands and thousands of practicing lawyers. The passage makes a simple argumentative point and then supports that point with reference to a case. The passage, viewed apart from its content, seems unspectacular, in part because of its typicality and in part because of its seeming lack of authorial presence. An analysis of the initial agents in the sentences quickly illustrates this. In four of the sentences, the court is the agent: “courts attach,” “courts conclude,” “the court determined,” “the court held.” In one other sentence, the informant is the agent: “the veracity prong is met [by the informant].” And in one sentence, the informant’s tip is the agent: “an informant’s tip satisfies.”138 Nowhere does the author appear as an agent in the passage.

137. Manuscript on file with the Author.
138. Actually, through metonymic extension, the informant is the agent in this sentence as well.
Nevertheless, there is a persona here, a legal persona, with its own voice. The voice is not distinctive—it does not establish what a casual observer would call voice in writing—because it establishes almost no authorial presence. In fact, paradoxically, it is precisely because this passage contains no direct authorial presence that it acquires authority—by virtue of its seeming objectivity and by its reference to underlying layers of textual authority (State v. Estroga) spoken through the repeated agency of “the court.” It also acquires authority because its voice is so typified. But the student who wrote this passage had to construct that persona and that voice.¹³⁹ For the purposes of this motion brief, they represent the student in that section. They are that student’s self-representation.

In fact, as Voice Sample D, quoted earlier in this paper, illustrates, this student is quite capable of projecting a recognizable, or more immediate, voice into his writing: “I have attached revision assignment two. . . . As with revision assignment one, I prioritized increasing cohesion and clarity in the passages, and then subsequently worked to revise the structure of each sentence. I hope that I have clearly and coherently identified my revisions and my reasons for making them.”¹⁴⁰ This voice, too, emerges from a persona, but a persona that is constructed differently from the voice in Sample B. Here, the voice contains more authorial presence.

In Ivanic’s terms, the voice in Sample D, and the persona that lies behind it, emerge more from the self-as-author, less from the discoursal self. And this is entirely appropriate. The textual footing for Sample D (a note to explain and justify what the student did for the assignment) is different from the textual footing, and accompanying discourse conventions, for the excerpt from a motion brief in Sample B. Two different textual footings, two different voices, emerging from a persona that is constructed somewhat differently. My point is that the voice in Sample D, seemingly more personal or authentic, still emerges from a persona, a constructed self-representation of the author. That persona may be positioned closer to the self-as-author, but the self-as-author is in turn still discoursal, still a self-representation. The self-as-

¹³⁹. And this construction may have run counter to discoursal constructions of self and voice that the student had experienced prior to entering law school.
¹⁴⁰. See supra n. 44.
author, here, is positioned as a student writing to a teacher—not quite the same thing as the autobiographical student—and the voice of this persona, although it contains more authorial presence, is the voice of the persona that this student has adopted for this textual occasion. In fact, this persona interests me because it mixes some formality (“prioritized . . .”) with an appeal that sounds more personal (“I hope . . .”). This persona and voice, positioned more closely to the self-as-author, acquires some authority through the positioning.

Law students, of course, are novice legal writers, not yet licensed legal practitioners, and in many respects they are struggling to master a discoursal voice in their legal writing. No one should be surprised that their legal writing contains little, if any, authorial presence like that discussed in Sample D above. At the other end of the spectrum from law student writers, perhaps, are Supreme Court justices, writers who are situated very differently within the profession and who possess very different authority as writers. That voice is worth examining as well. The final voice sample below comes from Justice Stevens’s dissent in a recent Second Amendment case, District of Columbia v. Heller.141

Sample F

Supreme Court Dissent

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a “law-abiding, responsible citize[n]” the right to keep and use weapons in the home for self-defense is “off the table.” Ante, at 64. Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District’s

policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

The passage begins with a voice common to Supreme Court opinions, essentially the voice of the Court. This voice is collective, magisterial, and—insofar as it could be called a typified voice of the Court—a discoursal voice. That is, although Stevens is the author of this dissent, the passage opens with the general voice of the Court. His choice of subject-verb combinations contributes to this general, typified voice. He begins with “it has been understood,” a passive construction that establishes long-standing precedent (“has been understood”) and, as the voice of the Court, needs no explicit reference to agency (the agency being, by implication, the Court—as in “by the Court.”)\(^{142}\)

As the passage continues, however, this discoursal voice begins to shift, becoming less the collective voice of the Court and more the voice of Stevens’s particular judicial persona.\(^{143}\) The subject-verb combination of the second sentence is “[t]he Court’s announcement . . . upsets.” The agency in this sentence still belongs to the Court (“Court’s announcement”), but the verb (“upsets”) changes the long-standing precedent of the first sentence. With this shift, the persona of the passage begins to step away from the collective voice of the Court with which it began.\(^{144}\) This distancing between the voice of the persona in this passage and the collective voice of the Court continues in the third sentence, where “judicial craftsmen have confidently asserted.” Here, the persona removes itself from the agency in the sentence—it does not join in with the “judicial craftsmen”—and the voice of this persona contains almost a tinge of irony\(^ {145}\) with the choice of the word “craftsmen” and with the modifier to the action—“confidently.”

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142. The ambiguity of the omitted agent may have the effect of broadening the long-standing “understanding” by bringing in other agents as well—for example, “long understood by Constitutional scholars.”
143. In fact, given that this passage comes from a dissent, the seeming collective voice of the opening sentence—“it has long been understood”—is, of course, also the voice of this persona and may have been consciously adopted as a way of establishing credibility for this judicial persona.
144. Although it is still a discoursal voice—the typified voice of a judicial dissent.
In the final sentence, the voice in this passage becomes much more direct, again as evidenced in the subject-verb combination—“I fear.” Here the voice shifts, more to the voice of what Ivanic calls the “self-as-author.” Although Stevens maintains his judicial persona, he seems to speak more directly through that persona, and the passage acquires more authorial presence. I would argue that this increased authorial presence extends to the metaphor with which Stevens ends the final sentence. With the Court’s change in Second Amendment jurisprudence, the policy of the respondent in this case, the District of Columbia, “may well be just the first of an unknown number of dominoes to be knocked off the table.” This is a graphic metaphor, and it entails the destruction of a well-structured arrangement (the jurisprudential dominoes) with little hope of their reordering (“knocked off the table”). It also turns against itself the original metaphor, “off the table,” used by those same judicial craftsmen in the third sentence.

I believe that many people, were they to read Sample F above, would claim (at least initially) that the voice of the passage emerges in the last sentence. I say this in accordance with my earlier assertion, backed by Ivanic, that many readers identify voice with authorial presence, like the authorial presence that emerges in that last sentence above. I argue, however, that the passage contains a voice all along, although a more discoursal voice, and that that voice shifts, acquiring more authorial presence as it became less the voice of the discoursal self—a Supreme Court justice writing a dissent—and more the voice of a particular justice, Justice Stevens, writing as the author of this dissent—the voice of the self-as-author. Stevens can shift the voice in his judicial writing and in doing so insert greater authorial presence because, in part, the discourse conventions for judicial dissents allow this and because, in part, as a Supreme Court justice he has both the legal and the rhetorical authority to do this. He is positioned to insert authorial presence, should he choose to do so.\textsuperscript{146}

The persona that he adopts in this passage is correspondingly complex. It begins as a seemingly collective persona, appropriate

\textsuperscript{146} Although it still remains, in part of course, a discoursal voice and is also still the voice of Stevens’s judicial persona—a persona that has been constructed and that represents, but does not “present,” the “real” person writing those words. In fact, given that those words may have been written by Stevens’s judicial clerk, this voice has to represent a persona.

\textsuperscript{147} On subject positioning, see Ivanic, supra n. 99, at 27–29.
to the voice of the Court. But as Stevens begins to inject an authorial presence, the voice of the passage also starts to turn against that collective persona, using its own words against itself and almost (but not quite) rendering the original persona to be an ironic one. Roger Cherry, who also views the device of persona as a way describing self-representation in writing, describes this as a kind of complex positioning. “[S]elf-representation in writing is a subtle and complex multidimensional phenomenon that skilled writers control and manipulate to their rhetorical advantage. Decisions about self-portrayal are not independent, but vary according to the way in which writers characterize their audience and other facets of the rhetorical situation.”

Stevens, with the kind of legal and rhetorical authority mentioned above, can do this. Our students, as novice writers who occupy very different roles and positions within legal discourse, largely should not, at least at first.

It may be, however, that we can show our students examples of legal prose that contain this kind of authorial presence and explain that it, too, can have a place in the professional voice of the lawyer. But it would be wrong to call this presence a personal voice. It is not personal and not quite a manifestation of the “real” writer. It belongs, rather, to the legal persona that they must construct for themselves as they learn to write in the law and through which they will represent themselves. Jane Danielewicz calls this “public voice” and describes it as

that quality of writing that conveys the writer’s authority within a community and ensures a place of participation: when located, the writer assumes an invested position, confident of having equally invested readers. In other words, I’m interested in voice as a social phenomenon with rhetorical effects and social recognition, not as a private, internal, or authentic experience.

Danielewicz is clearly interested in establishing some kind of authorial presence to voice, but she is also clearly distancing herself from notions of personal, or authentic, or expressivist voice. Not surprisingly, she too turns to persona. “Perhaps ‘persona’ is a better word because it signifies something real but fabricated,

148. Cherry, supra n. 129, at 252.
149. Danielewicz, supra n. 21, at 422.
impermanent but effective nevertheless. . . . There is no direct relationship to or fundamental representation of the writer in the words she chooses to reproduce.”

Danielewicz, then, in advocating for a public voice, turns to persona, as do Ivanic and Cherry. She does not break down this persona into the more detailed self-representation that Ivanic does, but she is clearly interested in establishing authorial presence without falling into the limitations of an expressivist notion of self. And, although she does not use the terms of Kambrelis and Scott, she is further interested in the co-constitutive nature of this public voice, in the contribution of the voice of any individual writing to the typified voice of that genre.

A public voice is one that enters the ongoing conversation to change, amend, intervene, extend, disrupt, or influence it. Where does such authority come from? Power, like voice, results from the relationships among and between individual subject positions, between individuals themselves, and between individuals and institutions. . . . In other words, the writer is not independent of but is influenced by the discourse she herself produces.

These distinctions do not strike me as too fine to teach to our students.

VII. CONCLUSION: INCULCATING VOICE AND PERSONA IN LEGAL WRITING

As we help our students to become legal writers, we are, among other things, inculcating in them a voice—the voice of a legal writer. We would do well, however, to point out to them that this voice is not a personal voice, at least not in the sense in which they would understand personal voice. But to call it a professional voice—the voice of a lawyer—is not to diminish the importance of that voice, because in a certain way that professional voice still belongs to them. It represents the legal persona that they have constructed for themselves. We could point out that in the other types of writing that they have done before law school, they have also constructed persona, although beginning early on

150. *Id.* at 425.
151. *Id.* at 425.
in school, they may have constructed a persona that has remained with them for a long time and with which they may feel very familiar—the persona of student-as-writer. The legal persona that we ask them to construct may be new to them, and it may be more difficult to construct because it is more fully positioned within a particular discourse and because that discourse—legal discourse—can seem overly constraining.

Constructing this legal persona entails a complex negotiation between who students think they “really” are as writers and how they are learning to position themselves in legal discourse. If we can explain that they are constructing a new persona, they may find the transition into legal writing a little easier. This may especially be true for students whose writing experience has been shaped by expressivist assumptions or for students whose language experience lies outside dominant discourses. The concept of persona can be useful to students as they move beyond the legal writing classroom as well. Often, when students enter internships or judicial clerkships, they are expected to write in the style and voice of someone else—a judge or law partner. It may be useful for them to see that taking on that voice is a matter of adjusting or reshaping their writing persona—but not necessarily of losing their self.

In tying voice to persona, and to the positioning of that persona, we might also be able to show them that their professional voice can also, at least at times, assert an authorial presence—that part of their persona that represents the self-as-author. Insofar as the typified voice of much legal writing requires an effacing of the self-as-author, or a submerging of it to the discoursal self, law students probably receive the message that in its objectivity, neutrality, and distance, that voice leaves no room for themselves. But they are always authorially there in that persona, although not always represented in the voice. And at certain times, the self-as-author can emerge, even if subtly, as I argue for in Voice Sample C above (“our case”). Sometimes, a legal text can represent the self-as-author even more fully, as in Sample F above, which represents the voice of Justice Stevens, a complex voice that shifts within its persona. Our own students may or may not become Supreme Court justices, but they will certainly

152. Or not so new for those students who have, for example, worked as a paralegal before entering law school.
have the occasion to write in legal settings in which they are positioned with more authority, with the ability to assert more authorial presence—in a voice and through a persona that are larger than the merely discoursal. In that sense, they would possess a public voice, not the same as a personal voice and perhaps more engaging than what is commonly meant by professional voice.

Finally, if we can not only demonstrate to them that they are acquiring a voice in legal writing, but also explain how that voice is tied to a discoursal identity, to a persona, we might also be able to illustrate how they individually contribute to the professional voice of the law. Their contribution would not be direct—within a discoursal view, no autobiographical self speaks directly in a text. But the legal persona that they construct can assert an authorial presence, not directly but through a public voice, one that in turn becomes a small part of the professional voice of the law. As Prior points out, “the person is socialized and the social is personalized.”

Even the small choices that they make about their discoursal identity shape the professional, typified voice of the law. For example, most of our students, and most lawyers, increasingly choose to avoid blatant legal archaisms. They may do so because we advise them to, or because they want their legal prose to be more readable; but I think they also do so because the demographics of the legal profession are changing, and they no longer identify with the stuffiness that legal archaisms lend to both their prose style and the voice of that prose. Choices that they make about their discoursal identity contribute as well to the voice of the profession.

Both through these small changes, then, and in the much larger task of constructing a legal persona, we can help our students to understand who they are as they become legal writers and how that construction entails voice. They may be using the words of the law, but those words are never voiceless. Neither are legal writers.

153. See Prior, supra n. 79, at 72.
INTRODUCING PERSUASIVE LEGAL ARGUMENT VIA THE LETTER FROM A BIRMINGHAM CITY JAIL

Mark DeForrest*

For a society to have a sense of its purpose in history, rhetoric is necessary.¹

The details of legal discourse matter. First and foremost, the details of legal discourse matter because language is the essential mechanism through which the power of the law is realized, exercised, reproduced, and occasionally challenged and subverted.²

I. INTRODUCTION: THE CHALLENGE OF TEACHING PERSUASIVE LEGAL ARGUMENT

Persuasive presentation—either in spoken or written form—is something that the typical lawyer does virtually every day that he or she practices law.³ Whether working in civil or criminal law, transactional or litigation practice, attorneys seek to present information in ways that will persuade decision-makers to draw conclusions favorable to the presenting attorney’s client or posi-

* Assistant Professor of Legal Research and Writing, Gonzaga University School of Law, Spokane, Washington. I would like to thank Professor James Vache of Gonzaga Law School for helping me explore the relevance of Dr. King’s work not only to issues regarding civil disobedience and civil rights but to broader questions of legal theory and practice. Thanks also go to Professor Cheryl Beckett, director of Gonzaga Law School’s legal research and writing program, for her helpful comments regarding this Article. Additionally, thanks go to Earlene Kent of Western Washington University’s Administrative Computing Department for her advice regarding several points of style in this Article. Finally, special thanks to my wife, Azelle San Nicolas-DeForrest, for all of her inspiration and support. Without her, this Article would likely have remained unwritten.

3. James Boyd White, Heracles’ Bow: Essay on the Rhetoric and Poetics of the Law 4 (U. Wis. Press 1985). According to White, “[a] lawyer's professional day is largely made up of conversations, oral and written, in which the object is to persuade another to a particular view. In this sense he or she is a professional rhetorician, and must be concerned with the possibilities of rhetoric as a way of life.” Id.
tion. Yet, as ubiquitous as persuasive argumentation is in the lawyer’s daily trade, many legal practitioners are not as efficient or as effective as they could be in presenting persuasive arguments due to an insufficient background in the basic methods of legal argumentation.

In law school, one common way of educating future lawyers about persuasive argumentation is the “learn by example” method. This method involves a professor guiding students through various persuasive writing techniques via the examination of literature, sample briefs, oral arguments, or court decisions in the expectation that the students will learn which rhetorical techniques to embrace or avoid. While the “learn by example” method does have certain weaknesses when it comes to helping students to grasp the process of legal writing, it is a tried and true method, and is an effective method for teaching the particular format and structure of drafting legal arguments.

Nevertheless, like all methods, the approach may be improved, and one way to do so involves the presentation of a broader rhetorical context to legal argumentation. Such a broader context, when used to introduce persuasive legal writing, takes the learner outside a formulaic approach to legal persuasion and allows for the development of a deeper approach to legal persuasion that looks not simply at legal format, but at the method and tactics of rhetorical argumentation. Such an approach does pose a challenge: how to keep the material both relevant to legal argumentation and interesting while at the same time not drowning the learner in jargon derived from disciples about which he or she may be ignorant, notably philosophy and communications theory.

This Article proposes an approach to presenting the basic principles of persuasive legal argumentation based on Martin Luther King, Jr.’s Letter from a Birmingham City Jail. In this Article, I will provide an overview of some of the contributions of ex-

4. See id.
7. See id. (providing a fuller overview of the “learn by example” method to teaching persuasive legal writing).
8. Id.
isting legal writing literature analyzing the use of the letter in teaching persuasive legal writing. I will also extend this analysis by demonstrating the value of King’s letter not only as a theoretical guide to persuasive writing techniques, but as a practical example of techniques of persuasive argumentation that are part and parcel of effective advocacy. Part II of this Article will establish the suitability of using King’s letter as an introduction to persuasive legal argumentation, using the nature and context of the letter, as well as the letter’s use of persuasive rhetorical technique, to demonstrate the utility of the letter as a method of introducing readers to the practical application of classical rhetorical theory as developed by Aristotle and Plato. In Part III, the Article will provide four examples of specific, practical persuasive tactics King used to appeal to his audience. These tactics are:

1. his use of an overarching theory of the Civil Rights Movement’s work to give shape to his argument;
2. his use of structure to prime his audience for his argument;
3. his use of authorities recognized by his audience to support his argument and undermine that of his opponents; and
4. his employment of evocative, plain language to convey his points.

Part IV of the Article will address some of the benefits of the letter to mission-oriented teaching of persuasive legal writing. In all, I will endeavor to show that King’s letter is well-worth reading closely when beginning the study of the art of legal persuasion.

II. THE SUITABILITY OF THE LETTER AS AN INTRODUCTION TO PERSUASIVE ARGUMENT

There is a long tradition of using works from outside the legal arena to introduce concepts and methods of persuasive presentation that are applicable to legal argumentation. Certainly, references to and quotation of non-binding texts and authors, many of
whom wrote in a non-legal context, are a feature of many judicial decisions. On a very basic level, it makes sense to use literature written in a style that may be more familiar to the student before plunging them into the technical formats and vocabulary of formal legal advocacy.

In addition, there is little question about the merit to exploring rhetorical theory in explaining persuasive legal argument, “because law and rhetoric have a common cultural and historical heritage, classical and contemporary rhetorical theory offer conceptual frameworks for understanding and learning legal argumentation.” A strong case has been made that social science research, along with classical and contemporary rhetorical theory, can provide valuable insights into human behavior related to persuasion. The value of examining other forms of rhetorical presentation when teaching persuasive legal argument is also a function of the nature of legal advocacy. As regards the presentation of rhetorical theory, legal argument is part of a broader matrix of human communication regarding the use of language. While a component of the legal system and thereby subject to particular forms and functions, persuasive legal writing is also linked to rhetorical strategies and techniques developed not only within its own ambit, but within other areas of study and persuasive argumentation. As German philosopher Josef Pieper once noted, “[w]ord and language, in essence, do not constitute a specific or specialized area: they are not a particular discipline or field. No, word and language form the medium that sustains the common

9. For a general discussion of the use of such non-binding texts and authors in Supreme Court jurisprudence, see Robert J. Hume, The Use of Rhetorical Sources by the U.S. Supreme Court, 40 L. & Socy. Rev. 817 (2006). Hume’s study includes an examination of the Court’s use of diverse rhetorical sources including: commentaries on the law; critical documents in the history of the development of the Anglo-American legal tradition; “[r]espected [j]urists”; and “[r]espected [n]onjurists,” including various Founding Fathers, philosophers, and scholars. Id. at 823.

10. See White, supra n. 3, at 4.

11. Saunders, supra n. 5, at 566 (explaining the validity of examining the connection between law and rhetoric); see also Plato, Phaedrus 41 (261a) (Robin Waterfield trans., Oxford U. Press 2002) (Plato explains that legal rhetoric is not different from other types of rhetorical presentation: “[t]hen the art of arguing opposite sides of the case is not restricted to lawcourts and the political arena. No, it seems that all speaking will be covered by a single branch of expertise (if it really is a branch of expertise”).


13. See White, supra n. 3, at 4.

14. Id.
existence of the human spirit as such.\textsuperscript{15} As a consequence, looking at the rhetorical techniques employed in other types of writing can provide an excellent introduction to presenting legal argument.\textsuperscript{16}

As the following material will show, the nature and content of the letter, King's use of classical rhetorical technique, and substantive points that demonstrate both Aristotelian and Platonic concepts of persuasive argumentation all make the \textit{Letter from a Birmingham City Jail} uniquely suitable for use as a vehicle for understanding persuasive argumentation.\textsuperscript{17} Since beginning my teaching career nine years ago, I have used the letter on several occasions to introduce persuasive argumentation to my students. While the study of King's letter will not result in complete mastery of all of the methods of legal argumentation, the letter does contain relevant examples of key techniques that are analogous to those used by lawyers in their daily work. While not shying away from addressing serious intellectual issues, the letter does a fine job of holding the reader's attention; while an excellent example of classically rooted persuasive technique, a reader could never mistake the \textit{Letter from a Birmingham City Jail} for a dry and dusty tome on ancient Greek rhetorical theory. Given the subject matter of the letter, it also reveals the intersection of law, our common law, and the power of language in a way that is uniquely evocative. This is not to say that King's letter can stand alone in providing the reader and student with a sufficient grasp of legal


\textsuperscript{16} See e.g. Stephen A. Newman, \textit{Using Shakespeare to Teach Persuasive Advocacy}, 57 J. Leg. Educ. 36, 36 (2007) (providing an overview of the use of Shakespeare to teach persuasive advocacy; “[p]ersuasive advocacy, a skill essential to the lawyer’s craft, may profitably be studied in law school by exploring realms of knowledge far from the courtroom and the legal textbook”). For a book-length treatment of Shakespeare's use of classical rhetorical method, see Miriam Joseph, \textit{Shakespeare's Use of the Arts of Language} (Paul Dry Bks., Inc. 2005).

\textsuperscript{17} For an example of using the \textit{Letter from a Birmingham City Jail} to teach persuasive narrative techniques, see Shaun B. Spencer, \textit{Dr. King, Bull Connor, and Persuasive Narratives}, 2 J. ALWD 209 (2004); for an overview of an in-class exercise involving the use of the letter to teach classical rhetorical devices to law students, see Kate Weatherly, \textit{Classical Rhetorical Devices & the Martin Luther King, Jr. “I Have a Dream Speech,”} 20 Second Draft (Bull. of Leg. Writing Inst.) 24, 25 (Aug. 2005). The applicability of King's work to legal study is not limited to legal argumentation; for example, King's work has also been employed to help understand contract theory. See Blake D. Morant, \textit{The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison}, 50 Ala. L. Rev. 63 (1998).
argument; it is obviously not a legal brief or a complete survey of legal rhetoric. The letter is best used as an introduction, to entice the novice into beginning the work of understanding the applicable skills involved in crafting persuasive legal arguments.

A. The Letter’s Nature and Context

One of the qualities that makes the *Letter from a Birmingham City Jail* an effective introduction to persuasive legal argumentation is its quality as a rebuttal document. King wrote the letter not simply to state his cause, but to win over those who were conflicted about segregation and civil rights, those who had yet to make an effective decision about which side they were on. In that sense, the letter can be analogized to a reply brief, written to convince King’s readers that the position set forth by his opponents was mistaken, not only in its applications, but in its underlying assumptions. And it is in this analogous function of the letter that makes it such a valuable teaching tool for introducing the fundamentals of legal argumentation.

Readers approaching the letter for the first time are often surprised to find that King wrote it in response to a detailed, public statement attacking the work of the Civil Rights Movement in Birmingham, Alabama. While in jail after being arrested for participating in a march that lacked a proper parade permit as required by the authorities, King received word that an interdenominational group of clergymen had issued a statement calling on the community to refrain from demonstrations against the re-

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18. The letter itself is available on numerous internet sites and has been widely published in print. The version of the letter cited to in this Article is from Martin Luther King, Jr., *Letter from a Birmingham Jail*, 26 U.C. Davis L. Rev. 835 (1993) (reprinted with permission). For background on King’s situation in Birmingham and the Civil Rights Movement’s work there, see David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from a Birmingham Jail*, 26 U.C. Davis L. Rev. 791, 801–824 (1993).

19. The initial statement that King was responding to was issued on April 12, 1963, by a group of white clergy responding to the civil rights demonstrations that King was involved with in Birmingham, Alabama. A complete text of the Alabama clergymen’s statement may be found at www.stanford.edu/group/King/frequentdocs/clergy.pdf. That King wrote the *Letter from a Birmingham City Jail* in reply to the clergymen’s statement is explicitly acknowledged by King in his Author’s Note to the letter. See *Letter from a Birmingham Jail*, supra n. 18, at 835; see also Derrick Bell, *The Triumph in Challenge*, 54 Md. L. Rev. 1691, 1693 (1995); Wendell L. Griffen, *Race, Law, and Culture: A Call to New Thinking, Leadership, and Action*, 21 UALR L. Rev. 901, 911 (1999).
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...gime of segregation then unlawfully in effect in Alabama. This Statement by Alabama Clergymen, was issued on April 12, 1963, and signed by leaders of the Roman Catholic, Methodist, Presbyterian, and Episcopalian churches in Alabama, as well as local Jewish and Baptist religious leaders from Birmingham. In their statement, the clergy stated that demonstrations protesting segregation were “unwise and untimely,” and that the civil rights marches in the city, “however technically peaceful,” had “incite[d] to hatred and violence.” Characterizing the marches as “extreme measures,” the clergy denied that such direct action was “justified,” and called on the local African-American community to “withdraw support from these demonstrations.”

The clergymen’s statement began with a moderate tone, noting that the authors had previously issued an appeal calling for obedience to judicial decisions mandating desegregation. The statement went on to urge reconciliation and negotiations among local leaders regarding racial issues, declaring that “recent public events” —a reference that included the civil rights protests that King had helped organize—“have given indication that we will have opportunity for a new constructive and realistic approach to racial problems.”

This moderate and even hopeful tone, however, soon fades from the statement as it begins to deal more directly with the demonstrations in which King was involved. The clergy praised the law enforcement tactics of Bull Connor’s Birmingham police department, commending the “calm manner” of the police, and called on law enforcement to continue their “calm” efforts to “protect our city from violence.” The clergy voiced concern that “outsiders”—a not-so-veiled-reference to King—were at least “in part”...
responsible for the demonstrations, and called on local members of the community, whites and African-Americans, to work for “honest and open negotiation of racial issues” using “their knowledge and experience of the local situation.”

The clergymen minimized the African-American community’s legitimate grievances in Birmingham by referring to the ongoing civil rights protests as the result of “impatience” and emotionalism, understandable to be sure, but ultimately a product of “people who feel that their hopes are slow in being realized.” The statement closed with an appeal to the African-American community to cease its support for the protests, for disputes regarding civil rights and equal treatment to be settled in the courts and via “negotiations among local leaders,” and for whites and African-Americans to “observe the principles of law and order and common sense.” Any steps involving demonstrations or non-violent civil disobedience were to be avoided, according to the clergymen, in preference for efforts not through “the streets” but through proper channels.

In his reply, King methodically countered the arguments set forth by the clergymen, and defended the direct action program that the Civil Rights Movement was then undertaking in the city. The text he produced has become famous world-over for its defense of civil disobedience, human dignity, and non-violence. Beleaguered as King was, his rebuttal was not an effort to preach to the choir. King was writing not only to bolster the morale of those involved in protests in Birmingham or elsewhere across the South; he hoped to convince his readers and Southern white Christians in particular, of the legitimacy of the Civil Rights Movement. Many of those Southern whites were not necessarily opposed to the Civil Rights Movement, but neither were they nec-

28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Letter from a Birmingham Jail, supra n. 18.
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...sarily supportive; they often sought to maintain a kind of neutrality between those who supported segregation and those who sought reform for equality. King was seeking, at least in part, to persuade this host of individual decision-makers, those who had to decide, in their consciences and in their public actions, whether they would work for a more racially just civic polity.

Why, a modern reader coming to King’s letter for the first time might ask, was such persuasion necessary? For those of us who have come of age after the 1950s and 1960s, it is sometimes difficult to imagine that any person of good faith—the kind of person open to the moral persuasion that King brought to bear in his letter—would need much convincing regarding the legitimacy of non-violent protest to bring attention to civil rights abuses. During the time, however, for people faced with the challenge of moving through and beyond segregation, the situation was often less than clear. There was extensive opposition to the Civil Rights Movement, and while a good deal of that opposition was due to overt racism, not all of it was. Conservative standard-bearers like 1964 Republican presidential candidate Senator Barry Goldwater and scholar Richard M. Weaver were skeptical of the Civil

38. Id. at 4.
39. That Southern whites were open to persuasion on the question of segregation is supported by writer Walker Percy’s observation that “[t]he argument from religion and law is in the long run unanswerable. The Southern segregationist knows in his bones that he can’t continue to profess Christ on Sunday and then draw a racial line to keep his fellow Christians in their place—and his churches are beginning to move. He knows in his bones that the Supreme Court decision [Brown v. Board of Education] will never be reversed and must in the end be obeyed. He has a bad conscience.” Walker Percy, A Southern View, in Signposts in a Strange Land 89, 93 (Patrick Samway ed., Farrar, Straus & Giroux 1991) (originally published as A Southern View, 97 Am. 428 (July 20, 1957)). Interestingly enough, King employs principles drawn from both theology and jurisprudence in crafting the overall argument expressed in the Letter from a Birmingham City Jail, the same sources Percy noted were undermining support for segregation in the south.
40. For Barry Goldwater’s views of the Civil Rights Movement during the early 1960s, see Barry Goldwater, The Conscience of a Conservative 25–31 (Regnery 1990) (originally published by Victor Publg. Co., Inc. 1960). In the book, Goldwater wrote that he supported the right to vote and other rights because they were related to property and contracts as civil rights, but he opposed characterizing the right to vote and other rights related to property and contracts as civil rights, but opposed characterizing school desegregation as a civil rights issue. See id. at 27–28. Goldwater stated that while he supported “the objectives” of the Supreme Court’s decision in Brown v. Board of Education, he was...
Rights Movement because of fears that efforts at desegregation would further foster statist intrusions into American culture—intrusions that would, as Weaver characterized them, be based “in ignorance, if not in a suicidal determination to write an end to the heritage of Western culture.”

Opposition to federally mandated desegregation was not limited to elements within conservative circles; leading figures in the Democratic Party also opposed desegregation. In the wake of Brown v. Board of Education, ninety-six members of Congress signed a document known as the Southern Manifesto decrying the Court’s decision as “a clear abuse of judicial power.”

The backers of the manifesto included Joseph Scotchie, Barbarians in the Saddle: An Intellectual Biography of Richard M. Weaver 85 (Transaction Publishers 1997) (quoting Richard M. Weaver). Scotchie includes the following quotation from an essay by Weaver, The South and the American Union, regarding integration:

The South knows that in wide areas a forced integration would produce tensions fatal to the success of education. . . . The South’s decision to resist the new forward motion of the centralizing and regimenting impulse has won it support in the North among those who see the issue of authority as transcending this particular application.

Id. at 85. It should be noted, as Scotchie points out, that while Weaver may have had strong reservations regarding the wisdom of desegregation, he “never formally declared his opposition to the Brown vs. Board of Education ruling . . . .” Id.

41. 102 Cong. Rec. 4255, 4460 (1956) (quoted in Daniel Kiel, Exploded Dream: Desegregation in the Memphis City Schools, 26 L. & Inequal. 261, 267 (2008)); see generally Tony Badger, Southerners Who Refused to Sign the Southern Manifesto, 42 Historical J. 517 (1999); Ronald Turner, Thirty Years of Title VII’s Regulatory Regime: Rights, Theories,
such notable Southern Democrats as Senator Harry Byrd of Virginia, Senator Strom Thurmond of South Carolina, Senator Richard Russell of Georgia, and Senator J. William Fulbright of Arkansas.\(^{43}\)

In the middle of the conflict and controversy over civil rights often stood Southern white clergy and the churches they pastored.\(^{44}\) Many of these clergy sought to maintain a neutral position regarding the civil rights struggle and were often attacked by both civil rights activists and segregationists.\(^{45}\) The clergy who issued the statement calling for an end to the demonstrations in Birmingham generally fit within this group, considered moderate or even liberal in their sympathies.\(^{46}\) King hoped that his letter would at least in part have the effect of moving moderate Southern white Christians from a position of neutrality to one of support for the civil rights struggle.\(^{47}\)

B. Classical Rhetorical Elements Found in the Letter

1. King as Classical Rhetorician

King is widely hailed for the power of his oratory, no less vivid today than when first spoken, but his written work also displays a sophisticated use of classical style and presentation. As several scholars have noted, King was a master of classical rhetorical presentation. In a presentation to the 2006 Legal Writing Institute Conference held in Atlanta, Georgia, Professor Suzanne Rabe demonstrated that King’s \textit{Letter from a Birmingham City Jail} could be used effectively to demonstrate the three modes of persuasion common in classical Greek rhetoric: logos, pathos, and ethos.\(^{48}\) Kate Weatherly of the University of Oregon Law School

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\(^{44}\) See Chappell, supra n. 37, at 6.

\(^{45}\) \textit{Id.}

\(^{46}\) Griffen, supra n. 19, at 909 (stating, “Dr. Martin Luther King’s April 16, 1963, Letter from a Birmingham Jail was written in a rare response (for King) to an open letter that eight prominent so-called ‘liberal’ white Alabama clergymen had issued which called on King to cease his policy of non-violent civil rights demonstrations in Birmingham”).

\(^{47}\) Chappell, supra n. 37, at 151.

\(^{48}\) Suzanne Rabe, Presentation, \textit{From Aristotle to Martin Luther King: Using Letter from a Birmingham Jail to Teach Aristotle’s Three Modes of Persuasion} (Atlanta, Ga., June 8, 2006) (at the Twelfth Biennial Conference of the Legal Writing Institute).
has noted that not only in method, but also in structure, King’s letter reflects classical rhetorical methods.\textsuperscript{49} Theologian Martin Marty, who was an associate of King’s, noted that while King and his colleagues in the Civil Rights Movement were not trained in “the secular classics,” they were astute students of the rhetorical patterns found in the Bible and in “the Baptist and Methodist churches that nourished them and which they, in turn, honored with their appeals.”\textsuperscript{50} For civil rights leaders like King, as Marty observed, “their ability to use persuasive speech or writing was all-important.”\textsuperscript{51} King had a comprehensive mastery of the forms of classical rhetoric, obtained not directly from the classical Greek and Roman sources, but from the religious patrimony of scripture and pulpit.\textsuperscript{52} Writing about King’s use of thematic divisions within classical rhetoric, Marty sums up King’s command of the forms of classical rhetoric: “[h]ear any King tape and you will know what the ancients meant by these divisions.”\textsuperscript{53}

As a result, King’s work can function effectively as an introduction to classical methods of persuasion because the strategies and tactics of his presentation exemplify those rhetorical tools.\textsuperscript{54} While King never expressly states his reliance on those classical rhetorical tools—and if Marty is to be believed he may well have been unaware of the theoretical origin of those rhetorical tools—King’s work, and the Letter from a Birmingham City Jail in particular, demonstrates the use of fundamental principles of classical persuasive theory. Such fundamentals form a key component in educating law students and attorneys in legal argumentation, if for no other reason than the simple fact that, as Michael Frost has observed, classical rhetorical methods work well to provide persuasive punch to legal argumentation.\textsuperscript{55}

\textsuperscript{49} Weatherly, supra n. 17, at 25.
\textsuperscript{50} Martin E. Marty, Martin Luther King: The Preacher as Virtuoso, Christian Century 348 (Apr. 5, 1989).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Rabe, supra n. 48.
2. King’s Use of the Three Elements of Persuasion Identified by Aristotle

Classical rhetoric largely derives from the work of the Greek theorists Plato and Aristotle. While King may or may not have been consciously relying on classical rhetorical forms when he composed the Letter from a Birmingham City Jail, his writing in the letter evidences all three of the major Aristotelian elements of persuasive argumentation: logos, ethos, and pathos.

In Aristotle’s presentation of persuasive argumentation, rhetoric has a unique position as a kind of meta-discipline, one that was global in scope, encompassing efforts at persuasion regardless of the topic. In his work, Aristotle defines rhetoric “as the faculty of observing in any given case the available means of persuasion.” As he wrote, “rhetoric we look upon as the power of observing the means of persuasion on almost any subject presented to us.” When effective persuasion relies on materials outside the control of the presenter—Aristotle mentions witnesses, testimony obtained under torture, and written contracts—such persuasion does not rise to the level of rhetoric in his view. Instead, rhetoric is a product of the combination of the character of the speaker and the quality of the speech so that it proves the case and puts the audience into “a certain frame of mind.” These two things, when properly executed, lead to the speaker being considered credible by his listeners.

Establishing credibility does not mean that rhetoric is reducible to a popularity contest; for Aristotle it is predicated on how what is said reflects the character of the speaker. Character counts, but in Aristotle’s view it is the character revealed by the speech which is the speaker’s most powerful tool to use in persuading his audience. In addition, persuasion can occur when

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57. Id. at 7.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id. As Aristotle puts it,

Persuasion is achieved by the speaker’s personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is,
the audience’s emotions are stirred, moving them towards a particular judgment, or when the presentation by the speaker “proves[s] a truth or an apparent truth by means of the persuasive arguments suitable to the case in question.” As he summarizes, “these three means of effecting persuasion” require one who presents an argument to “be able (1) to reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions.” These three means are—what are summarized by the Greek words *logos*, *ethos*, and *pathos*.

King’s argumentation in the letter provides excellent examples of the three Aristotelian means of persuasion. For example, his use of *logos* or logical argumentation is on sharp display when he explains to his readers why it is he came to Alabama to engage in non-violent direct action. When discussing the reasons why he chose Birmingham, he carefully and systematically explains the process by which he and his associates began a nonviolent campaign. After explaining those steps, he then sets forth facts to support the decision to engage in civil protest. As King explained:

In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self-purification; and direct action. We have gone through all these steps in Birmingham. There can be no gainsaying the fact that racial injustice engulfs this community. Birmingham is probably the most thoroughly segr-

and absolutely true where exact certainty is impossible and opinions are divided. This kind of persuasion, like the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak. It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion: on the contrary, his character may almost be called the most effective means of persuasion he possesses.

Id. at 7–8.
63. Id.
66. Id. at 836–838.
67. Id.
68. Id.
gated city in the United States. Its ugly record of brutality is widely known. Negroes have experienced grossly unjust treatment in the courts. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in the nation. These are the hard, brutal facts of the case. On the basis of these conditions, Negro leaders sought to negotiate with the city fathers. But the latter consistently refused to engage in good faith negotiation.69

Note in this excerpt King’s use of *logos* to counter some of the most damaging arguments set forth by the April 12, 1963 clergymen’s statement. The clergy claimed that the situation in Birmingham was one of “new hope,”70 and that such “extreme measures” as non-violent protests were unnecessary.71 King effectively thwarts that argument by noting that Birmingham’s civil rights situation was far from hopeful—the city was, in his words, “probably the most thoroughly segregated city in the United States.”72 King then focuses on the recurring and insistent call by the clergymen for local negotiations to solve the racial difficulties in Birmingham. After reciting a litany of abuses heaped upon the African-American community in Birmingham,73 King notes that African-American leaders had sought to negotiate with the leadership of the city, but to no avail.74 He goes on to recount that efforts to talk to members of the business community also were fruitless.75 In the end, King states, “[W]e had no alternative except to prepare for direct action. . . .”76 Yet, he explains, the purpose of direct action was not to prevent dialogue, but to create the conditions necessary for real negotiation to occur.77

Another example of the letter’s use of *logos*-based argument may be seen in King’s counter to the clergymen’s contention that the demonstrations, despite their non-violent nature, were in fact fostering an atmosphere of “hatred and violence.”78 King estab-

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69. Id. at 836-837.
70. Statement by Alabama Clergymen, supra n. 21.
71. Id.
72. Letter from a Birmingham Jail, supra n. 18, at 836.
73. Id.
74. Id. at 837–838
75. Id. at 837.
76. Id.
77. Id. at 838.
78. Statement by Alabama Clergymen, supra n. 21.
lishes, with the use of some examples that were sure to get the attention of his clerical opponents, that such an argument was based on nothing more than an attempt at blame-shifting:

In your statement you assert that our actions, even though peaceful, must be condemned because they precipitate violence. But is this a logical assertion? Isn't this like condemning a robbed man because his possession of money precipitated the evil act of robbery? Isn't this like condemning Socrates because his unswerving commitment to truth and his philosophical inquiries precipitated the act by the misguided populace in which they made him drink hemlock? Isn't this like condemning Jesus because his unique God-consciousness and never-ceasing devotion to God's will precipitated the evil act of crucifixion? We must come to see that, as the federal courts have consistently affirmed, it is wrong to urge an individual to cease his efforts to gain his basic constitutional rights because the quest may precipitate violence. Society must protect the robbed and punish the robber.79

Along with *logos*, King employs arguments based on *ethos* and *pathos*. Persuasive arguments regarding *ethos*, remember, are based on human character and credibility.80 Perhaps the best example of King's use of *ethos* in the letter is his defense of civil disobedience as part of the direct action campaign in Birmingham. King addresses the issue head on and notes that the clergymen had “express[ed] a great deal of anxiety over our willingness to break laws.”81 This concern went to the heart of King's character and credibility. After all, could it not be inferred from his selective embrace of the law—supporting the enforcement of *Brown v. Board of Education* while refusing to follow the ordinances of Birmingham, Alabama—that he was a dangerous hypocrite, a radical who would speak out of both sides of his mouth in order to get what he wanted? King does not try to minimize or explain away the clergymen's concern, but acknowledges that it was “legitimate.”82 It appeared “paradoxical,” he writes, to insist on obedience to *Brown v. Board of Education* while at the same

80. Aristotle, supra n. 56, at 7–8; Simpson & Selden, supra n. 64, at 1011.  
82. *Id.*
time advocating the non-violent violation of laws pertaining to marches and other forms of demonstration.\textsuperscript{83} King then launches into a sustained explanation of the moral basis of the Civil Rights Movement’s use of civil disobedience, pointing out that the paradox was resolved once one understood the distinction between just laws, which should be obeyed, and unjust laws, which “one has a moral responsibility to disobey. . . .”\textsuperscript{84} In drawing a distinction between the two, King focuses on the integrity of the human person:

Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.\textsuperscript{85}

After explaining further the distorting effect of segregation on the human personality, King offers additional arguments to explain that his decision to engage in non-violent civil disobedience was not the act of a lawless or dangerous individual, but the act of a principled activist seeking to uphold fundamental principles of American democracy. He presents arguments based on democratic theory,\textsuperscript{86} about the equal application of the laws,\textsuperscript{87} and about the need not only for proper laws but also the proper application of those laws,\textsuperscript{88} all in an effort to establish that he was no radical anarchist, but rather a leader committed to the rule of law. Content that the civil disobedience that he practiced was “nothing new,”\textsuperscript{89} King makes clear that he was not seeking a free pass for his violation of the law.\textsuperscript{90} King defends his credibility and his character by emphasizing that he was not seeking special treatment for himself;\textsuperscript{91} if upholding the moral law led him to violate the positive law, he expressed a willingness to accept the penalty.

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 840–841.
\textsuperscript{87} Id. at 841.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
for his civil disobedience, in the hope that it would lead people to fight for justice:

I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.\footnote{92} 

Alongside logos and ethos, King employs pathos quite effectively to support his position. As previously noted, pathos-based arguments rely on emotional appeals for their force. King’s use of pathos in the letter raises an interesting issue regarding the suitability of the letter as a model for teaching persuasive legal argument. The utility of emotional appeals in legal advocacy is subject to dispute. As Stephen Newman has pointed out, “emotion can serve legitimate purposes in honest advocacy. All advocates must show they care about their causes and that those who sit in judgment also have reason to care.”\footnote{93} At the same time, use of emotive appeals can backfire quickly, and emotional appeals can easily be perceived by an audience as an attempt at mere manipulation, of the advocate trying to “spin” the facts that make up the broader narrative.\footnote{94} There is no question that King strongly appeals to his readers’ emotions in making his arguments. Yet in most of the letter, he uses emotional language to support and give context to broader factual and logical arguments. His use of pathos is not isolated, but in combination with material incorporating both logos and ethos. Like any good advocate who knows that form follows function, King usually combines his emotional appeals with logical and factual support in order to bolster the force of his arguments.

There are a number of places in the letter where King’s fusion of logos and pathos is evident, but perhaps nowhere more effec-

\footnote{92. Id.}
\footnote{93. Newman, supra n. 16, at 55.}
\footnote{94. Jim McElhaney, Style Matters, ABA J. 29 (June 2008).}
We have waited for more than 340 years for our constitutional and God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse-and-buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society . . . then you will understand why we find it difficult to wait.95

This is not a record of mere “feeling” (recall the dismissive language used in the statement by the Alabama clergymen),96 but is rather a statement of fact rendered in an emotionally evocative way. King’s use of the then-present and historical context of the Civil Rights Movement reinforces his essential point that the time for waiting was over. King counters the minimizing language used by the clergymen regarding the protestors’ “impatience”97 by providing his readers with an understanding of the big picture of the civil rights struggle, of the myriad of ways in which the regime of segregation inflicted humiliation and subordination at the level of daily inconvenience (e.g., the inability to order coffee at a lunch counter), at the level of economic marginalization, and at the level of state-sanctioned police brutality and criminality.98 King’s structure of argument logically juxtaposes the “jetlike speed” of decolonization in Africa and Asia with the situation in America, where it seemed only possible to “creep at horse-and-

95. Letter from a Birmingham Jail, supra n. 18, at 839. 
96. Statement by Alabama Clergymen, supra n. 21. 
97. Id. 
98. Letter from a Birmingham Jail, supra n. 18, at 839.
buggy pace” towards equality under the law.\textsuperscript{99} King’s evocative use of descriptive terminology—“jetlike,” “creep,” “horse-and-buggy”—conveys the sense that the rest of the world was in the modern age moving towards the future, while America languished behind in its approach to civil rights.\textsuperscript{100}

In the next section of the passage, King’s use of example and language leads the reader both logically and emotionally to this conclusion, and to an understanding of the protestors’ “legitimate and unavoidable impatience.”\textsuperscript{101} It is a masterful example of the fusion of emotional intensity with factual support to guide an audience to an essential point. King begins by introducing the reader to some of the psychological effects of segregation on the African-American community.\textsuperscript{102} He provides numerous examples, from segregation’s impact on children\textsuperscript{103} to its systematic humiliation of an entire population subjected to racial epithets and categorization on a routine and casual basis,\textsuperscript{104} to demonstrate the distorting pressure placed on blacks by the denial of basic civic equality.\textsuperscript{105} He sums up these examples by noting that under such conditions, people of color were “forever fighting a degenerating sense of ‘nobodiness. . . .’”\textsuperscript{106} By use of these examples, King moves the reader from confronting the impression that segregation leaves on children to seeing how those impressions build over a lifetime of continual negative reinforcement to result in a situation where someone would be “harried by day and haunted by night” simply because of the color of his or her skin.\textsuperscript{107} By providing concrete examples of the social and governmental oppression fostered by the segregation regime, King gives form to the intolerable systemic abuse that segregation heaped upon individual African-Americans in ways both small and large. King cements his earlier point that the time for waiting was over and that the time for change had arrived: “[t]here comes a time when the cup

\begin{thebibliography}{9}
\bibitem{99} Id.
\bibitem{100} Id.
\bibitem{101} Id. at 840.
\bibitem{102} Id. at 839–840.
\bibitem{103} Id. at 839.
\bibitem{104} Id.
\bibitem{105} Id.
\bibitem{106} Id.
\bibitem{107} Id.
\end{thebibliography}
of endurance runs over, and men are no longer willing to be plunged into the abyss of despair.”

3. The Platonic Commitment to Truth and Justice Exemplified in King’s Letter

While existing analysis of the rhetorical value of King’s letter regarding legal argumentation has focused on the letter’s considerable value in exemplifying Arisotelan rhetorical forms, the letter also can provide excellent examples of other concerns found in Plato’s presentation of the principles undergirding argumentation. While Plato himself never fully developed a theory of rhetoric that compares with Aristotle’s overview of rhetorical technique, he did address principles of argument in his work. This portion of the Article will explore two related aspects of the Plato’s approach to argument: first, the Platonic commitment to truth; and second, the Platonic conviction that truth, justice, and the good are linked. As part of each exploration, I will examine the applicability of these Platonic principles to legal rhetoric and the suitability of King’s letter as an example of these Platonic argumentative practices.

In his Dialogue *Phaedrus*, Plato contends that good argumentation requires that the speaker or writer have a solid grasp of the truth, and that persuasive argumentation should be attempted only “after having grasped the truth.” Without such knowledge of the truth, skills regarding persuasive argumentation are not an “expertise,” but simply “an unsystematic knack.” To truly study and employ effective persuasive technique, it is necessary to have a commitment to the truth. Along

108. *Id.* at 839–840.
110. Plato, *supra* n. 11, at 47.
111. *Id.* at 48.
112. *Id.* Not that Aristotle would disagree with Plato on this point. *See* Josef Pieper, *Enthusiasm & Divine Madness: On the Platonic Dialogue Phaedrus* 100 (Richard & Clara Winston trans., St. Augustine’s Press 2000). As Pieper writes, “Aristotle too upheld what Socrates in the *Phaedrus* calls the heart of all true rhetoric: to know the subject and to present its truth to listeners and readers so that the truth is apparent.” *Id.* Pieper reinforces this Platonic concept when he writes,

Human words and language accomplish a two-fold purpose, as Plato without doubt would have answered—in clear agreement with the entire tradition of Western thought. . . . First, words convey reality. We speak in order to name and identify something that is real, to identify it for someone, of course—and
with this commitment to truth is joined a commitment to justice and the common good in order to round out the proper ends of rhetorical practice. As Plato wrote:

So suppose an orator who doesn’t know about good and bad gains power in a city which is in the same state of ignorance and tries to persuade it, not by eulogizing some miserable donkey as if it were a horse, but by making bad seem good. Suppose he’s carefully studied the opinions of the masses and succeeds in persuading them to act badly instead of well, what kind of crop do you think rhetoric would later harvest from the seeds it set about sowing?  

Looking at King’s use of persuasive technique with an eye towards Plato’s concern for truth provides legal advocates with a good counterbalance to an unhelpful view of legal argumentation that sees persuasive rhetorical methods as simply a form of “spin.” Plato referred to such a debased and instrumentalist view of rhetoric as sophistry, and he harshly criticized it in his dialogue Gorgias. While there is no question that the job of a legal advocate is to advocate on behalf of one’s clients—or as the preamble to the Washington State Rules of Professional Conduct states, ”a lawyer conscientiously and ardently asserts the clients [sic] position under the rules of the adversary system”—such ardent representation does not equate to bare sophistry. Instead, effective legal advocacy requires an understanding and incorporation of values such as a concern for factual and legal accuracy and a dedication to the mechanisms of the adversarial system as a vehicle to realize the common good within the judicial sphere of government.

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113. Pieper, supra n. 15, at 15–16.
114. Plato, supra n. 11, at 47.
115. For an overview of sophistry and Plato’s struggle against it, see Pieper, supra n. 15, at 7–39.

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Introducing Persuasive Legal Argument

Such a commitment to truthfulness is required to validate the reliability of an advocate’s characterization and application of the law and the facts. Relying on (or even worse, perpetuating) deceit or misstatement undermines an advocate’s credibility with a decision-maker. In an adversarial system such as ours, reliance on incorrect facts or law is catastrophic. In order to be believable and effective, an advocate needs to accurately state the law and the facts in order to formulate a persuasive argument. This need for truthfulness is even more important if arguing for change in an approach to a given law or legal doctrine. Such an approach is reinforced in an arena where opposing counsel is likely to pounce on any inaccuracy, omission, or misstatement. As a result, at both a theoretical and at a practical level, Plato’s insight regarding the necessity of truth is woven into our system of legal argumentation.

The relationship between legal persuasion and truth is what enables legal argument to transcend what Josef Pieper referred to as “flattery,” the use of language to engage in raw manipulation of an audience in order to serve the “ulterior motive” of individual desire. The audience is not subject, but is instead object—“to be manipulated, possibly to be dominated, to be handled and controlled.” What is difficult about applying this idea to legal rhetoric is the fact that legal argument virtually always has an ulterior motive—the legal advocate argues to obtain the best possible outcome that serves the client’s interests. Yet, it is critical to remember why lawyers have such a function in our system. Lawyers in an adversarial system have a commitment to zealous advocacy and a conviction that such representation serves not only the client’s interests, but also the common good. And, in this regard, our legal system carries forward the Platonic idea that rhetoric has an essential connection not only to the truth, but to the truth as it relates to justice and the good. Lawyers are

117. Pieper, supra n. 15, at 20, 21.
118. Id. at 20, 22.
119. Id. at 22.
120. But see Robert J. Cosgrove, Student Author, Damned to the Inferno? A New Vision of Lawyers at the Dawning of the Millennium, 26 Fordham Urb. L.J. 1669, 1689 (1999) (“[A]s has been noted however, zealous advocacy does not properly take into account public law’s concern for the common good.”).
not simply hired guns working for a client, but officers of the court working for the administration of justice, with commitments not only to their clients but also to the justice system.

King’s letter contains a powerful example of rhetoric in the service of the common good: his discussion, at an early point in the letter, of the idea that he and other civil rights activists were “outsiders,” essentially alien to the experience of the people of Birmingham, and therefore unqualified to intervene in racial situation there. This was a critical point set forth in the April 12, 1963 clergymen’s statement against King and the other civil rights activists who had come to Birmingham. King’s response to the clergymen’s assertion that he had no interest in the racial situation in Birmingham is a vigorous assertion of the reality of the common good in American life, and “of the interrelatedness of all communities and states.” Because of the solidarity that exists between people, a solidarity that creates “an inescapable network of mutuality,” the situations that affect local communities throughout the country impact everyone. “Whatever affects one directly, affects all indirectly.” This solidarity, this idea of the common good, means that within the country, no one is an outsider when it comes to pursuing justice. “Injustice anywhere,” King writes, “is a threat to justice everywhere.”

King’s conviction about the common good also leads to one of the most powerful, if overlooked, aspects of the letter: the way King characterized the harm caused by segregation. When attacking the moral validity of pro-segregation laws, King argued that such laws “[were] unjust because segregation distorts the soul and damages the personality.” One might then expect the letter to recite the indignities, violence, and legalized oppression of people who were being deprived of their rights. Instead, King wrote:

122. Letter from a Birmingham Jail, supra n. 18, at 835–836.
123. See Statement by Alabama Clergymen, supra n. 21. The clergymen in their statement claimed that the protests then ongoing in Birmingham were “directed and led in part by outsiders.” Id. The clergy also called for “citizens of our own metropolitan area” to meet and resolve the racial issues in Birmingham, based on “their knowledge and experience of the local situation.” Id.
124. Letter from a Birmingham Jail, supra n. 18, at 835.
125. Id. at 836.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 840.
of the African-American community at the hands of the segregation regime. But King took a different approach. He refused to concede that legally enforced segregation was an institution that damaged only the African-American community.\footnote{Id. at 841.} Instead of focusing solely on the harm that segregation inflicted on the African-American community, he drew the circle of those damaged by segregation more widely.\footnote{Id.} Segregation inflicted a false consciousness on African-Americans, “a false sense of inferiority,” but it also inflicted a false consciousness, “a false sense of superiority,” on whites.\footnote{Id. at 840.} The segregation regime thus trapped both people of color and whites in a system of deception that distorted their common perceptions of each other’s shared humanity.

As other strongly written sections of the letter attest, King did not minimize the unique and specific harms that segregation inflicted on African-Americans.\footnote{See e.g. id. at 839–840, 850–851.} But King, in describing the rank immorality of segregation, looked not only at the visible, tangible, and obvious harm that segregation caused to African-Americans but at the more subtle harm to whites by limiting their ability to acknowledge the full humanity of all members of the human community.\footnote{Id. at 841.} In this way, segregation “relegate[ed] persons to the status of things.”\footnote{Id. at 840.} And it was this aspect of segregation that rendered segregation so morally odious: “Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful.”\footnote{Id.} The whole tenor of King’s view of the moral illegitimacy of segregation is one that builds on the truth, justice, and good of our shared humanity to demonstrate that segregation’s system of dehumanization was intolerable.

This notion of the common good, shared by our legal system and King’s argument in the Letter from a Birmingham City Jail, reinforces the Platonic concept of the centrality of truth in effective argumentation. Key to the Platonic notion of knowledge is the principle of dialogue—that the truth is arrived at by individuals discussing issues, asking each other questions and testing evi-

\begin{itemize}
  \item \footnote{Id. at 841.}
  \item \footnote{Id.}
  \item \footnote{Id. at 840.}
  \item \footnote{See e.g. id. at 839–840, 850–851.}
  \item \footnote{Id. at 841.}
  \item \footnote{Id. at 840.}
  \item \footnote{Id.}
dence and argumentative coherence. It is not much of a stretch to see that this is the basis of the idea of “Socratic dialogue” in legal education, and the principle has parallels in several aspects of the Anglo-American legal system, from cross examination of witnesses to the sequence of presentation in an appellate argument. King’s view that segregation blocked the mutual recognition of a common equality among human beings built on the idea that segregation prevented a true dialogue between African-Americans and whites. Without a commitment to honest dialogue, discussion becomes impossible.

King’s argument here dovetails with observations about our own legal system made by James Boyd White in his book Hercules’ Bow. White notes that legal argument is both technical and substantive; it is not isolated from the players in the system; it creates a relationship between the speaker or writer and the audience. The daily work of a lawyer, as White points out, is persuasion on a variety of levels, and while some see law as nothing more than a set of “policy choices” and techniques of their implementation, a better view of law sees the law as a rhetorical process, grounded in story. For White, law is “a rhetorical activity” grounded in story, and law may be tested by one’s own story.

King’s point about the dehumanizing aspects of segregation is an example of the use of story to make a legal point.

139. Cf. Pieper, supra n. 15, at 15–17; see also Pieper, supra n. 111, at 100.
140. See Letter from a Birmingham Jail, supra n. 18, at 840.
141. Id. at 841.
142. White, supra n. 3.
143. Id. at xii–xiii.
144. Id.
145. Id. at 4.
146. Id. at 30.
147. Id. at 31.
148. Id. at 33. White presents a very rich understanding of ways to think about law, viewing law “as an activity, and specifically as a rhetorical activity.” Id. at 33. White provides an overview of “three aspects of the lawyer’s work,” namely, the need to use language suitable to her audience, the creative process she uses to persuade her audience, and her need to establish an “ethical or communal character.” Id. at 33–34. In his discussion, White explicitly connects his view of law with the classical rhetorical tradition, noting that to view the law “as a set of resources for thought and argument, is an application of Aristotle’s traditional definition of rhetoric, for the law in this sense is one set of those ‘means of persuasion’ which he said it is the art of rhetoric to discover.” Id. at 33 n. 2.
149. Id. at 168–169.
150. Id. at 41–42. For an overview of additional research that supports the centrality of storytelling in persuasive legal argument, see J. Christopher Rideout, Storytelling, Narrative Rationality, and Legal Persuasion, 14 Leg. Writing 53, 54 n. 10 (2008).
In such a situation, the legal system becomes inherently distorted because one entire element of the human community, one entire element of the common good, is excluded from the legal process. This resultant skew in the positive law can lead to horrific consequences; as King warned, “We should never forget that everything Adolf Hitler did in Germany was ‘legal . . . .’”

Law is not simply talking for the sake of talking, though. According to White, it is talking directed to justice. Law itself, as a species of rhetoric, is connected intimately with justice. And it is this orientation to justice that links White’s view of law with Plato’s view of argumentation. Justice and truth go together—and dialogue is the vehicle by which both are realized and understood. While in Plato’s view dialogue was the proper preserve of philosophers rather than the common people, his essential point regarding the value of dialogue as a way of discerning truth and justice is one that is carried over into our legal system. White’s point about the nature of law as dialogue meshes with Plato’s point in the *Phaedrus*, regarding the necessary connection between persuasion and truth.

The connection between effective advocacy, justice, and truth (or at least between a lack of overt deception) is supported by an examination of the Washington State Rules of Professional Conduct. As with the American Bar Association’s Model Rules of Professional Conduct, the Washington rules contain prohibitions on deceptive or untruthful activities by lawyers—including some limited requirements to disclose truthful information if such disclosure is necessary to avoid a legally incorrect ruling. Rule 3.3, for example, directly governs an attorney’s work as an advocate before the courts:

(a) A lawyer shall not knowingly:

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152. White, *supra* n. 3, at 28 (stating that rhetoric is “the central art by which culture and community are established, maintained, and transformed. ‘This kind of rhetoric—I call it ‘constitutive rhetoric’—has justice as its ultimate subject, and of it I think law can be seen as a species.’”).
153. *Id.*
156. *See* ABA Model R. Prof. Conduct 3.3.
The requirements of this rule demonstrate a link between good legal advocacy and a commitment to truthfulness. It is true that knowledge of the truth is almost always partial and therefore incomplete; as one scholar has stated, “legal claims are subject to indeterminacies of meaning.” Nevertheless, attorneys have a duty to be accurate in describing what they do know, both regarding the applicable law and the facts of a given case, subject, of course, to the requirements of attorney-client privilege. Good legal argument is not, as a consequence, mere “spin”; it is a principled presentation of the client’s arguments given the law and the facts that are before the court. Do lawyers argue about which law and what facts are presented to the court as it contemplates its decision? Of course they do. To borrow a phrase from James Boyd White, “rhetoric is always specific to its material.” However, legal argumentation is not disconnected from the substantive components of the law, and the lawyer’s role specifically calls upon the legal advocate to be accurate in the presentation of law and facts, if for no other reason than to maintain the advocate’s persuasive credibility with the court. As a consequence, proper
persuasive argument is not sophistry or mere manipulation. It contains a commitment to accuracy and therefore to truth: truth perhaps imperfectly or incompletely known, but real truth nonetheless.¹⁶⁴

King’s use of language to relate the truth of his experience to his readers has much to teach lawyers about linking the details of lived experiences to a broader substantive argument. As James Boyd White notes, rhetoricians work within a world of “radical uncertainty”¹⁶⁵ regarding the meaning of words, the effect that those words may have on others, and even their own motivations.¹⁶⁶ Rhetoricians work with “the knowledge [they] acquire as [they] first begin to move and act in [their] social universe and learn to speak and understand.”¹⁶⁷ In this context, it is by “attending to [their] experience, and that of others . . . ,”¹⁶⁸ that rhetoricians can become better at navigating “the rhetorical process of life.”¹⁶⁹ Such a view of the lawyer’s work and of law—viewing it as “constitutive rhetoric”¹⁷⁰—“should define the lawyer’s own work as far less manipulative, selfish, or goal-oriented than the usual models, and as far more creative, communal, and intellectually challenging.”¹⁷¹ As White notes, lawyers have to continually address questions of meaning and value in the broader culture, shaping the community.¹⁷² King’s letter provides a model for using truth to engage in just the kind of process that both Plato and White indicate is at the heart of a legal advocate’s work.

impact of legal argumentation. As one popular legal writing textbook puts it,

The best approach to persuading the court is an approach that maintains the attorney’s credibility. That may set the bar higher than the Code of Professional Responsibility, but it gains the audience’s respect, serves truth, and promotes the integrity of the judicial system . . . . In short, the best policy is to put your case in a clear light without putting it in a false light.”


¹⁶⁵. White, supra n. 3, at 40.

¹⁶⁶. Id.

¹⁶⁷. Id.

¹⁶⁸. Id.

¹⁶⁹. Id.

¹⁷⁰. Id. at 41.

¹⁷¹. Id.

¹⁷². Id.
III. FOUR EXAMPLES OF SPECIFIC RHETORICAL TACTICS RELEVANT TO PERSUASIVE LEGAL ARGUMENTATION

The Letter from a Birmingham Jail also contains numerous examples of tactical methods of presentation and argument from which legal advocates can learn. This Article will now turn to exploring four such examples, drawn from both the structure of the letter and its approach to cementing its points with its readership. The first tactical method is King’s use of an underlying theory of the Civil Rights Movement to underpin the theme that runs throughout the various arguments that he made in defense of the Birmingham civil rights protests. The second method is King’s use of structure to prime his readers to accept his argument. Finally, King uses persuasive authority and language to support his argument.

A. Using Theory to Maintain a Theme

As noted earlier, the Letter from a Birmingham Jail consists of a string of arguments set forth to counter the assertions made by the clergymen’s statement of April 12, 1963. King’s development of the theme of the letter flowed directly from his understanding of the principle of equality and how it applied to the situation in the South regarding segregation. Much like a lawyer developing argumentative themes in light of an underlying theory of the case, King’s themes and specific points of argument were constructed in light of his understanding of the theoretical basis of the Civil Rights Movement—of its roots in the principles of freedom and equality that were at the core of the American founding and the American experience. This theory is the glue that holds the discrete arguments of the letter together and provides coherence between King’s arguments and the actions undertaken by the civil rights protestors when they engaged in civil disobedience.

The intellectual challenge set before King in the letter was twofold. First, he had to explain the underlying dichotomy between the protestors’ acts in breaking the law via civil disobe-
ence and the protestors’ insistence that the City of Birmingham comply with court rulings regarding desegregation. Second, King had to explain that the Civil Rights Movement, far from engendering hate and violence as claimed by the clergymen’s statement, was based on underlying moral and spiritual principles of non-violent action in the face of oppression, what King referred to as “the more excellent way of love and nonviolent protest.”

In meeting this two-fold challenge, King employed a single consistent theory that shaped his presentation of the material in the letter. King understood the point he was arguing, and how that point fit into a broader narrative about the human condition; he had a vision that he sought to further, a commitment to the idea of civic freedom, which King called “the goal of America . . .”

King’s tactic in orienting his specific arguments toward an underlying theory provides a good lesson for legal advocates. King’s ability to link particular interests with his underlying theory and the broader consequent theme that runs throughout the Letter from a Birmingham Jail is an effective rhetorical technique, especially when combined with the kind of direct and evocative language that King employed. While acknowledging and emphasizing the particular and acute burdens that segregation placed on African-Americans, King returned throughout his letter to fundamental moral, spiritual, and political convictions shared with his audience, convictions that supported the actions taken in Birmingham by King and his colleagues. In doing so, King demonstrated that his actions and the actions of others in Birmingham involved far more than a group of demonstrators breaking the law because they were refused a parade permit.

King’s organization of his arguments around the theory of the Civil Rights Movement to reinforce his argumentative themes also provides an example of what John M. Conley and William M. O’Barr describe as “discourse structure.” Commenting on a study of divorce lawyers, Conley and O’Barr observed that attorneys “transform their clients’ stories in regular and predictable

173. See Letter from a Birmingham Jail, supra n. 18, at 841–842.
174. See id. at 837, 842, 845.
175. Id. at 844.
176. Id. at 849.
177. See e.g. id. at 839–841, 842, 850–851.
178. See e.g. id. at 837, 841–843, 846, 848–849, 850–851.
179. Conley & O’Barr, supra n. 2, at 133.
ways . . . by imposing a particular discourse structure on those stories."\textsuperscript{180} The effect of such a discourse structure is to create a way of looking at the law through the sanctioning of particular legal topics.\textsuperscript{181} King's \textit{Letter from a Birmingham Jail} provides a solid introduction to how such a discourse structure can be used to effectively shape an audience's approach to an entire topic. Looking at the April 12, 1963 statement by the Alabama clergy opposed to the civil rights demonstrations then occurring in Birmingham, the statement sought to impose a discourse structure on the Birmingham crisis that centered on legality.\textsuperscript{182} Eschewing “extreme measures” regarding racial problems,\textsuperscript{183} the clergymen's underlying theme was to urge restraint on the part of protestors and police in an effort to end the non-violent demonstrations then taking place in Birmingham, shunting efforts at direct action to the courts and negotiations between the African American community and the white leadership of the city.\textsuperscript{184} King rejected this approach by insisting that legality alone was insufficient.\textsuperscript{185} He cut the legs out from under the clergymen's call for negotiations by showing that calls for further negotiation were fruitless;\textsuperscript{186} the civil rights protestors had sought negotiations only to find that the power structure in Birmingham was unwilling to act in good faith.\textsuperscript{187}

King then emphasized that order had to be connected to deeper values of freedom, equality, and justice.\textsuperscript{188} Clinging to the

\begin{quote}
Western society has chosen for itself the organization best suited to its purposes and one I might call legalistic. The limits of human rights and rightness are determined by a system of laws; such limits are very broad. People in the West
law simply for the sake of law is not enough to preserve a decent civil society; for King, the law was a necessary component to a larger mission than mere order. King’s essential posture with regards to the question of civil disobedience, the position that undergirds his entire defense of his actions in Birmingham, is summed up in a single statement where he asks his audience to “understand that law and order exist for the purpose of establishing justice and that when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.”189 Once King has set this discourse structure in place, the call for order issued by the clergymen in their April 12, 1963 statement rings hollow. King has reduced their arguments to the point where the clergymen’s call for order is simply untenable.

B. Using Organizational Structure to Prime the Argument

The second exemplary technique that King used in the Letter from a Birmingham Jail involves the organization of his specific arguments. To build on the theory of freedom that undergirds the letter, King used the structural arrangement of material in the letter to reinforce both his credibility as an advocate and his specific arguments. The idea of using written structure itself as part

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189. Letter from a Birmingham Jail, supra n. 18, at 842.
of legal argumentation is nothing new.\textsuperscript{190} The basic idea is to arrange written product in such a way as to shape the reader’s perception of the material contained within the brief, memorandum, letter, or other legal document being composed, using the configuration of the document to increase the persuasive allure of arguments to the reader. Used well, this approach “carefully primes the reader by leading her, step-by-step, toward acceptance of the final thesis that is the winning proposition for the advocate.”\textsuperscript{191} The arguments are linked together in such a way that “acceptance of one proposition leads inexorably to the next.”\textsuperscript{192}

Of course, King did not compose his letter as a legal brief or other type of legal document. Nevertheless, the letter is structured in such a way as to provide a good overview to legal advocates about how to sequence material for persuasive effect. As Kate Weatherly has explained, King introduces his argument in the letter using techniques modeled along the lines of classical rhetoric.\textsuperscript{193} As she explains, “King first establishes his goodwill toward his audience, summarizes his argument, lays the groundwork for an argument whose subject he asserts has been misrepresented, and presents his credentials.”\textsuperscript{194} As Weatherly notes, this pattern of presentation is similar to that found in an appellate brief.\textsuperscript{195}

To expand on Weatherly’s analysis of King’s letter, if one looks closely at the way King’s letter is constructed, the parallels between it and a reply brief are easily perceived. The first paragraph of King’s letter functions as an introduction noting the purpose of his presentation.\textsuperscript{196} He provides a persuasively written summary of facts in the second paragraph, explaining his role in the Birmingham demonstrations and that he was in the city by invitation.\textsuperscript{197} In the fourth paragraph, he sets forth the basic thesis of his argument in defense of his involvement in the direct ac-

\textsuperscript{190} See Stanchi, supra n. 12, at 415 (explaining how “much of the conventional wisdom of legal writing incorporates” the idea of using structure to further the persuasive impact of an argument).
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Weatherly, supra n. 17, at 25.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Letter from a Birmingham Jail, supra n. 18, at 835.
\textsuperscript{197} Id. at 835–836.
tion campaign then underway in Birmingham. He then begins the body of the letter, methodically and systematically attacking the arguments set forth in the Alabama clergymen’s statement, explaining that far from being dangerous outsiders, he and his co-workers stood at the center of the American tradition of national identity and purpose.

Starting with the question of whether he was an outsider to the Birmingham community—a threshold point he had to refute in order to have any moral legitimacy as a participant in local struggle for racial justice—King quickly attacked the assertions of the Alabama clergymen in two ways. He first noted that the organization he leads, the Southern Christian Leadership Conference, has affiliated branches across the South including Alabama and the City of Birmingham. Institutionally, King was no stranger or outsider; his organization was present in the community, and had been prior to the start of the then-recent civil rights protests. After establishing his institutional ties to Birmingham, King then launched into a moral defense of his activities in Birmingham, based on the idea of human interconnectedness. “Whatever affects one directly, affects all indirectly.” Because of this linkage between people, the members of the American national community have a stake in the actions and conditions present in each locale in the country. “Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds,” King wrote. In such an interconnected world, the idea of an “outside agitator” has no merit.

After dealing with the threshold question of his status as an “outsider,” King then moves to rebut the arguments posed by the clergymen in the April 12, 1963 statement. He points to the underlying cause of the demonstrations then gripping the city, identifying the relentless imposition of segregation by means both le-
gal and illegal as the culprit. He presented the evidence that the demonstrators attempted to resolve the situation without resorting to civil disobedience; he recounted efforts to negotiate a solution to the racial problems present in Birmingham; and of suspensions and delays in beginning the direct action campaign. These facts are presented not simply for their own sake, but to lay a factual foundation for King to use when he explained why direct action at that time was necessary.

As King continued his argument, he employed references to theological and secular principles that continually move the reader deeper and deeper toward the central values regarding law, social policy, and human equality that stood at the core of King’s work: racial justice, love, equality, and freedom. He offered rebuttals to charges made against his work, that he was an anarchist that his non-violent protests lead to violence that he was impatient and that he was an extremist. He countered each one of these arguments, building on his previous statements to create a forward flow to his overall presentation, reminding the reader throughout that freedom’s inexorable call was the driving force of what was taking place in the South and across the country in regard to civil rights.

A specific example of this technique can be seen in his discussion of the allegations made in the Statement by the Alabama Clergymen that the civil rights protestors in Birmingham were engaging in “extreme measures.” Far from being an extremist, King argued that he himself stood between two different streams in the African-American community. One stream that, either out of exhaustion or comfort, had accepted segregation, and another

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208. Id. at 836-837.
209. Id. at 836–838
210. Id. at 837–838
211. Id. at 838–839
212. Id.
213. Id. at 844.
214. Id. at 845.
215. Id.
216. See id. at 842, 848–849.
217. Id. at 841.
218. Id. at 844–845.
219. Id. at 839–840, 843–844.
220. Id. at 844–845.
221. Id. at 835 et seq.
222. Statement by Alabama Clergymen, supra n. 21.
stream that had become so radicalized by the struggle against segregation so as to embrace “bitterness and hatred,” moving dangerously “close to advocating violence.”\textsuperscript{223} King saw expression of this radicalized sentiment in the growing ranks of “black nationalism” and separatism as characterized by groups like the Nation of Islam.\textsuperscript{224} “Nourished” by African-American “frustration over the continued existence of racial segregation,”\textsuperscript{225} this radicalized movement did not seek to tie itself to the best traditions about America.\textsuperscript{226} Instead, King argued, “this movement is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible ‘devil.’”\textsuperscript{227}

Without the philosophy of nonviolence that was part and parcel of the Civil Rights Movement, King was involved in, he explained, the only other option would be violence.\textsuperscript{228} And, as King points out, simply seeking to “dismiss” civil rights activists as “rabble-rousers” and “outside agitators,” will do nothing more than result in a “frightening racial nightmare” as African-Americans would likely “seek solace and security in black-nationalist ideologies. . . .”\textsuperscript{229} The yearning for freedom, as King noted, is unstoppable; it “eventually manifests itself.”\textsuperscript{230} To try to stop it, to try to prevent African-Americans from peaceful marches and other forms of non-violent protest would only lead to the “many pent-up resentments and latent frustrations” of the African-American community to “seek expression through violence.”\textsuperscript{231} King’s work made possible for “normal and healthy discontent [to] be channeled into the creative outlet of nonviolent direct action.”\textsuperscript{232}

Another example of King’s use of this rhetorical technique can be seen in King’s statements of disappointment with the white church,\textsuperscript{233} with white moderates,\textsuperscript{234} and with the praise

\begin{itemize}
\item \textsuperscript{223} \textit{Letter from a Birmingham Jail}, supra n. 18, at 844.
\item \textsuperscript{224} \textit{See} id. at 844–845.
\item \textsuperscript{225} \textit{Id.} at 844.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 844–845.
\item \textsuperscript{229} \textit{Id.} at 844.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.} at 844–845
\item \textsuperscript{232} \textit{Id.} at 845.
\item \textsuperscript{233} \textit{Id.} at 846–849.
\end{itemize}
that the authors of the clergymen’s statement had for the Birmingham Police Department.\textsuperscript{235} In voicing his disappointment, King did not fall into bitterness or angry denunciations; rather, he used the examples of the failings of those who, in his argument, should be his allies, to bolster his point that the Civil Rights Movement will be vindicated because the fight for freedom is unstoppable.\textsuperscript{236} After detailing his frustration with the lack of support he and the Civil Rights Movement had received from organized religion in the south, he noted with gratitude that many in the ranks of the religious had supported the movement, suffering for their support, and providing hope in the face of “the dark mountain of disappointment” that King felt.\textsuperscript{237} Returning to the theory of America’s call to justice and equality as part of its founding as a nation, King voiced confidence in that vision even in light of the failings of those people of faith who stood against the Civil Rights Movement. His ultimate hope was based on the nature of America’s sacred destiny as a nation:

I hope the church as a whole will meet the challenge of this decisive hour. But even if the church does not come to the aid of justice, I have no despair about the future. I have no fear about the outcome of our struggle in Birmingham, even if our motives are at present misunderstood. We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with America’s destiny. Before the pilgrims landed at Plymouth, we were here. Before the pen of Jefferson etched the majestic words of the Declaration of Independence across the pages of history, we were here. For more than two centuries our forebears labored in this country without wages; they made cotton king; they built the homes of their masters while suffering gross injustice and shameful humiliation—and yet out of a bottomless vitality they continued to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom

\textsuperscript{234} \textit{Id.} at 843.
\textsuperscript{235} \textit{Id.} at 849–850.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.} at 848.
because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.238

That last quotation from King’s letter sets the stage for the ultimate summation of the thesis that he has been developing throughout his text: the Civil Rights Movement stands within the great American tradition of faith, politics, and civic life.239 King ties all the strands of his presentation together to make his essential point that the civil rights protestors in Birmingham and throughout the South were not dangerous innovators, but were instead acting in accord with the deepest and most powerful aspirations of the religious and secular communities in America;240 they were not outside agitators as the clergymen’s statement had suggested; no, they were “real heroes.”241 While the Civil Rights Movement was, as King earlier in the letter acknowledges, a “social revolution,”242 it was, like the American Revolution itself, a conservative one, recalling the South and the entire country to return to the sources upon which our nation’s democracy was built. As King puts it,

One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judaeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.243

In this final substantive argument, King closes the circle of his argument and leads his readers back to his initial point: he and his fellow protestors were not “outside agitators.”244 Far from being alien to the locale of Birmingham or the ideas of American civic culture, King shows that the Civil Rights Movement was a native part of the great political, social, and theological story of

238. Id. at 848–849.
239. Id. at 850.
240. Id.
241. Id.
242. Id. at 845.
243. Id. at 850.
244. Id. at 836–837.
America; that civil rights demonstrators “were in reality standing up for what is best in the American dream.”245 In King’s overarching vision, reflected in the themes and arguments he developed in the letter, the Civil Rights Movement was a journey to the core of the American experience. Its task was not one of invention, but of recollection, a task to call the South’s attention back to remembering the promises of freedom and equality made by the American founding in light of the will of the superintending Providence governing the destiny of America.246 King’s use of structure in the letter to aid in presenting this key point is an effective demonstration of the technique of priming via large-scale organization to help increase the persuasive power of an argument.

C. Use of Authority

Legal authority serves as one of the premises upon which legal reasoning is based.247 As the grounds upon which arguments are made, the selection and use of legal authorities are pivotal to successful argumentation of a case. Very much like a lawyer citing authorities in a brief, King uses theological and historical examples and authorities to buttress his argument and appeal to his

| 245. | Id. at 850. |
| 246. | Id. |

Legal arguments may be based upon text, intent, precedent, tradition, or policy analysis. Each type of legal argument springs from a different source of law. Each type of argument functions as a rule of recognition. Each type of argument is based upon a different set of evidence. And each type of argument serves different values.

Huhn, supra n. 246 (emphasis in original). Huhn continues,

The five types of legal arguments represent different conceptions of what law is. Law may be considered to be legal text itself. It may be regarded as what the text meant to the people who enacted it into law. Law may be conceived of as the holdings or opinions of courts setting forth what the law is. It may be thought of as the traditional ways in which members of the community have conducted themselves. Finally, law may be understood as the expression of the underlying values and interests that the law is meant to serve. The five types of legal argument arise from these different sources of law.

Id.
readers. King’s use of these authorities contains valuable lessons for legal advocates regarding the use of authority in argument in general. Far from simply being the rhetorical equivalent of seminary-level name dropping, King employed a sophisticated approach to deploying theological authorities to rebut the contentions of the April 12, 1963 clergymen’s statement, using those authorities to undercut the position set forth by the clergymen.

In beginning this exploration of King’s use of authority, let’s go back and look a little more closely at the signatories of the April 12, 1963 clergymen’s statement. Those signatories, who identified themselves along with their religious traditions, are as follows:

- two Catholic signatories, local Alabama bishops C.C.J. Carpenter and Joseph A. Durick;
- one Jewish signatory, Rabbi Milton L. Grafman, of Temple Emanu-El in Birmingham;
- two Methodist signatories, Bishop Paul Hardin and Bishop Nolan B. Harmon;
- one Episcopalian signatory, George M. Murray, co-adjutor bishop of the Episcopal Diocese of Alabama;
- one Presbyterian signatory, Edward V. Ramage, moderator of the Alabama Synod of the Presbyterian Church in the United States; and
- one Baptist signatory, Earl Stallings, pastor of the First Baptist Church of Birmingham.

248. Oddly enough, the theological content of King’s work and legacy is often overlooked both at home and abroad. See Bente Clausen, For God’s Sake? American Religion and Politics Viewed from Denmark, in Religion and American Politics: From the Colonial Period to the Present 409, 409 (Mark A. Noll & Luke E. Harlow eds., 2d ed., Oxford U. Press 2007) (“Martin Luther King, Jr., who is well known in Denmark, was and is considered only a civil rights hero; his faith as a driving force behind his actions is not well known.”). For a discussion of some of the theological roots of King’s work, see Steven H. Hobbs, Following the Drum Major for Justice: Reflections on Luther D. Ivory’s Toward a Theology of Radical Involvement: The Theological Legacy of Martin Luther King, Jr., 50 Ala. L. Rev. 7 (1998).

249. Statement by Alabama Clergymen, supra n. 21; see also Letter from a Birmingham Jail, supra n. 18, at 835 n. * (discussing how King identifies the signatories of the April 12, 1963 clergymen’s statement in his Author’s Note).
For the early 1960s, this is a fairly ecumenical group, one that spanned a wide gamut of theological traditions within the broader Judeo-Christian tradition. A close reading of King’s letter shows that he used theological authorities from each of their traditions to counter their arguments and defend the actions of the civil rights protestors in Birmingham. As one clergyman responding to fellow clergy from a multiplicity of theological traditions, King tailored his use of religious authority to show that elements of thought from those diverse traditions supported his work. King used authority to both establish shared values with his readers and, by so doing, create a persuasive link with them as well. As a result, King both appealed to the theological consciences of the clergymen and undercut the theological validity of their own position; a valuable strategy for any advocate to pursue. In this way, his work serves to provide an example to the legal advocate of how to use recognized authority to undermine an opponent’s position.

An appeal to shared values and principles is a powerfully persuasive tool, and as Professor Kathryn Stanchi explains, is received differently than an appeal framed by values that conflict with those of the recipient. In such a situation, as Stanchi notes, the recipient “will respond to any substantive arguments that conflict with her beliefs by generating counterarguments,” making it much more challenging for an advocate to persuade the recipient. King’s use of theological authority provides him with a mechanism within the letter to challenge his audience’s position while achieving as little disruption as possible to their fundamental values and belief-systems. King cites to important historical and religious figures not simply because of the inherent value in their message, but also because those authorities would be held in high regard by his audience. As Kurt Saunders has noted, “[t]he persuasiveness of an argument always depends upon what the relevant audience regards as persuasive. The audience decides when and to what extent a claim has been justified by the arguments.” While appeals to a given religious authority have little if any persuasive effect on those who stand outside of that partic-

250. Stanchi, supra n. 12, at 442.
251. Id.
252. Id.
253. Saunders, supra n. 5, at 567 (emphasis in original).
ular religious tradition, King’s use of religious argument and authority was targeted to his audience. As theologian Martin Marty has observed, King used religious sources that resonated with his readers; his use of “scriptural authority and sacred language based on it could reach his black community and the larger American audience.”

King’s reference to and use of the ideas of key Protestant, Catholic, and Jewish theologians, as well as more sparse references to secular American historical figures, functions to provide a necessary persuasive link to his audience, a link that had to be established in light of the controversial nature of his actions in engaging in civil disobedience in Birmingham. In his use of the work of particular theologians from a variety of religious traditions, King managed to appeal to the specific theological backgrounds of the signatories of the April 12, 1963 clergymen’s statement, and demonstrate that his work was true to their own religious sensibilities, incorporating and integrating Catholic, Jewish, and Protestant thought—ancient and modern—into his understanding of the binding moral authority of the law and the injustice inherent in segregation. Rather than attacking or denouncing the clergymen themselves for issuing the statement, King uses their own theological authorities to demonstrate the integrity of his position—an effective tactic for lawyers to emulate.

There are two prime examples of King’s use of this technique in the letter. First, King sought to demonstrate that the civil rights work in Birmingham was grounded in work by theologians from the signatories’ own theological traditions. In so doing, King grounds his argument in the work of landmark American Protestant theologian Reinhold Niebuhr, employing Niebuhr to help explain to his audience why civil disobedience had been necessary as part of the broader strategy to obtain recognition of civil rights:

My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is an historical fact that privileged

254. See Marty, supra n. 50 at 350 (discussing George Kennedy, New Testament Interpretation Through Rhetorical Criticism (U. N.C. Press 1984)).
255. Id.
groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.256

King’s reference to Reinhold Niebuhr in support of the need for direct action as part of the broader Civil Rights Movement is telling. Niebuhr was one of the most influential and respected professional theologians in mid-twentieth century America.257 A professor at Union Theological Seminary in New York, Niebuhr was a widely read Protestant theorist on the relationship between religious faith and civil power.258 Niebuhr’s point, noted by King, about group dynamics is the subject of what was one of his most notable works, Moral Man and Immoral Society,259 a book that avoids an overly optimistic view of social progress.260 By referring to Niebuhr, King demonstrated that the need for direct action was not the product of frustration or utopian impatience, but rather was grounded in the work of one of the most notable American Protestant theological thinkers of the time.

Niebuhr was not the only noted Protestant theologian cited by King; slightly later in the letter, King employed the definition of sin developed by noted Protestant theologian Paul Tillich.261 Tillich was, like Niebuhr, one of the most prominent Protestant theologians of the mid-twentieth century. King quoted Tillich’s definition of sin as “separation”262 to make the point that segrega-

256. Letter from a Birmingham Jail, supra n. 18, at 838.
258. See id. at xii.
260. Gilkey, supra n. 256, at xvi.
261. Letter from a Birmingham Jail, supra n. 18, at 840.
262. For an overview of Tillich’s theory of sin as separation, see Paul Tillich, The Shaking of the Foundations 154–163 (Charles Scribner’s Sins 1948). As Tillich puts it, “[t]o be in the state of sin is to be in the state of separation. And separation is threefold: there is separation among individual’s lies, separation of a man from himself, and separation of all men from the Ground of Being.” Id. at 154–155. Examining how this sin separates people from each other in the social sphere, Tillich wrote,

The most irrevocable expression of the separation of life from life today in the attitude of social groups within nations towards each other, and the attitude of nations themselves towards other nations. The walls of distance, in time and
tion was immoral. King then employed Tillich’s definition of sin in order to demonstrate the moral illegitimacy of the segregation regime. As King asked, what better example of separation could there be than segregation, “an existential expression of man’s tragic separation, his awful estrangement, his terrible sinfulness?”

Since King was appealing not only to the Protestant pastors who signed the clergymen’s statement, but also to the Catholic and Jewish clergy who were signatories, as a good advocate he naturally sought to demonstrate that the civil rights work in Birmingham was grounded in principles accepted within the Catholic and Jewish theological traditions as well. To further his argument in this regard, he incorporated key ideas from three significant theologians from outside the Protestant tradition. The first of these theologians was St. Augustine of Hippo, one of the single most influential theologians in the history of Christianity and a key theological figure in the western Christian tradition, both Catholic and Protestant. King quotes Augustine directly that “an unjust law is no law at all,” a quote that King uses to support his position that “one has a moral responsibility to disobey unjust laws.”

Augustine was not the only Catholic theologian whom King quoted; he also referenced St. Thomas Aquinas, a medieval theologian who by papal decree was considered, at the time King wrote the letter, to be a model for theological and philosophical inquiry in Roman Catholic theology. King references Aquinas
by name in providing the definition of an unjust law: “[t]o put it in the term of St. Thomas Aquinas: [a]n unjust law is a human law that is not rooted in eternal law and natural law.”270 This quotation, deployed by King, provided direct Catholic support for the idea that simply because a particular custom or social practice is enacted into human life does not necessarily mean that such a custom or practice is morally legitimate.

King then references Martin Buber, a mid-twentieth century Jewish Hasidic theologian and philosopher, when explaining how segregation statutes degrade the human personality by depersonalizing the relationship between human beings into one of subject and object, rather than of equal persons, thereby reducing “persons to the status of things.”271 As with his discussion of Niebuhr,272 King incorporates one of Buber’s key ideas and the very language from the title of one of Buber’s most famous works, I and Thou,273 to make his case that segregation is not only wrong from a secular point of view, but “morally wrong and sinful.”274

The second example of King’s use of authoritative sources in the letter involves King’s reply to the charge that he was an ex-

While, therefore, We hold that every word of wisdom, every useful thing by whomsoever discovered or planned, ought to be received with a willing and grateful mind, We exhort you, venerable brethren, in all earnestness to restore the golden wisdom of St. Thomas, and to spread it far and wide for the defense and beauty of the Catholic faith, for the good of society, and for the advantage of all the sciences. The wisdom of St. Thomas, We say; for if anything is taken up with too great subtlety by the Scholastic doctors, or too carelessly stated—if there be anything that ill agrees with the discoveries of a later age, or, in a word, improbable in whatever way—it does not enter Our mind to propose that for imitation to Our age. Let carefully selected teachers endeavor to implant the doctrine of Thomas Aquinas in the minds of students, and set forth clearly his solidity and excellence over others. Let the universities already founded or to be founded by you illustrate and defend this doctrine, and use it for the refutation of prevailing errors. But, lest the false for the true or the corrupt for the pure be drunk in, be ye watchful that the doctrine of Thomas be drawn from his own fountains, or at least from those rivulets which, derived from the very font, have thus far flowed, according to the established agreement of learned men, pure and clear; be careful to guard the minds of youth from those which are said to flow thence, but in reality are gathered from strange and unwholesome streams.

Id.

270. Letter from a Birmingham Jail, supra n. 18, at 840.
271. Id.
272. Id. at 838.
273. Id. at 840; see also Martin Buber, I and Thou (Simon & Schuster 1971).
274. Letter from a Birmingham Jail, supra n. 18, at 840.
tremist. In part of his reply to this charge, King noted that he had been “initially disappointed” at being thought of as extreme, but then came around to “gain[] a measure of satisfaction from the label.”

King then recalled great figures from history who were considered to be extremists, including some noteworthy historical secular figures like Abraham Lincoln and Thomas Jefferson, but mostly religious figures. In his list he includes the Apostle Paul, Martin Luther (the founder of the Protestant Reformation), and John Bunyan, the author of one of the most widely read Protestant devotional books of all time, The Pilgrim’s Progress. He quotes from the biblical prophet Amos, “[l]et justice roll down like waters and righteousness like an ever-flowing stream.”

But bookending his discussion on this point were explicit references to the founder of Christianity itself, Jesus of Nazareth. He begins his argument about extremism with the question, “[w]as not Jesus an extremist for love[?]” He ends his argument with an appeal to the example of Jesus’ sacrificial death:

So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary’s hill three men were crucified. We must never forget that all three were crucified for the same crime—the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. Perhaps the

275. Id. at 843–845.
276. Id. at 845.
277. Id.
278. Id.
279. Id.
281. Letter from a Birmingham Jail, supra n. 18, at 845 (quoting the Book of Amos 5:24, which reads as follows in King James Version, “But let judgment run down as waters, and righteousness as a mighty stream.” It is likely that King was quoting the verse from the Revised Standard Version translation, which reads identically to the quote used in the letter: “But let justice roll down like waters, and righteousness like an ever-flowing stream.”).
282. Id.
South, the nation and the world are in dire need of creative extremists.\(^2\)\(^8\)\(^3\)

It is difficult to imagine, within a Christian context, a more powerful example of righteous action than Jesus’ suffering and death on the cross. Indeed, within the New Testament, the idea of self-sacrificial love is held up as the ultimate standard of love: “Greater love hath no man than this, that a man lay down his life for his friends.”\(^2\)\(^8\)\(^4\) King’s use of the religious examples of Jesus, Paul, Amos, Luther, Bunyan, as well his use of the example of the secular figures like Lincoln and Jefferson, turns the charge of extremism on its head. Given such authorities, one might ask, who would not want to be an extremist? Far from being a badge of shame, to stand with such men is a badge of honor, it is to be an extremist for justice, an extremist for love—it is to be, in King’s words, a “creative extremist[ ].”\(^2\)\(^8\)\(^5\)

D. Plain (But Not Boring) Language

In addition to providing examples of using theory, structure, and authority to support a persuasive argument, the Letter from a Birmingham City Jail also provides a good example of using evocative words and phrases for persuasive effect while at the same time maintaining a tone and cadence to the language used so the reader remains engaged in the text. Anyone who is familiar with trends within the teaching of legal research and writing knows that there is a high premium paid in legal writing circles to the need for using plain language in preparing arguments and drafting documents.\(^2\)\(^8\)\(^6\) It is one of the nuances of teaching good English writing that it is often better observed rather than merely explained. A thorough explanation of the basics and advantages of plain English is quite useful for students, but it may be even more effective if paired with examples of plain English

\(^{283}\) Id.
\(^{284}\) John 15:13 (King James).
\(^{285}\) Letter from a Birmingham Jail, supra n. 18, at 845
writing that will capture the students’ attention and let them experience over the course of an entire reading the power of direct, clear language on a reader.

Using the Letter from a Birmingham City Jail to introduce persuasive legal writing has the advantage of being an interesting example of good English writing. It is relatively concise,\textsuperscript{287} can easily be read in a single setting, grabs the attention, and is filled with language that is both easy to understand and powerfully evocative. As King himself noted, the letter was written from a jail cell, and its composition reflects that.\textsuperscript{288} Yet, for all the difficulty regarding the circumstances of its creation, the letter lacks for the most part any pretentious or jargon-laden wording. The language of the letter gains much of its power from its direct simplicity. While there are places where the letter betrays the polished preaching style for which King was so justly famous, its most persuasive moments come not when it is soaring to the heights, but when it is speaking of the challenges and stark brutality faced by the African-American community under the regime of segregation. And even when King’s language soars, it often does so by use of vivid, descriptive language and a cadence of diction that use simple words and concepts. King hits the necessary tone of the letter spot on.

When it comes to legal writing, plain language does not mean boring and stale terminology. As Justice Antonin Scalia and Bryan A. Garner noted in a recent publication, “[t]o say that your writing must be clear and brief is not to say that it must be dull.”\textsuperscript{289} In fact, the contrary is true. To get an idea of how this is so, let’s go back and look at a section of the letter we have already encountered, only this time, pay attention to the specific words used in the following passage:

We have waited for more than 340 years for our constitutional and God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse-and-buggy pace toward

\textsuperscript{287}The version of the letter published in the University of California, Davis Law Review numbers only sixteen pages. See generally Letter from a Birmingham Jail, supra n. 18.

\textsuperscript{288}Id. at 835, 850.

\textsuperscript{289}Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 112 (Thomson/West 2008).
gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society. . . .

Note the kind of verbs that King is using here: wait, creep, feel, see, lynch, drown, kick, kill, smother. What kind of verbs are these? They are almost all Germanic in origin, deriving from Middle English or Anglo-Saxon. “Waited” derives from the Middle English “waiten,” a word of Germanic origin, although related to the Old French “waiter.” “Creep” comes to us from the Middle English “crepen,” which in turn tracks back to the Anglo-Saxon word “creopan.” “Felt” is the past tense of “feel,” a verb with a similar pedigree in Middle English and Anglo-Saxon. “Kill” and “kick” both derive from Middle English, as do “drown” and “smother.”

Why does this matter? It matters because traditional English words tend to be more direct and concrete than words of Latinate origin. This point is made quite memorably in a passage from George Orwell’s essay Politics and the English Language, in which Orwell describes the literary effect of writing with Latinate words: “inflated style is itself a kind of euphemism. A mass of Latin words falls upon the facts like soft snow, blurring the outlines and covering up all the details.” Latinate words, especially the big, impressive Latin words, are often more ornate, but that

290. Letter from a Birmingham Jail, supra n. 18, at 839.
292. Id. at 334–335.
293. Id. at 509.
294. Id. at 762.
295. Id. at 761.
296. Id. at 431.
297. Id. at 1309.
shiny linguistic patina often comes at a price—reduced verbal clarity. This should not be taken to mean that legal advocates should avoid all use of Latin loan-words in the English language in order to write effectively. That would be impossible. While English is a Germanic language, the vast majority of the words used in English consist of loan-words from Latin, either directly or through French. Add to this the presence of a large number of Latin phrases and terms of art in the legal world and it becomes clear that a wholesale removal of Latinate words from legal writing is neither advisable nor feasible. In addition, there are times when it may be in the best interests of one’s client to deploy, as Orwell put it, the “soft snow” of a Latinate vocabulary. But as a general rule, a legal writer should err on the side of clarity and forcefulness, and the deployment of such language can be aided by the use, as often as possible, of a vocabulary derived from the historic roots of the English language. This is particularly true because Latinate words often have much less concrete and definite meanings than the Anglo-Saxon or Middle English words they usually replace. Try this as a thought experiment: replace any of the Anglo-Saxon or Middle English verbs employed by King with their Latin-derived equivalents. Is the language still as effective? Sometimes the replacement would make sense, for example, if we replaced the Middle English “kill” with the Latinate “exterminate”—but the Latinate word still feels more antiseptic than its Middle English equivalent. “Exterminate” simply lacks the same kind of visceral punch that the word “kill” provides. In other instances the use of a Latinate word would not work at all. What

299. See id. at 161 (observing that a result of an increased use of Latinate vocabulary “is an increase in slovenliness and vagueness”).
300. See Tore Janson, A Natural History of Latin 172–173 (Merethe Damsgård Sørensen & Nigel Vincent trans., Oxford U. Press 2004). As Janson explains, modern English vocabulary has developed so that “[t]he Germanic words, which have been in the language since the beginning, are now just a small minority of all the words in an English dictionary. The words that come from Latin and Greek, either directly or via French, are the great majority. Estimates vary between three quarters and nine tenths. At most the original Germanic words constitute no more than about twenty per cent.” Id. As Janson notes, “English is a Germanic language which mainly consists of words that are not Germanic.” Id. at 173.
301. Orwell, supra n. 296, at 167.
Latin word carries the quick simplicity of “felt”? Or the sharp cruelty of “lynch”?  

IV.  TEACHING PERSUASIVE ARGUMENT IN A MISSION-ORIENTED ENVIRONMENT

The final benefit to be discussed in this Article regarding the use of the Letter from a Birmingham City Jail to introduce persuasive advocacy is the value of the letter in reinforcing mission-oriented legal education. As Professors Pamela Edwards and Sheilah Vance have noted in their article Teaching Social Justice Through Legal Writing, there are a number of concrete benefits that accrue to incorporating social justice into the broader curriculum. For both faculty and student in social justice-oriented law school environments, teaching towards mission via the incorporation of social justice themes into the teaching of persuasive advocacy can be quite helpful in improving the value of law school education in the context of persuasive advocacy. Edwards and Vance address a number of different reasons why this is so, at least two of which strongly support the particular usefulness of the Letter from a Birmingham City Jail. First, the letter can provide students with an introduction to concepts related to social justice and the role of lawyers in enabling or hindering social change. Second, the letter provides an interesting vehicle that can be used to explore the human background to legal problems.  

In a mission-oriented environment that takes social justice seriously, “[t]eaching social justice introduces students to attorneys’ role in developing law.” This means providing students and lawyers with the tools necessary to approach their legal work with an ethical concern, as Edwards and Vance put it, “to alleviate the effects of oppressive legal and socio-political power structures in society.” The Letter from a Birmingham City Jail is an ideal introduction to this concept of the lawyer’s role. It provides students with a view of the legal system from the perspective of

303. “Lynch” as a word comes not from Latin or Old English, but derives instead from the name of an individual, William Lynch. Id. at 826.
305. See id. at 64–70.
306. Id. at 70.
307. Id.
someone who was at the time marginalized by an oppressive power structure that sought to deprive him and others like him of their equality under the law. By presenting material from a first-person perspective, rather than through dry case excerpts or third-party accounts, the letter provides readers with a much more direct and vivid sense of the experience, including the costs, that may be entailed in working for social justice.

The letter also provides an extraordinarily concise, yet conceptually detailed, overview of some of the relevant theoretical components of social justice work via King’s explanation of the philosophical and theological foundations of his work for racial equality. King’s discussion about natural law, for example, is for all its brevity a masterful presentation of the normative role of natural law theory in conceptualizing the moral underpinnings of human dignity and civil rights. For law schools that have explicit social justice components to their mission statements, the use of the letter provides an avenue for students and faculty to discuss the nature and role of social justice, the moral and legal origins of the concept of social justice, and the dynamic within the legal system between order and necessary social change.

The second reason why the letter can serve as an effective way to get legal advocates thinking about social justice regards student interest. As Edwards and Vance point out, one benefit of incorporating social justice components into legal teaching is that such work allows students from a variety of backgrounds to remain connected to their experience of legal education. The Letter from a Birmingham City Jail, because of its historical and cultural importance as one of the lasting testaments of the work of King and the Civil Rights Movement of which he was a part, has a good deal of value in holding student’s attention. In my own classes when I have had students read the letter and discuss its value as an introduction to legal advocacy, the feedback I have received has been overwhelmingly positive—students have found the letter to be both informative and engrossing. In a legal curriculum where students are often reading material quickly, the letter is one of the rare examples of a text that can slow a reader down. It

308. See George, supra n. 267, at 154–157. George looks beyond King’s short discussion of natural law theory in the letter to see natural law’s interplay with civil rights as the central theme of the letter; “The entire letter,” George writes, “is a meditation on natural law and civil rights.” Id. at 154.
demands attention, and as another law professor has noted, when he has used the letter for a class exercise, “most students are as engaged in the subject matter as I am.” 309

Along with its inherent ability to capture student interest, the Letter from a Birmingham City Jail can serve to introduce students and lawyers to thinking about the human background of legal problems. By providing students with a fuller picture of the background of the Civil Rights Movement, abstract legal doctrines regarding constitutional law, statutory construction involving the civil rights acts, even the impact of local laws and ordinances on legal issues, can be brought alive in a way that is difficult to do when simply viewing the laws from a detached and abstract viewpoint. Reading the letter can also be an experience in building empathic skills. One of the most compelling aspects of King’s writing is its ability to draw the reader into the jail cell with him—the distance between author and reader is bridged, even across the decades. Further, by providing a glimpse into the human effects and consequences of legal regimes, use of the letter can serve as a starting point for conversation about the real life impact of the legal system, with all of its impersonal and occasionally dehumanizing mechanisms, mechanisms that affect clients and attorneys alike. 310 Dealing with these mechanisms, and guiding clients through them, is a big part of what lawyers do—not simply looking at what the law is, but how the law is applied.

One example of the letter's value in this regard can be seen briefly in its discussion of the actual basis upon which King was arrested during the Birmingham civil rights protest: marching without a parade permit. 311 This charge was based on a local ordinance, which on its face makes perfectly good sense. As King noted in the letter, “there is nothing wrong in having an ordinance which requires a permit for a parade.” 312 The consequences of not having some kind of permit requirement are easy enough to imagine, and these kinds of ordinances are common throughout

309. Spencer, supra n. 17, at 220.
310. For example, King’s arrest and incarceration in Birmingham, the background to his composition of the Letter from a Birmingham City Jail, led in part to a United States Supreme Court decision, Walker v. City of Birmingham, 388 U.S. 307 (1967). And while Walker has been a widely taught case in the law school curriculum, most legal casebooks do not note that King was even a defendant in the case. Oppenheimer, supra n. 18, at 826.
311. Letter from a Birmingham Jail, supra n. 18, at 835, 841.
312. Id. at 841.
systems of local governance. From a purely abstract point of view, King’s arrest and jailing were perfectly sensible—the law says no marching without a parade permit, he marched without a parade permit, therefore he broke the law. Good deductive logic leads him straight to jail. But such an approach ignores the wider human context in which King’s actions took place. His application for a permit had been turned down in order to prevent his protest from occurring. As King argued, this turned the ordinance from a tool to protect a just civic order into a mechanism of injustice: “such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.”

King’s point builds on a deeper appreciation that a law, while it may be valid in the abstract, is never applied in the abstract. In King’s case, the real world application of the local ordinance regarding parade permits impacted the struggle for basic human equality in regard to race. And real world impact is something upon which a good legal advocate should always have his or her eye.

There is one challenge that may be raised to the use of the Letter from a Birmingham City Jail, a challenge regarding what Edwards and Vance refer to as “[s]tudent comfort.” As they note, “[s]tudents may be uncomfortable with issues that are too personal or with issues they do not want to confront.” The letter can confront the reader with material that may cause discomfort on several different levels, and any academic use of the letter needs to take those areas of potential discomfort seriously. To look at one specific area, discomfort that may arise involves some of King’s racial terminology in the letter. For example, in the letter King repeatedly uses the word “Negro” to refer to African-Americans, and while that word was perfectly respectable at the time when he wrote the letter, the term is now considered offensive to modern readers. More critically, when explaining the social impact of segregation on the African-American community, he uses an inherently offensive derogatory term, used then and now as an invective against African-Americans. Without question the presence of such terminology requires some sensitivity when

313. Id.
314. Edwards & Vance, supra n. 304, at 76.
315. Id.
316. Letter from a Birmingham Jail, supra n. 18, at 839.
discussing the contents of the letter, but it also serves as an opportunity to raise issues with students regarding how changes in perception and language and law shape each other. In that regard, any potential discomfort that might be raised by the letter can be turned into a learning opportunity for students and faculty alike.

V. CONCLUSION

Learning the skill of persuasive legal advocacy is an important component in legal education and legal practice. As a constant component of the everyday work of the practicing attorney, the ability to use persuasive rhetorical techniques is an essential part of each lawyer’s tool kit. Since legal advocacy is a subset of the broader practice of rhetoric, an examination of looking at other types of rhetorical works can be of value to the legal student or practitioner looking to improve his or her skills at advocacy. Martin Luther King’s Letter from a Birmingham City Jail provides an excellent example of one such rhetorical work that can be looked upon with profit to introduce basic principles of effective persuasive argumentation. In the letter, King provides a comprehensive overview of the basic principles of classical rhetorical method and technique, providing examples of both Aristotle’s approach to persuasion based on the tri-part presentation of logos, pathos, and ethos, and of Plato’s view of the necessary connection between rhetoric and truth as set forth in the Dialogue Phaedrus.

In addition to classical rhetorical theory, King’s letter provides an excellent introduction to four basic strategies used in legal advocacy: the construction of a theme; the use of priming in developing an argument; the use of authority in supporting an argument; and the use of plain, but not dull, language to communicate evocatively and directly to a target audience. Finally, the use of the letter as an introduction to persuasive legal advocacy can provide benefits in legal education by providing a vehicle that can be used to inform students about human-centered approaches to advocacy as well as mission-oriented concerns regarding social justice. For teachers, students, and lawyers alike, Martin Luther King Jr.’s Letter from a Birmingham City Jail has much to teach regarding effective persuasive rhetoric and can
serve as an effective instrument to introduce the techniques and skills of effective legal presentation.
LEARNING DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT: THE CONUNDRUM OF DYSLEXIA AND TIME

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I. INTRODUCTION

While the Americans with Disabilities Act and its regulations make clear that learning disabilities are covered, neither defines learning disabilities. The lack of definition, combined with a general lack of public understanding of learning disabilities, leaves some legal academics wondering whether learning

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disabilities exist to the extent claimed and whether the usual accommodations level the classroom playing field or tilt it in favor of the accommodated student. Of specific concern is the frequent accommodation of providing extra time to students with learning disabilities, whether on exams or on writing assignments.

This Article addresses that concern by exploring the historical and current scientific understanding of learning disabilities and relating that understanding to the ADA in the law school context. The Article agrees with the standard accommodation of extra time on exams, but argues that writing-intensive courses frequently require more creative accommodations. As law schools move to incorporate more skills courses in response to the Carnegie Report, they need to consider both the implications of writing deadlines for students with learning disabilities and how accommodations for those students can affect the administration of such courses. Schools can use successful accommodation strategies from legal writing classes as models for developing new skills courses that appropriately accommodate students with learning disabilities.

3. Nicole Ofiesh et al., Using Speeded Cognitive, Reading, and Academic Measures to Determine the Need for Extended Test Time among University Students with Learning Disabilities, 23 J. Psychoeducational Assessment 35, 35 (2005) (stating that extended time for tests is “the most frequently requested and provided accommodation for postsecondary students with learning disabilities”).

4. Questions about time accommodations have been raised whenever I have made presentations about the ADA. E.g., Suzanne E. Rowe, Presentation, Reasonable Accommodations for Unreasonable Requests: The ADA in LRW (Seattle, Wash., July 2004). Other accommodations that may cause concern, especially in the legal writing curriculum, are addressed in an earlier article. See Rowe, supra n. 2, at 41–56 (identifying nine additional categories of accommodations other than requests for additional time). While learning disabilities produce challenges in reading and writing that are interrelated, the focus of this Article is reading.

5. For someone just entering the world of learning disabilities and dyslexia, as I am, the scientific literature can be initially overwhelming. A clear, accessible summary of history and recent developments is provided in the first few chapters of Sally Shaywitz, Overcoming Dyslexia: A New and Complete Science-Based Program for Reading Problems at Any Level (First Vintage Bks. ed. 2005).

6. The Article distinguishes between the typical three- or four-hour exam and longer exams. See infra pt. V(A).


8. Schools use a variety of names for the required, first-year legal writing course. Although this Article uses the generic name “legal writing,” the course necessarily teaches legal analysis and organizational paradigms. Moreover, even when legal research is taught in a separate course, the legal writing course will require students to conduct independent research and use the results of that research as the authoritative basis for their analysis.
The Article begins in Part II with a brief discussion of the statutory requirements of the ADA, focusing on the sections that are implicated when a student requests time accommodations because of learning disabilities. In Part III, the Article turns to learning disabilities, examining the general characteristics of students with learning disabilities, the historical development of the scientific understanding of learning disabilities, and the current methods for studying learning disabilities and for testing students with such disabilities. The focus of this part is on dyslexia both because it accounts for approximately 80 percent of all learning disabilities and because it is more likely to cause challenges to law students than are other learning disabilities. Part IV reviews studies of learning disabled students and normally achieving students in timed testing situations. Part V assesses one of the most common accommodations for learning disabilities—extra time—on timed law school exams, in law school classes requiring independent papers, in legal writing classes, and in other skills courses.

The Article supports providing extra time on exams, while recognizing that further scientific advances and commitment of greater resources in administering exams will allow the ADA to be applied more accurately. In “paper classes,” students typically do not receive extra time because they have the entire semester in


10. On the October 2003 Law School Admissions Test (LSAT), 42 percent of the accommodated testing requests were for applicants with learning disabilities; on the December 2003 test, 38 percent of the accommodated testing requests were for applicants with learning disabilities. Joan Van Tol, Panelist, Can We Be Too Accommodating? Probing the Outer Limits of the ADA (Am. Assn. L. Schs. Sec. on Leg. Research & Writing Annual Program, Jan. 4, 2004) (copy of PowerPoint slides on file with Author).

Other common learning disabilities include Disorder of Written Expression and Mathematics Disorder. See Am. Psychiatric Assn., supra n. 9, at 53–56. Written language disorder is evidenced by poor grammar, punctuation, and spelling; poor handwriting; and poor organization of paragraphs. All but the last symptom should be less of a concern now that almost all students use computers (with grammar and spelling check features) for typing class notes, papers, and exams. Math disorder could cause some problems in classes like taxation and accounting for lawyers.
which to produce a single paper. For those classes, the Article suggests techniques that may assist learning disabled students (and, in fact, all students) in producing work of a high quality. As for legal writing classes, the Article concludes that practical circumstances and pedagogical goals often limit the provision of extra time, but proposes as an alternative solution light-loading during the first semester of law school. This alternative may also be useful for schools designing new skills courses. In sum, understanding the science of learning disabilities should convince faculty, administrators, students with learning disabilities, and their classmates that learning disabilities do exist, but careful thought is required to determine when extra time is a fair accommodation.

II. REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT

The ADA prohibits public and private law schools from discriminating against any qualified, disabled individual on the basis of that disability. Specifically, Title II of the ADA prohibits discrimination by “public entities” in their provision of services,  

11. An informal survey of representative schools indicates that few students request more time as an accommodation in a class that requires one paper be written throughout the course of the semester. (Results on file with the Author.) I am especially grateful for the insights of Tracy McGaugh, Nancy Soonpaa, and Cliff Zimmerman.

12. See Lindstrom, supra n. 9, at 230 (noting impact of faculty attitude and pedagogy on success of students with learning disabilities, in addition to the effects of the personal characteristics of the students themselves).

Anecdotes abound about the stigma that students with learning disabilities receive. In one instance, classmates of a law school’s valedictorian refused to applaud her at graduation because they perceived her as having received her top grades through an unfair advantage. Suzanne E. Rowe, Presentation, The Science behind the ADA (Indianapolis, Ind., July 15, 2008) (comment of audience participant).

Schools and individual teachers can do much to combat the lack of knowledge that leads to such unfortunate situations while at the same time assisting undiagnosed students with learning disabilities in understanding their condition. In an orientation session or as part of an early class, administrators or faculty could explain the most common characteristics of persons with learning disabilities, provide examples from this Article to demonstrate the challenges faced by learning disabled students, explain the types of accommodations that may be available, and note the office on campus a student should contact for testing and accommodation if he suspected himself of having learning disabilities. This approach provides students with information about learning disabilities and steps to take for diagnosis, which is consistent with the ADA standard for placing the burden of self-identification on students, and shows classmates why accommodations should not be perceived as advantages.


programs, and activities.\textsuperscript{15} Title II defines public entities to include state and local governments as well as their departments, agencies, and other instrumentalities,\textsuperscript{16} which includes state universities and law schools.\textsuperscript{17} Title III of the ADA\textsuperscript{18} prohibits discrimination by private entities that operate "places of public accommodation,"\textsuperscript{19} defining places of public accommodation to include postgraduate private schools and other places of education.\textsuperscript{20} Thus, all law schools are covered. The ADA works in tandem with the Rehabilitation Act of 1973 (also known as “Section 504”),\textsuperscript{21} which similarly prohibits discrimination by entities receiving federal funding—including law schools and their parent universities\textsuperscript{22}—against an otherwise qualified individual solely on the basis of the individual’s disability.\textsuperscript{23}

In the law school context, as in other postsecondary situations, the student must first claim ADA protection and request accommodation. The school must then respond by assessing the request and providing appropriate accommodations. An overview of this process follows.

\textsuperscript{15} 42 U.S.C.A. § 12132.
\textsuperscript{16} Id. at § 12131(1).
\textsuperscript{17} Zukle v. Regents of U. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999) ("Title II prohibits discrimination by state and local agencies, which includes publicly funded institutions of higher education."); see also Wong v. Regents of U. of Cal., 192 F.3d 807, 811 (9th Cir. 1999); U. of Wash., 15 Natl. Disability L. Rep. (LRP) ¶ 125 (U.S. Off. Civ. Rights Nov. 30, 1998) (applying Title II to disabled student’s complaint against public law school’s tuition fee structure).
\textsuperscript{18} Title III is codified at 42 U.S.C.A. §§ 12181–12189.
\textsuperscript{19} 42 U.S.C.A. § 12182(a).
\textsuperscript{22} See Bonnie Poitras Tucker & Joseph F. Smith, Jr., \textit{Accommodating Law Faculty with Disabilities}, 46 J. Leg. Educ. 157, 158 (1996) (explaining that a school is covered by the Rehabilitation Act regardless of whether the federal financial support award is made specifically to the law school or to its parent university).
\textsuperscript{23} 29 U.S.C.A. § 794(a) (Westlaw 2009). For a discussion of the interrelationship of the ADA and the Rehabilitation Act, see Rowe, supra n. 2, at 8–10. See also Stern v. \textit{U. of Osteopathic Med. & Health Sci.}, 220 F.3d 906, 908 (8th Cir. 2000) (explaining that ADA and Rehabilitation Act cases are interchangeable); Dubois v. Alderson-Broaddus College, Inc., 950 F. Supp. 754, 757 (N.D.W. Va. 1997) (explaining that Rehabilitation Act cases have been considered precedential for many ADA decisions); 122 Stat. at 3554 (rejecting a United States Supreme Court case interpreting the ADA in favor of an earlier Supreme Court case under the Rehabilitation Act).
A. Student Action: The Student Must Be a Qualified Individual

To receive the protection of the ADA (and the Rehabilitation Act), a law student must assert that he is one of the qualified individuals Congress intended to protect.\(^{24}\) The law student must prove the assertion through documentation that is recent, relevant, and trustworthy.\(^{25}\) The ADA defines a covered individual as an individual with a disability who, with or without reasonable modifications to rules, polices, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.\(^{26}\)

\(^{24}\) See Rowe, supra n. 2, at 10–11 (explaining that a student who does not inform the school of a disability has no claim against the school for failure to provide accommodation); see also Zukle, 166 F.3d at 1047 (examining burdens of proof in case involving medical student with learning disabilities); Marlon v. W. New Eng. College, 27 Natl. Disability L. Rep. (LRP) ¶ 70 n. 18 (D. Mass. Dec. 9, 2003) (noting school did not have notice of disability); Leacock v. Temple U. Sch. of Med., 14 Natl. Disability L. Rep. (LRP) ¶ 30 (E.D. Pa. Nov. 25, 1998) (holding that a student failed to state a claim because medical school did not know of her disability before termination); St. Thomas U., 13 Natl. Disability L. Rep. (LRP) ¶ 259 (U.S. Off. Civ. Rights Apr. 2, 1998) (stating that post-secondary school students have to notify their school of the disability and request accommodations). Contrast the requirement for self-identification in post-secondary schools with the requirement in elementary and secondary schools, in which the school must identify students with disabilities. See Council for Exceptional Children, Understanding the Differences between IDEA & Section 504, 35 J. Learning Disabilities 357, 358, 359–362 (2002) (examining the training and understanding of the ADA by clinicians who “considered themselves to be experts” in diagnosing learning disabilities). A school is not required to accept the student’s documentation but may have a separate evaluator review the case. Rowe, supra n. 2, at 15.

\(^{25}\) Rowe, supra n. 2, at 13–15. Documentation is typically considered recent if the testing was done within three years, although that is not a rigid rule. Id. at 13. Documentation is relevant if it specifically addresses the disability the student is asserting. Id. at 13–14. Documentation is trustworthy if it was prepared by a qualified evaluator. Id. at 14–15. The school should review the documentation, as noted in Part II(B), “to determine whether the individual’s diagnosticians has adequately documented his or her diagnosis and whether the documentation demonstrates a need for accommodations.” Lindstrom, supra n. 9, at 230.

\(^{26}\) 42 U.S.C.A. § 12131(2). Note that the ADA Amendments Act of 2008 modified the
Not all disabilities give rise to ADA protection. A disability under the ADA is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual.” The statute includes as impairments “specific learning disabilities,” though as noted earlier the term is not defined. “Major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”


27. This point gave rise to considerable media coverage and legislative action in 2008. News stories focused on individuals who were dismissed from employment because of their disabilities but not allowed to sue under the ADA because their disabilities were not recognized by that Act. See Joseph Shapiro, Revamped Disabilities Rights Bill on Fast Track, http://www.npr.org/templates/story/story.php?storyID=91625706 (accessed Mar. 1, 2009). One of the best known cases was McClure v. General Motors Corp., 2003 U.S. Dist. LEXIS 402 (N.D. Tex. Jan. 13, 2003). The ADA Amendments Act of 2008 was introduced in Congress to address these concerns; it was signed into law by President George W. Bush on September 25, 2008, and its changes became effective January 1, 2009. See 122 Stat. 3553.


29. For Title II, see 28 C.F.R. § 35.104. See also 29 C.F.R. § 1630.2(h) (2008) (providing the same definition for the equal employment provisions of the ADA). Regulations under the Rehabilitation Act also include “specific learning disabilities” as physical or mental impairments. 34 C.F.R. § 104.3(j)(2)(i); see also DePaul U., 4 Natl. Disability L. Rep. (LRP) ¶ 157 (U.S. Off. Civ. Rights May 18, 1993) (concluding that a student’s specific visual learning disabilities constituted a physical or mental impairment under Rehabilitation Act regulations).

30. 42 U.S.C.A. § 12102(2)(A) (emphasis added). Prior to the 2008 Amendments, ADA regulations defined “major life activities” to include, inter alia, breathing, walking, seeing, hearing, speaking, and learning. 28 C.F.R. § 35.104; 29 C.F.R. § 1630.2(i). Rehabilitation Act regulations also include learning as a major life activity. 34 C.F.R. § 104.3(j)(2)(ii); see also Villanova U., 16 Natl. Disability L. Rep. (LRP) ¶ 170 (U.S. Off. Civ. Rights Feb. 12, 1999) (concluding that law student’s disability that substantially limited her ability to learn satisfied Rehabilitation Act regulations’ definition of disability). Court decisions prior to 2008 found reading and working to be major life activities. Bartlett v. N.Y. St. Bd. of L. Exams., 226 F.3d 69, 80 (2d Cir. 2000); see also Bartlett v. N.Y. St. Bd. of L. Exams., 156 F.3d 321, 328 n. 3 (2d Cir. 1998) (reading), vacated on other grounds, 527 U.S. 1031 (1999); EEOC v. R.J. Gallagher Co., 181 F.3d 645, 654–655 (5th Cir. 1999) (working). These activities are now clearly included in the post-2008 statutory definition. Relevant to the discussion infra at Part III(E), the Second Circuit declined to decide whether test taking and studying are major life activities. Bartlett, 226 F.3d at 80; see also Baer v. Natl. Bd. of Med. Exams., 392 F. Supp. 2d 42, 48 n. 2 (D. Mass. 2005) (questioning whether taking a timed test is a major life activity).
pairment “substantially limits” a major life activity by preventing or significantly restricting an individual’s ability to perform the activity.\textsuperscript{31} This very specific, three-part definition of disability was interpreted by courts to restrict ADA coverage to a subset of persons generally considered to have disabilities, a situation the 2008 ADA Amendments sought to rectify by broadening coverage.\textsuperscript{32}

B. School Response: The School Is Not Required to Fundamentally Alter the Course of Study or Take on Undue Burdens in Providing Accommodations

The school must determine each student’s assertion of disability and requested accommodations on a case-by-case basis.\textsuperscript{33} The school must respond to a documented assertion of a covered disability by determining whether the student has requested reasonable accommodations.\textsuperscript{34} Most law schools and universities have established processes for making this determination.\textsuperscript{35} In

\begin{itemize}
\item \textsuperscript{31} 29 C.F.R. § 1630.2(j) (employment). Diagnosis of an impairment alone is insufficient; the ADA also examines the effect an impairment has on a specific individual’s ability to perform a major life activity. \textit{Id.; see also Rowe, supra n. 2, at 12} (explaining pre-2008 that a law student who self-accommodates for dyslexia to the point of being unimpaired in the major life activity of learning is not covered by the ADA despite having a diagnosed learning disability); \textit{but see} 122 Stat. at 3555–3557 (continuing to use the “substantially limits” language but rejecting the narrow application of the term in Supreme Court cases \textit{Toyota Motor Manufacturing, Inc. v. Williams}, 534 U.S. 184 (2002) (carpal tunnel syndrome in assembly line workers), and \textit{Sutton v. United Air Lines, Inc.}, 527 U.S. 471 (1999) (visually impaired airplane pilots)).
\item \textsuperscript{32} \textit{See supra} n. 27 (explaining the news stories and cases that generated support for the ADA Amendments Act of 2008).
\item \textsuperscript{33} \textit{Wong}, 192 F.3d at 818 (“Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual’s circumstances and the accommodations that might allow him to meet the program’s standards.”); \textit{Childress v. Clement}, 5 F. Supp. 384, 391 (E.D. Va. 1998) (stating that the ADA requires a case-by-case determination by an educational institution to determine whether a student is otherwise qualified despite the disability); \textit{see e.g.} 29 C.F.R. § 1630.2(j); \textit{see also Nicole S. Ofiesh et al., Extended Test Time and Postsecondary Students with Learning Disabilities: A Model for Decision Making, 19 Learning Disabilities Research & Prac. 57, 57 (2004) (proposing a model for university disability service providers to follow in addressing accommodation requests regarding extended time).}
\item \textsuperscript{34} This Article uses the more common term “reasonable accommodation,” although it is actually from Title I of the ADA on employment. Title II uses the term “reasonable modification.” In deciding ADA cases, courts tend to use the terms interchangeably. \textit{See e.g. Wong}, 192 F.3d at 816 n. 26 (“We will continue the practice of using [‘reasonable accommodation’ and ‘reasonable modification’] interchangeably.”).
\item \textsuperscript{35} Many schools have offices dedicated to disability issues. \textit{See e.g. U. of Louisville
deciding whether to accommodate the student as requested, the school is not required to \textit{fundamentally alter} the course of study or to assume \textit{undue financial or administrative burdens}.\textsuperscript{36} Examples of requested accommodations that would have fundamentally altered the course of study in a law school include requiring a professor to break complex exam questions into outline format and allowing a student to outline answers instead of writing essays.\textsuperscript{37}

In determining whether a requested accommodation would create an undue financial burden, courts balance the cost of the accommodation against the financial resources of the school.\textsuperscript{38} Undue administrative burdens could result from requests for professors to meet daily with a disabled student to keep him on track or to edit the student’s paper.\textsuperscript{39} Technological advances must be considered in determining the burden that might be imposed.\textsuperscript{40} For example, just a few years ago, a school could have argued that a student’s request to turn in papers other than during the business day was unreasonable because it would have required someone to be at the school twenty-four hours per day. With electronic filing of documents becoming routine, that argument would no longer be persuasive, and the accommodation would likely be seen as reasonable.

\textbf{III. LEARNING DISABILITIES}

This Part turns to learning disabilities that may entitle a student to accommodation under the ADA.\textsuperscript{41} This Part begins by

\begin{itemize}
  \item \textsuperscript{36} See Rowe, supra n. 2, at 15–20 (explaining concepts of fundamental alteration and undue burdens).
  \item \textsuperscript{37} Villanova U., 16 Natl. Disability L. Rep. ¶ 170 (concerning law student with learning disabilities); see also S.E. Community College v. Davis, 442 U.S. 397 (1979) (holding that nursing school did not have to admit hearing-impaired applicant who would not have been able to participate in clinical portion of the program).
  \item \textsuperscript{38} 42 U.S.C.A. § 12111(10) (defining undue hardship). See 28 C.F.R. § 36.104 for a complete list of factors.
  \item \textsuperscript{39} See Rowe, supra n. 2, at 19–20 (arguing that even weekly meetings with a single student could be an unreasonable burden).
  \item \textsuperscript{40} See Davis, 442 U.S. at 412–413 (noting that technological advances could make programs accessible to students with disabilities without fundamentally altering the program or imposing undue burdens).
  \item \textsuperscript{41} That learning disabilities give rise to accommodations scenarios is clearer since
explaining general characteristics of learning disabled individuals. Then it traces the development of scientific understanding of learning disabilities, including the work of the Connecticut Longitudinal Study and advances in brain imaging. This Part ends by explaining the methods used to determine whether a person has learning disabilities.

At the outset, it is important to realize that a number of different learning disabilities exist, although laypersons often lump them together. Learning disabilities as defined by the Diagnostic and Statistical Manual of Mental Disorders include Reading Disorder (also called dyslexia), Mathematics Disorder, and Disorder of Written Expression. Attention Deficit Hyperactivity Disorder (ADHD, also called Attention Deficit Disorder or ADD) is not technically a learning disorder, but it frequently coexists in students with learning disorders. Many studies on learning disabled students also group together students who have a variety of learning disabilities.

The most common learning disability is reading disability, also known as dyslexia. It has been estimated to account for 80 percent of all learning disabilities and is the particular focus of this Article because reading is so fundamental to law study. Extrapolating from the number of school children and college stu-

the 2008 Amendments included “learning” as a major life activity. See 122 Stat. at 3555.

42. Am. Psychiatric Assn., supra n. 9, at 49, 52.

43. The DSM-IV-TR does not classify ADHD as a learning disorder. See id. at 50 (noting that “[m]any individuals (10 percent–25 percent) with ADHD also have learning disorders); see also Larry B. Silver, What Is ADHD? Is It a Type of LD? http://www.ldonline.org/article/5800 (accessed Feb. 25, 2009) (providing a brief, accessible overview of the causes, symptoms, and treatment of ADHD).


45. E.g. Sally M. Reis et al., Compensation Strategies Used by High-Ability Students with Learning Disabilities Who Succeed in College, 44 Gifted Child Q. 123, 127 (2000) (listing the following characteristics to describe the nature of disabilities experienced by the twelve students being studied: reading disability, slow processing of information, spelling, handwriting, poor short-term memory, decoding, dyslexia, language problems, abstract math problems, social problems, motor skills, verbal and written expression, auditory problems, attention deficit disorder, and penmanship).

46. Am. Psychiatric Assn., supra n. 9, at 52.

47. Id.
students receiving disability services, law faculty and administrators are likely to encounter increasing numbers of dyslexic students in the future, many of whom will be covered by the ADA.

Definitions of dyslexia are plentiful but not always helpful, especially to the layperson. Moreover, definitions of dyslexia have evolved over time, and the scientific underpinnings are still the subject of debate. The focal points are (1) a discrepancy between aptitude and achievement, and (2) a neurological basis. Most definitions have addressed an unexpected discrepancy between intelligence and reading ability. Students with high IQ scores but low reading ability are known to have average or above-average intelligence, but a discrepancy exists between the students’ aptitude and achievement levels. Thus, the disability

48. See Shaywitz, supra n. 5, at 29 (discussing studies suggesting that 3.5 percent of school children—more than two million—receive special education for reading disabilities); Bill Schackner, “Invisible” Disability Now Visible on Campus, Pitt. Post-Gazette (Sept. 5, 2004) (available at http://www.post-gazette.com/pg/04249/373149.stm) (noting that 4 percent of college students have a learning disability and that the segment of students with learning disabilities is growing faster than any other sector of disabled college students).

49. See Nicolson & Fawcett, supra n. 9, at 11 (listing various definitions from 1968 to 2002); see also G. Reid Lyon et al., Defining Dyslexia, Comorbidity, Teachers’ Knowledge of Language and Reading: A Definition of Dyslexia, 53 Annals of Dyslexia 1, 2–9 (2003) (providing a line-by-line analysis of the prevailing definition in 2003); Michael Rutter & William Yule, The Concept of Specific Reading Retardation, 16 J. Child Psychol. & Psych. 181 (1975) (exploring “the continuing controversy about the existence of dyslexia” and the terminology used in the mid-1970s).

50. See Nicolson & Fawcett, supra n. 9, at 11–12 (noting that published definitions are the result of compromise and analyzing the development of various definitions). Laypersons are especially likely to find the scientific jargon unclear. See id.

51. Id. at 12; see also Guinevere F. Eden & Thomas A. Zeffiro, Neural Systems Affected in Developmental Dyslexia Revealed by Functional Neuroimaging, 21 Neuron 279, 279–282 (1998) (comparing behavioral and neuroimaging evidence supporting both the phonological processing theory and the visual processing theory); Albert M. Galaburda, Neuroanatomical Basis of Developmental Dyslexia, 11 Neurologic Clinics 161, 161 (1993) (noting the possibility of more than one cause for dyslexia, but supporting the phonologically based, linguistic defect theory over the visual defect theory).

52. See Nicolson & Fawcett, supra n. 9, at 11 (listing several definitions between 1968 and 2002); see also Snowling, supra n. 44, at 15 (quoting the following 1968 definition of dyslexia provided by the World Federation of Neurology: “[A] disorder manifested by difficulty in learning to read despite conventional instruction, adequate intelligence and sociocultural opportunity. It is dependent upon fundamental cognitive disabilities which are frequently of constitutional origin.”).

53. Shaywitz, supra n. 5, at 20 (discussing dyslexic students). Much of the literature discussed in this Article assumes that learning disabilities are based on a specific discrepancy between aptitude and achievement. See e.g. Reis et al., supra n. 45, at 131–132; Linstorm, supra n. 9, at 229. The DSM-IV-TR, however, does not require this discrepancy. See Am. Psychiatric Assn., supra n. 9, at 49–53 (listing among criteria for dyslexia standardized test scores “substantially below” that expected given the person’s chronological age, measured intelligence, and age-appropriate education” (emphasis added)). The criteria of
in reading is unexpected in these students because of their high cognitive skills in other areas. Some researchers refer to these students as having isolated difficulties in a “sea of strengths.” Under the discrepancy definition, the overall intelligence of dyslexic students stands them in contrast with low-achieving students of below-average intelligence, who simply lack the ability to learn.

Another component of most definitions explains the cognitive impairment of dyslexia as a phonological deficit. One definition states dyslexia is “neurological in origin,” and is “characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities [that] . . . result from a deficit in the phonological component of language.” Phonemes are the most basic components of speech, so according to this definition the person with dyslexia has difficulties at the most basic level of reading—rapid word identification. Researchers disagree about the causes of the phonological deficit, but the predominant view is that faulty brain circuitry impedes the fundamental decoding of words. The phonological deficit definition will be explored in more detail in Part III(C).

A. General Characteristics of Learning Disabilities and Dyslexia

While each student with learning disabilities will exhibit her strengths and weaknesses uniquely, some general characteristics provide useful benchmarks for understanding what learning dis-

54. Shaywitz, supra n. 5, at 20 (noting that the “central concept that underlies developmental dyslexia [is] an unexpected difficulty in learning to read”) (emphasis in original).
55. See id. at 57 (observing that a “circumscribed, encapsulated weakness” such as that found in dyslexia “is often surrounded by a sea of strengths”).
56. See id. at 20.
57. Nicolson & Fawcett, supra n. 9, at 11.
58. Id. (quoting the 2002 definition of the International Dyslexia Association).
59. For a critique of the competing visual stimuli theory, see Snowling, supra n. 44, at 158–176. For a critique of the phonological deficit theory, see Hollis S. Scarborough, Developmental Relationships between Language and Reading: Reconciling a Beautiful Hypothesis with Some Ugly Facts, in The Connections between Language and Reading Disabilities 3 (Hugh W. Catts & Alan G. Kamhi eds., Lawrence Erlbaum Assocs. 2005) [hereinafter Language and Reading Connections].
abilities are. Students with learning disabilities may have difficulties acquiring reading skills, reading effectively, writing, reasoning, or performing mathematical functions, depending on the particular disability. General indicators of dyslexia—a type of learning disability—include problems reading aloud, learning new words, using words in context, reading comprehension, taking effective notes, organizing thoughts, spelling, and editing text.

Children with dyslexia have difficulty learning to read; they tend to read more slowly, and they process what they have read more slowly. These children may also have verbal problems. They may begin speaking later than their peers and then experience difficulty with pronunciation. As they get older, dyslexic children may face challenges in finding the right words to express their ideas and may try to cover those challenges by using general or vague language (e.g., “stuff” or “things”). Clearly, students who have been admitted to law school can read with some level of facility and speak with clarity, but they share in common some important characteristics, some of which harken back to childhood struggles. The law students with dyslexia likely read at a much slower pace than classmates, may take longer to comprehend what they read, and may have problems with writing exams and papers.

60. Eichhorn, supra n. 2, at 34–35.
61. Noel Gregg et al., Timed Essay Writing: Implications for High-Stakes Tests, 40 J. Learning Disabilities 306, 307 (2007). A related issue is meeting deadlines; given the challenges the dyslexic student faces, timing issues are not surprising. Id.
62. See Shaywitz, supra n. 5, at 36–40 (using case studies of two patients to illustrate common childhood symptoms of dyslexia).
63. Id. at 94. These children may have difficulty with the sounds that comprise words, meaning that childhood rhymes elude them. Id. at 95. The phonological reasons for this difficulty are discussed infra in Part III(C).
64. Id. at 96. Some “common knowledge” about dyslexia has been shown to be simply myth. Dyslexia is more than switching the order of letters, but it is not necessarily connected to being left-handed or to left-right orientation difficulties. Id. at 100–101.
65. See id. at 38–39 (discussing Gregory, a medical student who struggled with new terminology and memorization but had no difficulty with conceptual work). Regarding writing, one group of researchers noted,

Writers with dyslexia often demonstrate problems with semantics (word usage in context), grammar (e.g., agreement), and mechanics (e.g., application of punctuation and capitalization rules) that have direct and negative effects on written syntax. Furthermore, [some dyslexic writers] may make sentence-level monitoring errors (e.g., leaving out words) when faced with the taxing demands of planning and composing an entire essay.
Set against these challenges with written language, people with learning disabilities display remarkable skills that contribute to their success: resilience, determination, resourcefulness, creativity, original thinking, self-confidence, and strong oral communication skills. These abilities show that, despite fundamental problems with written language, students with dyslexia can think at very high levels.

Successful dyslexics often have turned their challenges into advantages. Given that reading large amounts of writing is difficult, many successful dyslexics have developed an uncanny ability to zero in on the key passages in lengthy documents and identify the critical information. As another example, because rote memorization is often extremely difficult for dyslexics, they might compensate by learning concepts on a deeper level, which make sense to them and can be remembered. A disproportionate number of artists and scientists—working in fields that reward creativity—seem to have dyslexia, and some credit the disability with their success.

66. Lindstrom, supra n. 9, at 230; Reis et al., supra n. 45, at 124; see also William Wissemann, Accomplishing Big Things in Small Pieces (Sept. 14, 2008) (essay on National Public Radio's Weekend Edition Sunday, as part of the “This I Believe” series) (available at http://www.npr.org/templates/story/story.php?storyId=94566019). Examples of successful professionals with dyslexia abound. E.g. Shaywitz, supra n. 5, at 345–366 (discussing the struggles and successes of author John Irving, playwright Wendy Wasserstein, novelist and television writer Stephen J. Cannell, financial guru Charles Schwab, surgeon Graeme Hammond, and others), 117 (listing other highly intelligent people with dyslexia); Betsy Morris, Overcoming Dyslexia, 145 Fortune 54 (May 13, 2002) (discussing the challenges and advantages dyslexia provided for attorney David Boies and others); Paul Orfalea & Ann Marsh, Copy This! How I Turned Dyslexia, ADHD, and 100 Square Feet into a Company Called Kinko's (Workman Publ. Co. 2007); Reis et al., supra n. 45, at 124 (discussing studies of high-ability students with learning disabilities and listing common characteristics); Rob Turner, In Learning Hurdles, Lessons for Success, 153 N.Y. Times 10 (Nov. 23, 2003) (publishing an interview with Charles Schwab).

67. Students with learning disabilities can develop highly successful strategies to help them succeed. See generally Reis et al., supra n. 45 (studying the habits of twelve successful university students with learning disabilities). Among these compensation strategies are time management skills, improved note-taking, test-taking preparation, library skills, use of mnemonics and flashcards to aid memory, and “chunking” large quantities of information into small units to aid in mastery. Id. at 128–131.

68. See Shaywitz, supra n. 5, at 340; see also id. at 117 (listing other highly intelligent people with dyslexia). A law professor uses the following filtering device: she looks for the phrase “The court says . . .” in long judicial opinions. Id. at 118.

69. Id. at 57–58 (noting that the challenge with a basic skill can be turned into a source of greater comprehension).

70. Nicolson & Fawcett, supra n. 9, at 1; see also Shaywitz, supra n. 5, at 53 ( theoriz-
B. Historical Development of Scientific Understanding of Learning Disabilities

Knowing the long history of dyslexia helps modern-day teachers, administrators, and students understand that brain circuitry can cause bright individuals to have difficulty with reading. Historically, dyslexia was called “word blindness” because the patient seemed to have adequately functioning eyes but was unable to read words because of some injury to the brain.\(^{72}\) The scientific literature includes references to symptoms of reading disability as early as 1676, the year a German physician wrote about a man who lost his ability to read after suffering a stroke.\(^{73}\) In 1872, a British neurologist wrote of another man who lost both his ability to read and his ability to name familiar objects.\(^{74}\) The condition came to be called “acquired alexia” because the patient had lost his prior ability to read following some trauma to the head.\(^{75}\) Later the term “dyslexia” was coined as a subset of word blindness for patients who lost some, but not all, of their reading ability following brain lesions.\(^{76}\)

Thus, even in the late 1800s, doctors recognized that injuries to the brain affected the ability to read. At the close of the nineteenth century, some were also wondering whether a congenital form of word blindness could limit a person’s ability to learn to read.\(^{77}\) In 1896, an English physician first recognized what is now known as “developmental dyslexia” when he described a fourteen-year-old boy who was unable to read or to write his own name, despite adequate intelligence and high ability in other areas of learning.\(^{78}\) By 1909, an American physician had document-

\(^{71}\) E.g. Orfalea & Marsh, supra n. 66.
\(^{72}\) Shaywitz, supra n. 5, at 14. The term “word blindness” is credited to Scottish eye surgeon James Hinchelwood, who worked in the early years of the twentieth century. Nicolson & Fawcett, supra n. 9, at 2.
\(^{73}\) Shaywitz, supra n. 5, at 14.
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id. at 15.
\(^{77}\) Id. at 13–14, 16–17.
\(^{78}\) Nicolson & Fawcett, supra n. 9, at 2; Shaywitz, supra n. 5, at 13–14; Snowling, supra n. 44, at 14.
ed forty-one cases of congenital word blindness.\textsuperscript{79} Beginning in 1925, Samuel Orton, an American neurologist, studied over 1,000 children for the problem he called “symbol twisting.”\textsuperscript{80} Regardless of the term applied, the result of the acquired and congenital conditions was the same—an inability or diminished capacity to read—but one condition was acquired through a traumatic change to the brain circuitry later in life while the other resulted from congenital wiring of the brain.\textsuperscript{81}

As researchers became more convinced of the congenital form of the condition, they turned to studying groups of children to learn more about differences between those who read well and those who did not. One of the most important studies on a large population of children occurred on the Isle of Wight in the early 1970s and distinguished between those who had specific reading difficulties (i.e., dyslexia) and those who had more general problems learning.\textsuperscript{82}

In the 1960s and 1970s, scientists began to more systematically examine the brains of deceased dyslexics and discovered important differences between these brains and the brains of those people who did not have dyslexia.\textsuperscript{83} The differences existed in areas of the brain known to be associated with language.\textsuperscript{84} As examples, the dyslexic brains showed abnormalities including scarring in these areas, the dyslexic brains showed symmetry in

\textsuperscript{79} Shaywitz, supra n. 5, at 24.

\textsuperscript{80} Nicolson & Fawcett, supra n. 9, at 2; see also Michel Habib & Jean-François Démonet, Dyslexia and Related Learning Disorders: Recent Advances from Brain Imaging Studies, in Brain Mapping: The Disorders 459, 460 (John C. Mazziotta et al. eds., Academic Press 2000) (stating that Orton’s work gave initial credibility to the neurological origins of dyslexia).

\textsuperscript{81} Shaywitz, supra n. 5, at 17.

\textsuperscript{82} Snowling, supra n. 44, at 16.

\textsuperscript{83} Albert M. Galaburda & Thomas L. Kemper, Cytoarchitectonic Abnormalities in Developmental Dyslexia: A Case Study, 6 Annals of Neurology 94 (1979); see also Shaywitz, supra n. 5, at 68 (discussing the “brain bank” study). For later work, see Galaburda, supra n. 51; Albert M. Galaburda et al., Developmental Dyslexia: Four Consecutive Patients with Cortical Anomalities, 18 Annals of Neurology 222 (1985).

\textsuperscript{84} Shaywitz, supra n. 5, at 68; see also Deborah F. Knight & George W. Hynd, The Neurobiology of Dyslexia, in Dyslexia and Literacy: Theory and Practice 29, 30 (Gavin Reid & Janice Wearmouth eds., John Wiley & Sons Ltd. 2002) [hereinafter Dyslexia and Literacy] (explaining the significance of the studies by Galaburda of seven deceased adults with dyslexia, which located abnormalities in the portions of the brains associated with language).
areas where asymmetry is typical for normal readers, and the dyslexic brains had misplaced cells.

These two approaches—studying large populations to understand their reading differences and studying human brains—have converged in the past twenty-five years. Two events are paramount. The first is work undertaken by Centers for the Study of Learning and Attention with the support of the National Institutes of Health beginning in the mid-1980s. At least one such study, the Connecticut Longitudinal Study at Yale University, is ongoing today. The study included extensive examination of 445 students in Connecticut schools and has provided invaluable insights into how we read and how those among us with dyslexia struggle with reading. The second paramount event in research concerning dyslexia is the development of technology that allows scientists to see the brain as it works, through functional magnetic resonance imaging (fMRI). These two events are explored in the following sections.

C. The Connecticut Longitudinal Study

The Connecticut Longitudinal Study is funded by the National Institutes of Health and housed at Yale University. Its purpose has been to study reading skills in a large number of children over a long period of time. The study began in 1983 with 445 kindergarten students who were attending Connecticut public schools that had been randomly chosen to participate in the study. Each student was tested for learning disabilities, and each student’s progress was tracked carefully. Around 90 percent of those students were still active in the study twenty years later.

85. Snowling, supra n. 44, at 151.
86. Knight & Hynd, supra n. 84, at 30 (discussing several studies of autopsied brains).
87. Shaywitz, supra n. 5, at 25–26. The co-directors are Bennett Shaywitz and Sally Shaywitz. The study comprises much of Sally Shaywitz’s book Overcoming Dyslexia, supra n. 5. Parts of the book were previously published in an earlier article. See Sally E. Shaywitz, Dyslexia, 275 Sci. Am. 98 (Nov. 1996) [hereinafter Shaywitz, Dyslexia]. For more scholarly treatment by the same author and others involved in the Yale project, see Sally E. Shaywitz et al., Persistence of Dyslexia: The Connecticut Longitudinal Study at Adolescence, 104 Pediatrics 1351 (1999); Jack M. Fletcher et al., Cognitive Profiles of Reading Disability: Comparisons of Discrepancy and Low Achievement Definitions, 86 J. of Educ. Psychol. 6 (1994); see also Nicolson & Fawcett, supra n. 9, at 3 (citing the 1996 Shaywitz article in a 2008 book to explain the phonological deficit hypothesis of dyslexia).
88. Shaywitz, supra n. 5, at 26–27.
89. Id. at 27.
1. General Findings about Dyslexia

The study has produced many important findings about dyslexia:

- **Dyslexia is dimensional, not categorical.** This means that dyslexia exists on a spectrum, with no definitive marker for when a person is or is not dyslexic.

- **As many as one in five school students might be affected.** This number (20 percent) is much higher than the percent of school-age children generally estimated to have dyslexia or the percentage estimated to be receiving educational assistance for reading disabilities. The higher percentage likely resulted from the fact that every student was tested, not just those students whom teachers or parents suspected of exhibiting traits of dyslexia.

- **Girls are as likely as boys to have dyslexia.** Researchers suspect that social norms may have much to do with the

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91. Shaywitz, supra n. 5, at 28. The dimensional aspect of dyslexia means that choosing an evaluator can affect the outcome, depending on whether a particular evaluator is more or less inclined to make a diagnosis. See Gordon et al., supra n. 25, at 359–362 (describing the training and understanding of clinicians diagnosing ADA disabilities). The evaluator decides which tests to conduct and, based on those tests, may diagnose a disability that needs to be accommodated. Tests for Learning Disabilities: Introduction, 37 Juv. & Fam. Ct. J. 25, 25 (Nov. 3, 1986) (“The choice of a particular battery of tests has much to do with the individual clinician’s training, practices and procedures dictated by state law, and the developmental level of the student who is to be tested. Therefore, from state to state, there is variance in assessment practices and procedures.”). The tests used for determining dyslexia are discussed infra in Part III(E).

92. See Am. Psychiatric Assn., supra n. 9, at 52 (estimating 4 percent).

93. See Shaywitz, supra n. 5, at 29 (estimating 3.5 percent).

94. Id. at 30.

general assumption that dyslexia is much more prevalent in boys. In essence, the classroom behavior of children often varies by gender. Girls who are having difficulty with assignments are more likely to sit quietly, while boys are more likely to act out. The student acting out is more likely to be tested for learning disabilities, resulting in a higher proportion of boys being diagnosed with dyslexia. In the Connecticut study, all students were tested, and while boys tested as dyslexic more often than girls, the difference was statistically negligible.\footnote{Shaywitz, supra n. 5, at 31–33.}

- **Dyslexia is a chronic condition.** While early and aggressive interventions can overcome many of the challenges faced by students with dyslexia, the condition does not disappear.\footnote{Id. at 33. A number of studies confirm this conclusion. Liliane Sprenger-Charolles et al., Reading Acquisition and Developmental Dyslexia 13, 71 (Psych. Press 2006) (listing studies reaching the same conclusion and noting the lifelong persistence of dyslexia even with remedial treatment and compensatory strategies); see also Snowling, supra n. 44, at 12–13 (discussing a case study of student whose phonological decoding problems persisted into adulthood), 60 (noting that, although most research focuses on children, many problems with dyslexia continue into adulthood), 198 (recognizing that “[a]lthough the symptoms of dyslexia change with age, phonological processing difficulties persist in adulthood”); Maggie Bruck, Persistence of Dyslexics’ Phonological Awareness Deficits, 28 Developmental Psychol. 874, 882 (1992) (finding that “dyslexics do not acquire appropriate levels of phoneme awareness, regardless of their age or their reading levels”).}

2. **Phonemes and Reading**

One of the most lasting contributions of the Connecticut study is a comprehensive investigation into how we learn to read and where the dyslexic reader encounters problems. While speaking is innate,\footnote{Shaywitz, supra n. 5, at 45; see generally Steven Pinker, The Language Instinct: How the Mind Creates Language (William Morrow & Co. 1994).} reading is not.\footnote{Shaywitz, supra n. 5, at 49; see also Snowling, supra n. 44, at 63 (noting that reading is an unnatural act).} The symbols that we use to enable reading mean nothing on their own.\footnote{Sprenger-Charolles et al., supra n. 97, at 56. A simple exercise I have used in my presentations drives home the point that letters alone mean nothing. I ask participants to identify commonalities in the following three words: leer, lire, read. Common answers include that each contains an “r” shape and that they all have four letters (though that is obvious only to those of us familiar with the unique letters of a certain set of alphabets). For those of us who have learned Spanish, French, and English, the three combinations of letters all mean “to read.”} They come with a code proportions in previous studies).
that must be learned.\textsuperscript{101} The code is phonologic, meaning that it is based on phonemes—“the smallest unit of speech that distinguishes one word from another.”\textsuperscript{102} English contains just forty-four phonemes, which in various combinations produce all of the words in our language.\textsuperscript{103} To be able to read, one must understand this written code and how it relates to spoken words.\textsuperscript{104} This understanding happens in a series of steps.\textsuperscript{105} First, one must be aware that individual words are themselves composed of smaller, individual parts.\textsuperscript{106} These parts represent individual sounds.\textsuperscript{107} Then one must link written letters and individual sounds.\textsuperscript{108} The final step in understanding the phonologic code is realizing that written words and spoken words are the same.\textsuperscript{109} For example, the word \textit{cat} has three phonemes: k-aaaa-t. Before being able to read the word \textit{cat}, one must be able to hear the three sounds that comprise the spoken word, link them to written letters, and recognize that the symbols that comprise \textit{cat} refer to the sounds k-aaaa-t and mean the furry household pet.\textsuperscript{110}

This most fundamental level of reading is no more than simply decoding words on a page.\textsuperscript{111} While most readers master the

\begin{flushleft}
101. Shaywitz, supra n. 5, at 42.
102. \textit{Id.} at 41.
103. \textit{Id.}
104. \textit{Id.} at 50. “Beginning readers throughout the world must learn how to decipher print, how to convert an array of meaningless symbols on paper so that they are accepted by a powerful language machinery [in the brain] that recognizes only the phonologic code.” \textit{Id.}
105. Snowling, supra n. 44, at 62–74 (exploring various theories for learning to read).
106. Shaywitz, supra n. 5, at 44.
107. \textit{Id.}
108. \textit{Id.}
109. \textit{Id.} Other researchers explain the process this way:

Children begin reading by recognizing words based on visual features or context. After gaining some knowledge of the alphabet and its associations with speech sounds, children begin using a few prominent letters in words as phonetic cues for identification. Then as they gain a full understanding of the mapping of print to sound, children begin to decode words letter by letter in their entirety. Finally, as their vocabulary and automaticity improve, they consolidate common letter sequences, identifying them as a whole, and begin to read new words by analogy to known ones.

Peter E. Turkeltaub et al., \textit{The Neurobiological Basis of Reading: A Special Case of Skill Acquisition}, in \textit{Language and Reading Connections}, supra n. 59, at 111.
110. Shaywitz, supra n. 5, at 42–44.
111. \textit{Id.} at 51. In presenting these ideas to different groups, I have used the following, admittedly unscientific, example to demonstrate how much we take for granted the simplicity of decoding words:

Can you read this?
decoding skill quickly, it is the stumbling block for dyslexic readers. Learning to link letters to sounds does not come easily; even after the linkage is established, the neural pathways used are often not the most efficient. Because dyslexic readers are able to read and process information only by using secondary mental passageways, they work much more slowly and laboriously. Sometimes, the dyslexic person will have difficulty retrieving the right word, selecting instead a word with similar phonemes (e.g., “ocean” v. “lotion”).

But the difficulty with the fundamental level of decoding does not mean that the more sophisticated level of reading—the mental work that we all associate with effective reading—is also compromised. The higher level reading abilities may be unimpaired or even outstanding. These abilities include a comprehension of semantics (i.e., vocabulary), syntax (i.e., grammar), discourse (i.e., connecting sentences), and reasoning. (Figure 1 below demonstrates the lower and higher levels of language systems and reading.) Different students with dyslexia may exhibit different weaknesses and strengths. Written vocabulary and grammar may raise challenges, while reasoning is unimpaired. Rote

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112. Id. The Connecticut Longitudinal Study found that phonemic awareness is the best predictor of reading ability. Id. at 55. This study confirms earlier findings. See Snowling, supra n. 44, at 76–77 (describing a study of 400 children that showed “a strong relationship between the children’s phonological awareness at 4 years and their reading and spelling achievement at 8 [years],” id. at 77.).

113. Shaywitz, supra n. 5, at 81–84. The brain imaging that maps these neural pathways is discussed in Part III(D).

114. See id. at 155.

115. Id. at 42–43. The author gives the example of a politician welcoming supporters to “this lovely recession” rather than “this lovely reception.” Id. at 43.

116. Id. at 53.

117. Id. at 41, 53.

118. Id. at 52.

119. See Gregg et al., supra n. 61, at 307–308 (explaining writing challenges of dyslexics); but see Shaywitz, Dyslexia, supra n. 87, at 102 (“Linguistic processes involved in word meaning, grammar and discourse—what, collectively, underlies comprehension—seem to be fully operational, but their activity is blocked by the deficit in the lower-order function of phonological processing.”).
memorization of new terms can be difficult for a dyslexic student, who still may be able to discuss complex ideas on a very high level, using sophisticated reasoning and logic. Similarly, a dyslexic student may read more slowly than classmates, but may excel in oral discussions.

Figure 1

<table>
<thead>
<tr>
<th>Levels of Language System</th>
<th>Levels of Reading</th>
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<tr>
<td>Discourse</td>
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<td>Higher</td>
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<td>Lower</td>
<td>Phonology</td>
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<td>Decoding</td>
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3. Memory and Fluency

Crucial to decoding and reading is the student’s memory—both short-term and long-term. “The most consistently reported phonological difficulties found in dyslexia are limitations of verbal short-term memory.” Short-term memory includes working memory, which is the temporary storage unit of the brain. For example, working memory allows one to remember a phone number provided orally while the caller is dialing. Mental processing, another subset of short-term memory, is equally important. To hear spoken words, the listener must be able to hold individual sounds in short-term memory long enough to integrate them into words and phrases. Translating letters into understandable units called words requires similar processing. Short-term memory also plays a role in reading comprehension: a

120. See Shaywitz, Dyslexia, supra n. 87, at 98–99.
121. Shaywitz, supra n. 5, at 54.
124. Id. at 47.
125. Shaywitz, supra n. 5, at 48.
126. Snowling, supra n. 44, at 128 (noting that a poor speller seemed to have a problem with short-term memory: “she was unable to segment the word in its entirety before her memory for it declined”), 119–122 (on processing speed); Sprenger-Charolles et al., supra n. 97, at 4 (noting that skilled readers are able to process and recognize an average of five words per second).
reader whose memory does not hold information long enough, or who is expending energy decoding words, will struggle with reading comprehension and likely need more time to read complex material.\textsuperscript{127}

In contrast to short-term memory, long-term memory stores knowledge permanently.\textsuperscript{128} It allows a reader to remember words mastered in the past and apply them to new situations.\textsuperscript{129} Without this ability, the reader must laboriously decode each written word repeatedly.\textsuperscript{130} A limited vocabulary stored in long-term memory also slows dyslexic readers.\textsuperscript{131}

Related to memory is the concept of fluency, the ability to read a word “accurately, quickly, smoothly, and with good expression.”\textsuperscript{132} Readers acquire fluency through practice; reading a word many times strengthens the neural circuitry for word recognition and retrieval.\textsuperscript{133} Fluency is supported when the brain recognizes common words automatically.\textsuperscript{134} As noted already, dyslexic readers use secondary passageways in reading and thus fail to establish the strong neural circuitry of their non-impaired counterparts.\textsuperscript{135} As a result, dyslexic readers struggle to read with fluency. The neural circuitry underlying this process is discussed next.

D. Functional Magnetic Resonance Imaging

Among the most important scientific advances in understanding how the brain decodes the written word are neuroimaging techniques that record the brain in action.\textsuperscript{136} These techniques

\begin{itemize}
  \item \textsuperscript{127} Shaywitz, supra n. 5, at 115.
  \item \textsuperscript{128} Carroll, supra n. 123, at 50.
  \item \textsuperscript{129} See Shaywitz, supra n. 5, at 79–81 (discussing the portions of the brain that perform this function); see also Hatcher & Snowling, supra n. 118, at 71 (noting a connection between long-term verbal learning and the ability to retrieve phonological information stored in long-term memory).
  \item \textsuperscript{130} Shaywitz, supra n. 5, at 111.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id. at 105 (distinguishing fluency from automaticity, which refers to “the neural processes that underlie fluent reading”); see also Carroll, supra n. 123, at 57 (distinguishing automatic processes from controlled processes and identifying recognition of common words as an automatic language-processing function).
  \item \textsuperscript{133} Shaywitz, supra n. 5, at 105.
  \item \textsuperscript{134} Carroll, supra n. 123, at 57
  \item \textsuperscript{135} Shaywitz, supra n. 5, at 82–84, 155.
  \item \textsuperscript{136} See Guinevere Eden, The Role of Brain Imaging in Dyslexia Research, 29 Perspectives (publication of the Intl. Dyslexia Assn.) 14, 14–16 (Spring 2003) (summarizing briefly
allow scientists to observe the brain as it performs various tasks to determine where the processing functions for each task take place. Among these techniques are positron emission tomography (PET) scans and functional magnetic resonance imaging (fMRI). Although the PET scan was developed first, it subjects the person being tested to radiation. The fMRI offers several advantages over the PET scan: it is completely non-invasive; testing can be repeated over time without harm to the test subject; and it offers tomographic (i.e., sectional) images.

The science behind the imaging techniques is fairly straightforward. Different areas of the brain control different skills, including language processing skills. Blood supply in one area will vary depending on the level of activity that area controls.

the history of imaging in dyslexia research); Habib & Démonet, supra n. 80, at 466 (summarizing thirteen studies through 2000 that compare images of non-dyslexic and dyslexic brains at work); Knight & Hynd, supra n. 84, at 32 (noting both benefits and caveats to testing through imaging); see also Sally E. Shaywitz & Bennett A. Shaywitz, The Neurobiology of Reading and Dyslexia, 5 Focus on Basics (publication of the Natl. Ctr. for Study of Adult Learning and Literacy) 11 (Aug. 2001) (available at http://www.ncsall.net/fileadmin/resources/fob/2001/fob_5a.pdf) (explaining how measures of blood oxygenation in brain tissue shows differences in how good readers and dyslexic readers use their brains). Gordon Sherman, The Possible Impact of Brain Research on Education, http://www.greatschools.net/cgi-bin/showarticle/2449 (accessed Apr. 23, 2009).


138. Knight & Hynd, supra n. 84, at 32–33. These two techniques are most familiar to general readers. Another is magnetoencephalography (MEG), a type of electroencephalography (EEG), which is also non-invasive. Id. at 32; Lyon et al., supra n. 49, at 4. For an accessible scientific explanation of the MRI, see Anthony Brinton Wolbarst, Looking Within: How X-Ray, CT, MRI, Ultrasound, and Other Medical Images Are Created, and How They Help Physicians Save Lives 19–21, 143–167 (U. Cal. Press 1999).

139. Kwong et al., supra n. 137, at 5678. This exposure to radiation through the contrast agent makes difficult repeated testing of one subject, limiting intra-subject averaging. Id.

140. Id. PET scan studies have continued to contribute to the literature. See e.g. E. Paulesu et al., Dyslexia: Cultural Diversity and Biological Unity, 291 Sci. 2165, 2165 (2001) (concluding from PET scan study that “there is a universal neurocognitive basis for dyslexia” despite cultural variations such as orthography); N. Brunswick et al., Explicit and Implicit Processing of Words and Pseudowords by Adult Developmental Dyslexics: A Search for Wernicke’s Wortschatz? 122 Brain 1901, 1901 (1999) (confirming through PET scans that “dyslexic readers process written stimuli atypically, based on abnormal functioning of the left hemisphere reading system”). For a discussion of the limitations of the fMRI in studying dyslexia, see Turkeltaub et al., supra n. 109, at 120–123.

141. Kwong et al., supra n. 137, at 5675.

142. Shaywitz, supra n. 5, at 75.

143. Id. at 70; Kwong et al., supra n. 137, at 5675–5676.
supply to areas that control reading. Oxygen in blood is magnetic, so an increase in blood is seen as an increase in brain function in an fMRI. This relationship between blood flow and energy metabolism has been understood since the late nineteenth century, although it was initially unclear whether the brain itself was responsible for variations in blood flow. That discovery came in the middle of the twentieth century. PET scans and other techniques were developed soon after to take advantage of this new understanding of how the brain works. The fMRI was developed later, in the early 1990s.

Soon researchers studying learning disabilities began to use the technique. Analyzing the brain images produced by fMRI, researchers identified the areas of the brain used by normal readers and the areas used by dyslexic readers. They discovered that subjects with dyslexia use different parts of their brains for reading than do non-impaired readers. Significantly for understanding the reading and processing problems encountered by law students, these researchers identified three pathways for reading. The normal route works most efficiently; the two alternative routes are slower. Brain images showing the areas activated by normal and by dyslexic readers illustrate the difference dramatically.

144. Shaywitz, supra n. 5, at 78–79.
145. Id. at 79, 73–74; see also Kwong et al., supra n. 137, at 5675 (explaining scientific aspects of oxygenation of hemoglobin and its relationship to mapping of brain activity).
147. Id. (discussing the findings of Seymour Kety and Carl Schmidt).
148. Id. (crediting Seiji Ogawa and Kenneth Kwong with developing fMRI); see also Seiji Ogawa et al., Brain Magnetic Resonance Imaging with Contrast Dependent on Blood Oxygenation, 87 Proc. Natl. Acad. Sci. U.S. 9868. 9869 (1990) (explaining the extension of MRI techniques to obtain information about biological function); Kwong et al., supra n. 137 (one of the earliest articles on fMRI).
149. Shaywitz, Dyslexia, supra n. 87, at 103.
151. Shaywitz, supra n. 5, at 71–89; Shaywitz, Dyslexia, supra n. 87, at 103.
152. Shaywitz, supra n. 5, at 81.
153. Id.
154. Id. at 83. For actual images and additional explanation, see the Yale Center for Dyslexia and Creativity, available at http://www.google.com/imgres?imgurl=http://dyslexia.yale.edu/images/brain_image001.jpg.
Because the alternate pathways used by dyslexic readers take longer for word processing and retrieval than do normal pathways, the reader with dyslexia needs more time. Dyslexic readers lack the automaticity of normal readers in decoding words, so they rely more on context, which also requires more time. In the law school setting, the student with dyslexia probably reads less efficiently than classmates using the normal brain routing system. Given that the dyslexic student’s brain works slower, extra time may level the playing field that biology tilted.

E. Testing for Learning Disabilities

Determining whether a person has learning disabilities draws upon a number of factors, including tests, observation, and history. The tests typically used to determine learning disabilities examine both achievement and cognitive skill. Specifically, they examine reading comprehension, decoding, vocabulary, short-term memory, and non-verbal reasoning. The most common tests include subtests or portions that can be given independently; while they change over time, the general names are Woodcock-Johnson Test of Achievement, Wechsler Adult Intelligence Test, and Nelson Denny Reading Test.

Two popular tests for determining a subject’s reading ability are the Woodcock-Johnson Reading Mastery Test and the Nelson Denny Reading Test. The Woodcock-Johnson test is composed

155. Shaywitz, *Dyslexia*, supra n. 87, at 102 (noting that a child with dyslexia may take over twelve times longer (measured in milliseconds) to process phonemes).

156. Id. at 104 (arguing that multiple choice tests, lacking context, penalize dyslexics).

157. Shaywitz, *supra* n. 5, at 20, 93–165 (describing clues to whether a person may have dyslexia and explaining approaches to diagnosing dyslexia in children and young adults).


159. Id.

160. The Woodcock-Johnson cluster of tests includes subtests for math fluency and writing fluency as well. The math portion is a two-minute test requiring the subject to complete simple, one-digit problems of addition, subtraction, and multiplication. Ofiesh et al., *supra* n. 3, at 41. The writing portion is limited to seven minutes and requires the subject to write sentences prompted by a picture and a number of words that the subject must include in the sentence. Id.

161. Id. at 36. Woodcock-Johnson tests are among the most widely used with postsecondary students who have learning disabilities. Id. Both Woodcock-Johnson and Nelson-Denny tests include speeded portions and are used to support the accommodation of extended test time. Id.
of a number of subtests. One of these, the “word identification” subtest, includes a list of actual words of increasing difficulty; the subject is asked to read as many words as possible.\textsuperscript{162} Example words include \textit{is}, \textit{find}, and \textit{mathematician}. Another subtest, called “word attack,” measures the subject’s decoding skills by requiring the subject to decode a list of pseudo-words. Examples of the pseudo-words, which increase in complexity, include \textit{dee}, \textit{straced}, and \textit{bafmotbem}.\textsuperscript{163} These subtests are not timed; rather, when the subject misses a certain number of answers, the testing is discontinued.\textsuperscript{164}

The Nelson Denny Reading Test is offered in both timed and untimed (or extended time) settings.\textsuperscript{165} The “reading comprehension” portion contains a number of reading passages and multiple choice questions that the subject answers on paper. In the timed settings, the subject has twenty minutes; in the untimed setting, the subject has up to forty minutes for the test.\textsuperscript{166} The “reading rate” portion is derived from the subject’s performance during the first minute of the “reading comprehension” portion.\textsuperscript{167}

One of the most commonly used tests for determining vocabulary, short-term memory, and non-verbal reasoning skills is the Wechsler Adult Intelligence Scale (WAIS).\textsuperscript{168} It, too, is composed of subtests. In the “vocabulary” subtest, the subject must provide meanings of words and is scored on the quality of the response.\textsuperscript{169} This subtest is untimed; it is discontinued when the answers fall below a certain benchmark.\textsuperscript{170} Example words are \textit{winter}, \textit{consume}, and \textit{remorse}.\textsuperscript{171} The “block design” subtest is timed; the subject is shown a design and has to recreate it using colored
blocks. The “digit span” subtest requires the subject to repeat strings of numbers given orally. The strings increase in length, and the subject must repeat each digit in the string both forward and backward. The subtest ends when the subject fails to provide a single string correctly in both directions.

The following subtests determine cognitive speed. The Wechsler “digit symbol” subtest provides the subject with two minutes in which to copy symbols paired with numbers. The Woodcock-Johnson “visual matching” subtest allows the subject three minutes in which to locate and circle the identical numbers in a row containing six numbers. The Woodcock-Johnson “retrieval fluency” subtest provides a category (e.g., things to drink) and asks the subject to name as many items as possible in that category.

Together these tests can determine the fundamental deficits in dyslexia: decoding skill, using both real words and pseudo-words; reading comprehension, in both timed and untimed situations; reading rate; short-term memory; non-verbal reasoning skills; fluency in retrieving words; and cognitive skill. In testing young adults, as opposed to children, the evaluator should bear in mind the educational level of the person being tested. A person with a college degree is unlikely to struggle at word identification tests, but may show the hidden disability in tests of oral reading or timed comprehension.

Testing is just part of the diagnosis, especially for those beyond secondary school age. The evaluator observes the subject carefully throughout the evaluation; the evaluator may also review observations made by teachers in the past as part of learning the subject’s history of reading and language challenges. “A developmental history of difficulties with language, particularly phonologically based components of language, often provides the clearest and most reliable indication of a reading disorder.”

172. Id. at 26–27.
173. Id. at 27.
174. Ofiesh et al., supra n. 3, at 40.
175. Id.
176. Id.
177. Shaywitz, supra n. 5, at 163.
178. Id.
179. See id. at 150–165 (providing anecdotes of young adults with dyslexia and emphasizing the role of each person’s history in reaching a diagnosis).
180. Id. at 156.
Indicators include learning to read late, laborious reading, poor spelling, and a need to devote extra time to reading. Additional clues include vulnerability to noise and movement while reading, as well as difficulty learning a foreign language.

IV. ACCOMMODATING WITH EXTRA TIME

Once it is accepted that learning disabilities exist and slow the processing of written information, and that tests can determine the level of disability a student experiences, the question turns to accommodations that level the playing field. A frequent accommodation requested for students with learning disabilities is additional time, which is linked to the phonological weakness of dyslexic students. One of the leaders of the Connecticut Longitudinal Study and the author of numerous articles and books on dyslexia makes a strong case for extra time, based on the findings of both personal interviews and brain imaging. She concludes that reading can be tiring work for dyslexics, requiring “enormous resources and energy.” Timed tests reveal that decoding remains very laborious for compensated dyslexics; they are neither automatic nor fluent in their ability to identify words. Multiple-choice examinations, too, by their lack of sufficient context, as well as by their wording and response format, excessively penalize dyslexics. This Part reviews some of the scientific literature that has examined extra time as an accommodation.

181. Id.
182. Id. at 116.
183. See Lindstrom, supra n. 9, at 231 (“[E]xtended testing is the most commonly used accommodation in test situations . . . ”). The testing accommodation typically is double time or time-and-a-half. See Rowe, supra n. 2, at 54 (noting request for more time on exams). On the LSAT, however, some students may receive just a few minutes extra for each section. Id. at n. 284; see infra n. 236 (discussing LSAT time accommodations). The request is most common on exams, though as discussed infra in Part V, students sometimes request more time on writing assignments.
184. See Lindstrom, supra n. 9, at 231 (discussing extra time on exams to accommodate phonological weakness).
185. Shaywitz, Dyslexia, supra n. 87, at 102–103.
186. Id. at 103.
187. Id. at 102–103.
188. Id. at 104; see also Sprenger-Charolles et al., supra n. 97, at 5–6 (discussing the use of context in reading).
An early study showed how extra time on tests can level the playing field among students with and without dyslexia.\textsuperscript{189} Thirty-one University of California students were administered reading tests that measured reading rate, vocabulary, and comprehension.\textsuperscript{190} Fifteen of the students were normally achieving, while sixteen had learning disabilities.\textsuperscript{191} Thirteen of the fifteen normally achieving students completed the test in the allotted twenty minutes.\textsuperscript{192} None of the students with learning disabilities did.\textsuperscript{193} The extra time that the students with learning disabilities needed to complete the test ranged from four to twenty-nine minutes.\textsuperscript{194} Significantly, in untimed tests, the students with learning disabilities performed as well as the normally achieving students.\textsuperscript{195} Moreover, the normally achieving students did not perform significantly better when they were given extra time.\textsuperscript{196}

Recent work has confirmed the results of this study.\textsuperscript{197} In analyzing a battery of tests taken by eighty-four undergraduate students, researchers found that the scores of normally achieving students improved only modestly (an average of 3.59 points) with extra time while the scores of students with learning disability improved significantly (an average of 16.14 points) under extended time conditions.\textsuperscript{198} The test group included forty-one normally achieving students and forty-three learning disabled students.\textsuperscript{199} All were between eighteen and twenty-five years of age, and all

\textsuperscript{189} See M. Kay Runyan, \textit{The Effect of Extra Time on Reading Comprehension Scores for University Students With and Without Learning Disabilities}, 24 J. Learning Disabilities 104 (1991) (discussing how administering a reading test to university students with and without learning disabilities impacted their performance under timed and extra-time conditions).

\textsuperscript{190} The Nelson Denny Reading Test was the testing instrument used. \textit{Id.} at 105.

\textsuperscript{191} \textit{Id.} The two groups selected were controlled for ethnicity, gender, age, and scores on the Scholastic Aptitude Test (SAT). \textit{Id.}

\textsuperscript{192} \textit{Id.} at 106. Two of the fifteen normally achieving students who needed extra time completed the test in three and four minutes longer, respectively, than the twenty minutes allotted. \textit{Id.}

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} \textit{Id.} at 107.

\textsuperscript{195} \textit{Id.} at 106.

\textsuperscript{196} \textit{Id.} at 107.

\textsuperscript{197} Ofiesh et al., supra n. 3, at 47 (summarized infra nn. 193–200 and accompanying text); see also Lesaux et al., supra n. 158, at 21–22 (explaining infra nn. 200–211 and accompanying text); Lindstrom, supra n. 9, at 231.

\textsuperscript{198} Ofiesh et al., supra n. 3, at 44, 47. The average score for learning disabled students rose from 202.65 points to 218.74 points, while the average score for normally achieving students rose from 230.66 points to 232.24 points. \textit{Id.} at 44.

\textsuperscript{199} \textit{Id.} at 39.
spoke English as their native language. The students were given a variety of tests typically used to test for learning disabilities. The tests assessed processing speed, reading comprehension, and reading rate as well as fluency in reading, math, and writing. The students also took a test to assess their intelligence.

The results of the study showed that students with learning disabilities “performed at a slower and more variable rate” than did normally achieving students. Because the study also tested the students’ IQ scores, it concluded that students with learning disabilities needed more time “because they have the knowledge and capabilities to answer questions correctly, but slow reading may hamper their performance.”

A third study focused on reading comprehension, as students with learning disabilities need more time in order to read and process questions on exams. The study examined reading comprehension performance in timed and untimed testing conditions. Sixty-four participants in the study included thirty-three women and thirty-one men, ranging in age from seventeen to sixty. They were drawn from the Vancouver, British Columbia, metropolitan area and included a range of socioeconomic and educational backgrounds. The participants were divided into two initial groups: normal readers and those with reading disabilities. Later, four subgroups were determined, with each initial group divided into two: normal readers were divided into above average readers and average readers, while participants with

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200. Id.
201. The tests included the Wechsler Adult Intelligence Scale-III (WAIS-III) Digital Symbol test; Woodcock-Johnson Tests of Cognitive Ability and Achievement III (WJ III COG and WJ III ACH) Visual Matching, Decision Speed, Rapid Picture Naming, and Retrieval Fluency tests; and the Nelson Denny Reading Test (NDRT). Id. at 40–41. For explanations of these tests, see supra Part III(E).
202. Id. at 40–41.
203. The Kaufman Brief Intelligence Test (KBIT) was used. Id. at 40.
204. Id. at 46.
205. Id. at 47.
206. Lesaux et al., supra n. 158, at 21. The authors noted that “individuals’ differences in the accuracy and speed of single word reading account for the most substantial variance in comprehension.” Id. at 23.
207. Unlike earlier studies, this one also examined “whether there was a differential influence of vocabulary, short-term memory, and reasoning skills on reading comprehension performance.” Id. at 24.
208. Id. (noting that the average educational level was grade twelve).
209. Id. at 25.
Reading disabilities were divided into below-average readers and those with severe reading disabilities.\textsuperscript{210} The participants were administered the same test under both timed and untimed conditions.\textsuperscript{211} While all four groups benefited from extra time, participants in the lower two groups received the most benefit.\textsuperscript{212} Under untimed conditions, the performance of the third lowest group (below-average readers) approached that of the second group (average readers). The performance of the lowest group “remained significantly lower than that of all other groups.”\textsuperscript{213} The study’s authors determined that this lowest group lacked not only basic skills but also higher-level processing.\textsuperscript{214} On the other end of the spectrum, the normally achieving readers improved performance under untimed conditions, but not significantly so.\textsuperscript{215} The study concluded that “increased time for test taking is an appropriate accommodation to compensate for the reading difficulties of individuals with a reading disability.”\textsuperscript{216}

Another recent study shows the benefit of extended time for students with learning disabilities, but notes that extended time benefits medium and higher achieving non-disabled students as well.\textsuperscript{217} The study included 1,929 high school juniors who were given the 2001 version of the SAT under conditions that varied the time limit.\textsuperscript{218} In addition, testing conditions varied in whether sections of the test were timed separately with breaks or whether students were allowed to use the time as they chose. The students were placed in four groups to test the two variables: (1) double time with section breaks, (2) time-and-a-half with section breaks, (3) time-and-a-half with no section breaks, and (4) double time with no section breaks.\textsuperscript{219} The final sample included 1,929

\begin{itemize}
\item \textsuperscript{210} Id. at 25, 27.
\item \textsuperscript{211} The Nelson Denny Reading Test (forms G and H) were used. Id. at 25.
\item \textsuperscript{212} Id. at 40.
\item \textsuperscript{213} Id. at 40, 41.
\item \textsuperscript{214} Id. at 41.
\item \textsuperscript{215} Id. at 45.
\item \textsuperscript{216} Id. at 46.
\item \textsuperscript{217} Ellen B. Mandinach et al., The Impact of Extended Time on SAT Test Performance 1 (College Bd. Publications, Research Rep. No. 2005-8, 2005) (summarized in Lindstrom, supra n. 9, at 233).
\item \textsuperscript{218} Id. at 4–6. In the actual administration of the tests in the study, students were given shorter portions of the test, not more time to complete the full test. The results were equivalent to double time or time-and-a-half. Id.
\item \textsuperscript{219} Id. at 5–6.
\end{itemize}
students, of which 264 were either learning disabled or had ADHD. The normally achieving students were divided into three ability levels: low, medium, and high. The learning disabled/ADHD students were divided into two ability levels: lower and higher.

This study showed that extra time helps medium and high ability test-takers with and without disabilities. In contrast, the students in the lower ability categories gained little or no benefit from the extra time, again regardless of whether they had disabilities or were normally achieving. The researchers concluded that when students lack knowledge and strategies for solving test problems, extra time does not enhance performance. Extra time seemed to have more of an impact on the math portion of the test than the verbal portion, though in both the math and verbal portions of the test the best testing combination was time-and-a-half with section breaks. The researchers noted in their report that in complex problem solving (e.g., reading comprehension or math problems) extra time may be beneficial, while in answering more straightforward questions (e.g., verbal analogy and sentence completion) extra time confers no benefit.

The general conclusion of these studies and others is that extra time levels the playing field without providing an undue ad-
vantage to students with learning disabilities.\textsuperscript{228} The first two studies also show wide variance in the amount of time needed by students with learning disabilities\textsuperscript{229} and suggest that the severity of each student’s disability determines the extra time that student needs.\textsuperscript{230}

In the law school context, the challenges facing the dyslexic student may be pronounced and time is likely to be an issue for many types of evaluation procedures. Long, complicated essay tests are the norm, and law students with learning disabilities need more time to read, parse through, and digest the material in order to work through the legal implications, craft a solution, and write an essay. Although multiple choice tests are not used as frequently in law school, they deprive students with learning disabilities of the opportunity to demonstrate their comprehensive knowledge because the questions lack sufficient context. In classes where students must produce papers within tight deadlines, students with learning disabilities may need more time than their non-impaired classmates to learn new vocabulary, master case names and facts, and read dense legal documents.

V. IMPLICATIONS FOR THE LAW SCHOOL CLASSROOM

The findings explored above strongly suggest that extra time is a reasonable accommodation because (a) students with learning disabilities process written information more slowly and (b) extra time can accommodate these students without providing them with an unfair advantage. But whether extra time makes sense from a pedagogical or administrative perspective varies depend-

\textsuperscript{228} Runyan, supra n. 189; see also Gregg et al., supra n. 61 (discussing the timed impromptu essay exam). But for analysis concluding only weak support for the theory underlying the Runyan experiment and other studies, see G. E. Zuriff, Extra Examination Time for Students with Learning Disabilities: An Examination of the Maximum Potential Thesis, 13 Applied Measurement in Educ. 99 (2000). Notably, Zuriff’s analysis does not offer an opposing study to prove that extra time is an inappropriate accommodation, but simply argues against the strength of the support for earlier studies.

\textsuperscript{229} See Runyan, supra n. 189 (reporting the results of an early study that measured the impact of extra test-taking time on students with and without dyslexia); see also Huesman & Frisbie, supra n. 95, at 1 (summarizing the results of gender proportions in previous studies).

\textsuperscript{230} This conclusion suggests that the frequent accommodations of double time or time-and-a-half may be used more for administrative convenience than as accurate measures of each dyslexic student’s true needs. See infra pt. V(A) (describing potential administrative burdens of offering many different testing periods for timed exams).
This Part first considers the request for extra time in testing situations, then for paper classes, and finally in the context of the legal writing classroom and in other skills courses.

A. Extra Time on Exams

In most testing situations, providing extra time for students with learning disabilities makes sense. “Dyslexia robs a person of time; accommodations return it.”

The goal of law school exams is generally understood to be testing the analytical skill of students, not their speed in accomplishing various tasks. While law students frequently use the full time allotted to each exam (typically three or four hours), professors expect students to complete the exam in the time allotted and create the exam with that expectation in mind.

The amount of extra time provided should be closely geared to the individual student’s degree of disability. As shown earlier...

231. Lindstrom, supra n. 9, at 230 (noting that accommodation recommendations may vary “from one environment to another for the same individual”).

232. See Gregg et al., supra n. 61 (discussing the timed impromptu essay exam). Most studies are performed on students taking multiple choice tests, and one such study specifically noted that “it is unclear how these results would generalize to the amount of time needed for essay exams or other test formats.” Ofiesh et al., supra n. 3, at 49. Given the processing and writing difficulties students with learning disabilities experience, it seems logical to conclude that they need additional time on law school tests, whether the test is multiple choice, short answer, or essay.

233. Shaywitz, supra n. 5, at 314.

234. Rowe, supra n. 2, at 54 (referring to presentation of Laura Rothstein at the 2004 Annual Meeting of the Association of American Law Schools). Although the focus of this Article, and particularly this section, is accommodating with extra time, the challenges multiple choice exams pose for learning disabled students must be mentioned. Students with dyslexia may compensate for their disability by gathering clues from context; multiple choice questions by their nature tend to provide less context and thus may not be the best testing tools for students with learning disabilities, even when extra time is allowed. Shaywitz, Dyslexia, supra n. 87, at 103.

235. Rowe, supra n. 2, at 54 n. 286 (noting one expert’s belief that professors would have a difficult time establishing that the goal of a law school exam was to test speed); see also Ofiesh et al., supra n. 3, at 37, 47 (noting that most exams actually test both speed and knowledge and suggesting that to truly test knowledge all students should be given more time on exams). Some professors are embracing the idea of untimed exams for all students by, for example, setting aside an extra classroom with a teaching assistant where students who decide they want more time can take the exam. Interview with Hilary Gerdes, Senior Dir. Disability Servs., U. of O. (Feb. 16, 2009).

236. A more precise level of accommodation is possible, as shown by administrators of the LSAT. Rowe, supra n. 2, at 54 n. 284 (explaining Van Tol, supra n. 10). Based on the level of disability, students may receive just a few extra minutes per test section. See id. Thus, the range of time accommodating any students in a single testing cycle could range...
er, learning disabilities exist on a continuum,\textsuperscript{237} not on a strict, three-step scale where each student needs no extra time, time-and-a-half, or double time. The standard accommodations of time-and-a-half or double time likely exist primarily for administrative ease on at least two points. First, it is much less of an administrative burden for an exam proctor to announce just two or three stop times (regular time, time-and-a-half, and double time) rather than a range of different times to accommodate every student with learning disabilities. Second, students who have different testing periods would likely need to be in different testing rooms. Few law schools have enough rooms to provide large numbers of students with separate testing facilities.\textsuperscript{238} Despite these administrative burdens, the studies discussed in Part IV indicate that students with learning disabilities need widely different accommodations to level the playing field.\textsuperscript{239} To achieve fairness, schools should consider the extent to which they can provide more accurate accommodations than simply time-and-a-half or double time. If schools are willing to provide these tailored accommodations, the exam results will be fairer.\textsuperscript{240}

An important consideration in providing extra time on exams is the extent to which technology can ameliorate the student’s disability. Consequently, most conversations with disability coordinators address the possible role of technology in providing appropriate accommodations. If, for example, a student has audito- from a few minutes to many hours.

While double time and time-and-a-half are the most frequently discussed accommodations, schools may offer a variety of time periods. See Gerdes, supra n. 230 (discussing the frequency of a 25 percent increase in time allotted at the University of Oregon, especially for law students).

\textsuperscript{237} See supra pt. III(C) (describing the fundamental findings of the Connecticut Longitudinal Study).

\textsuperscript{238} Space limitations may already be so constrained in some schools that all students needing extra time accommodations are grouped together in a single room. The students receiving double time will be disrupted when the proctor ends an exam for students receiving time-and-a-half. Imagine the disruption with additional stop times, an especially difficult situation for students whose learning disabilities co-exist with ADHD.

\textsuperscript{239} See supra nn. 189–196 and accompanying text (explaining results of experiment with University of California students, in which students with learning disabilities taking a twenty-minute test needed additional time ranging from four minutes to twenty-nine minutes).

\textsuperscript{240} An additional benefit may be that the classmates of learning disabled students feel less resentful. Knowing that classmates receive extra time in proportion to their disability seems intuitively fairer than suspecting that learning disabled classmates all receive double time.
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ry strengths and serious reading difficulties, the accommodations may include use of oral exam questions. One option is using questions that are digitally recorded in advance and played back during the exam. Another option is using questions scanned into a computer that reads the words during the exam. Both options would reduce the time the student needed to struggle with the reading portion of the exam and would reduce the extra time needed as an accommodation.\textsuperscript{241}

A small number of professors offer exams under extended time conditions, for example an eight-hour exam or an overnight exam. As the amount of time allowed for the exam increases, the need for accommodation would seem to decrease. Professors design these exams specifically so that students will have time to mull over ideas, rest, and return to the project with fresh insights. Although students with dyslexia may not have as much time for resting as other students, all but the most severely disabled may be able to complete the exam within the allotted time.

B. Extra Time in Paper Classes

All law schools are required to provide students with at least one “rigorous writing experience after the first year.”\textsuperscript{242} Most schools provide this experience by having students write papers, either as part of seminar classes or through independent work with a professor. Additionally, schools are providing more elective writing courses for law students.\textsuperscript{243} These experiences typically require students to read large amounts of complex material, and then organize, write, and edit a lengthy paper.

While providing extra time to complete a paper seems a reasonable accommodation for a student who reads slower than classmates,\textsuperscript{244} few learning disabled students request this accommodation and even fewer law schools provide it.\textsuperscript{245} The most commonly given reason is that each student has an entire term in

\begin{itemize}
  \item \textsuperscript{241} E-mail from Hilary Gerdes, Senior Dir. of Disability Servs., U. of Or., to Suzanne E. Rowe, Prof., U. of Or. Sch. L. (Feb. 19, 2009) (copy on file with Author).
  \item \textsuperscript{244} Studies supporting the accommodation of extra time on tests are silent about whether extra time is appropriate for students who are writing papers outside of class.
  \item \textsuperscript{245} See supra n. 11 (providing the results of an informal survey).
\end{itemize}
which to complete the work; problems in completing a paper in such an extended time stem as much from time management, life choices, and discipline as from the disability. Moreover, the several-month period of time for writing papers mirrors the real world (or is more generous), unlike exams that take place in artificially constrained settings of just a few hours.

To assist all students in meeting the demands of writing a major paper, the professor may want to share with the class strategies for accomplishing a large project over an extended period of time. Such strategies may include setting aside time each week to work on the project; setting interim deadlines for researching specific portions; creating an outline; drafting the document, and editing; and arranging a few times to meet with the professor to discuss progress and concerns. 246

One can imagine several possible accommodation requests that should be denied in the context of a paper class. For example, to address concerns over sufficient time to read and process vast amounts of information and produce a paper, a student with learning disabilities may ask to complete an alternative assignment with less analytical complexity, to simply outline the full paper, or to write several shorter papers instead of one comprehensive paper. Each of these requests should be denied as a fundamental alteration of the course. 247 When faced with similar issues in the context of an exam—a student requested both that long exam questions be broken into component parts and that she be allowed to write an outline rather than an essay—the United States Office of Civil Rights agreed with the law school that such accommodations would fundamentally alter the course. 248 Writing a lengthy paper on a challenging subject tests a student’s “ability to understand and analyze a complex factual situation, to recognize the material facts and their relevance, to identify essential issues, to prioritize these issues and then to develop an organized response, applying legal principles to the facts and consider-

246. For additional ideas, see Rowe supra n. 2, at 44–45. These strategies will benefit all students, but may be particularly useful for students with both learning disabilities and ADHD.

247. For a discussion of fundamental alteration, see supra Part II(B). See also Rowe, supra n. 2, at 15–17 (discussing the process for determining whether a student is entitled to an accommodation).

ing all alternatives in a coherent way.”\textsuperscript{249} Writing such a paper is probably even more effective than writing exam essay answers in testing the student’s ability “to articulate conclusion[s] clearly and persuasively, demonstrating sound and persuasive reasoning.”\textsuperscript{250} The school was not required to modify its exam in order to accommodate the student.\textsuperscript{251} Such a conclusion seems even stronger in the context of writing papers.

If a student could produce compelling reasons for needing extra time as an accommodation in a paper course, providing the extra time probably would not impose an undue administrative burden on the professor or other students in the class. This is especially true when the student is working independently of other students and when no class discussions are tied specifically to the completion of the paper, as is the situation in many paper classes. The administrative burden on the professor appears in situations where the student must produce multiple drafts, which the professor must mark and return, and meet with the student to discuss.\textsuperscript{252} If the drafts form the basis for class discussion, either because students are presenting their works-in-progress or because the professor is providing general comments on the drafts in a class lecture, then the student is asking to step out of sequence, which could diminish the student’s educational experience.

Furthermore, even if some additional time is required, administrative reasons may dictate that the student complete the paper within a definite window (e.g., by the end of the exam period, by the end of the winter break).\textsuperscript{253} If students are being graded on a curve, then the entire class should not be denied grades.

\textsuperscript{249} Id. (analyzing goals of essay exams).
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} The American Bar Association’s Standards for Accreditation of Law Schools include the following guidance in Interpretation 302-1:

\begin{quote}
Factors to be considered in evaluating the rigor of writing instruction include: the number and nature of writing projects assigned to students; the opportunities a student has to meet with a writing instructor for purposes of individualized assessment of the student’s written products; the number of drafts that a student must produce of any writing project; and the form of assessment used by the writing instructor.
\end{quote}

\textsuperscript{253} For a discussion of administrative burdens, see supra Part II(B).
while one student takes months to complete the paper.\textsuperscript{254} As another example, the professor should not have to wait indefinitely (or up to the student’s graduation day) to tie up the loose ends of a particular class. Practically, an extension through the exam period or through a short term break (or a few weeks into the summer) should be sufficient; moreover, longer extensions are likely to leave the student working on the old paper while undertaking new assignments in new classes, defeating the purpose of the extension.

Of course, a key issue in granting the accommodation of extra time in a paper class would be whether the extension would fundamentally alter the course for the student. The extra time could be perceived as lowering academic standards if the student was not held to the same overall expectations as other students in the course.

C. Extra Time in First-Year Writing Classes

In legal writing classes, extra time for individual assignments can be pedagogically problematic.\textsuperscript{255} Writing assignments often build on each other, requiring students to have mastered a certain set of organizational paradigms and analytical concepts before proceeding to the next assignment.\textsuperscript{256} A student who takes longer on the first assignment may be unable to move successfully to the second assignment with the rest of the class.\textsuperscript{257} The student would be unlikely to benefit from class discussions or group exercises on the new assignment, and would likely struggle to produce sufficiently competent work. Moreover, providing extra time for learning disabled students to complete legal writing assignments does not prepare students for the real world of law practice, where judges do not allow learning disabled attorneys longer to file briefs and supervisors do not give learning disabled associates in law firms lighter client loads.\textsuperscript{258}

\textsuperscript{254} In schools that do not allow the grade “Incomplete,” this option would not be available.

\textsuperscript{255} Rowe, supra n. 2, at 37–41 (discussing accommodations for learning disabled students, some of which require little extra time). The discussion in Part V(C) focuses on more substantial needs for extra time.

\textsuperscript{256} Id. at 37–38.

\textsuperscript{257} Id.

\textsuperscript{258} See Zukle, 166 F.3d at 1044 (noting that doctors in emergency rooms do not receive extra time to accommodate disabilities); Pandazides v. Va. Bd. of Educ., 804 F. Supp. 794.
One argument for letting the student with learning disabilities take more time is that the student would be able to see the bigger picture—through the professor’s later lectures and class discussions—while still working on an earlier assignment. An additional argument for allowing more time early in the term is that the student with learning disabilities may simply need more time to become accustomed to the new vocabulary and structure of law school arguments. Once the student has mastered these fundamentals, her strong reasoning skills and creativity may allow her to succeed. Flipping the real world analogy, students are not asked to work on real world timetables as they make their initial efforts to write memos or briefs, especially in the early weeks of the term. Instead, professors may provide weeks of instruction on how to write a single memo that later in the semester—or in a summer job—the students will write in a single week. As long as the student is able to produce documents at a normal rate by the end of the term, the argument goes, the student could meet the course objectives.  

Modifying the rhythm of the course to suit each student with learning disabilities would, however, be an unreasonable administrative burden on the teacher, especially with the student-teacher ratio currently averaging forty-one students per professor. Consider a teacher doing the following for a class of forty-one students during a single week: (1) grading final memos for most students, (2) holding individual office conferences on drafts of the final memo with others, (3) reviewing even earlier class material with a few others, and (4) marking the first memo written by the student with the most severe learning disabilities.

The best approach may be for a learning disabled student to carry a lighter course load, which would provide extra time for reading, but keep the student on track with the timing of the as-

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803 (E.D. Va. 1992), rev’d, 13 F.3d 823 (4th Cir. 1994) (noting that unlimited time to take a teacher certification exam was not a reasonable accommodation since such modifications would not be available in real world teaching jobs).

259. Of course, it is possible that the student with learning disabilities may never be able to produce work at the same speed as non-disabled peers. In those instances, the attorney with learning disabilities will need to either devote more hours (some unbillable) to projects or find areas of law to practice in that require less frequent immersion into new fields with vast amounts of reading.

260. According to a national survey, in 2008 legal writing classes contained an average of 41.65 students in the fall semester and 41.09 students in the spring semester. ALWD & Leg. Writing Inst., supra n. 243, at 62.
The typical course load in the first year is fifteen credits per semester, a student who did not take a three-credit course in the fall semester would likely still be classified as full time for standing and financial aid purposes. Once a student becomes familiar with legal reading, it may not be necessary to light-load in the second semester. Because most schools require fewer than ninety credits for graduation, light-loading one semester in the first year should allow the students to graduate on time. A student who light-loaded in both semesters of the first year may need to take summer school courses to graduate on time.

In the most extreme case, such a student may need an extra semester to accumulate enough credits for graduation. While the extra time and expense would be unfortunate, the increased opportunity for success may justify both. Moreover, the student would get a realistic perspective of the working world, where projects may take longer and promotions tied to amount of work produced might be delayed slightly. The school could take measures to reduce the financial impact. If the school used a tuition plateau (for example, charging students a flat fee for taking between nine and sixteen credits), the school could charge slightly less for students with learning disabilities who needed more semesters to complete the course of study. The reduction would reflect the fact that the student took fewer courses—and consumed fewer school resources—during each semester. If the school charged tuition per credit hour, the student would simply pay the tuition over a longer period of time. In both situations, the school might also reduce other fees or offer stipends for housing during the extra semester. In a difficult economy, spending longer in school and having more opportunities for part-time or summer work could actually benefit students in the job market. Given that few students would actually need to take an extra semester and that students have many personal reasons for needing to extend law school, employers would not be able to guess that a student who took an extra semester had a learning disability.

261. See Reis et al., supra n. 45, at 129 (noting that a reduced course load is a compensation strategy employed by highly successful undergraduate students).
262. Reducing tuition for a few students who needed an extra semester could not be seen as an undue financial burden on the law school. See supra pt. II(B).
There are a few potential downsides to a lighter course load, but they are negligible compared to the educational benefit. First, a student might use the extra time provided by a light load to focus on doctrinal classes, not the legal writing class. If those doctrinal courses carry more credits than legal writing, a situation that is increasingly less common as legal writing courses are awarded more credits, a student could try to raise his grade point average by ignoring the lower-credit writing course in favor of the higher-credit doctrinal class. Anecdotal evidence suggests just the contrary: most students spend more time on their legal writing classes, even when those classes are awarded fewer credits. Students invest time in legal writing because they recognize the need for the practical skills that the course teaches. A learning disabled student who did poorly in legal writing would end the term with a poor writing sample, a weak reference from the legal writing professor, and insufficient skills for doing the work of the typical summer job.

Another potential downside is that other students could perceive the light load as an unwarranted benefit. But classes not taken during the first year of law school would have to be taken later as a second-year student, a scenario few students would willingly choose. Moreover, if students understood the challenges faced by learning disabled students—a goal that could be accomplished in a short presentation during orientation—they would quickly stop making such arguments. In addition, classmates rarely find out about light loads carried by other students, in large part because students who take the light load are embarrassed by the circumstances that require the accommodation (whether that is a learning disability, family obligations, academic struggles, or something else).

263. See ALWD & Leg. Writing Inst., supra n. 243, at 7 (reporting number of credit hours awarded by semester at the reporting schools). For 2008, during the fall semester of the first year, sixty-seven schools awarded legal writing courses three credits and six schools award four credits. In the spring semester of the first year, fifty-nine schools awarded three credits and two schools award four credits. Id. Additionally, almost fifty schools required a third semester of legal writing, id.; students would likely realize that skimping in the first two semesters would cause problems later on. Past surveys are available at www.lwionline.org/surveys.html.

264. See supra n. 12 (relaying story of valedictorian whose classmates thought she received high grades through an unfair advantage).

265. Shaywitz, supra n. 5, at 164–165 (rejecting the notion that students pretend to be dyslexic because the social costs are so high).
D. Extra Time in Skills Courses

With the release of the Carnegie Report, schools will likely try to increase the number of skills courses offered. How students with learning disabilities are accommodated in the many types of skills courses depends on the nature of the course, the assignments, and the educational goals. Skills courses with reading-intensive components are likely to encounter some of the same problems discussed above for legal writing courses. These courses include litigation simulation courses, in which students must quickly read and process pleadings and authorities and in a short period draft responsive pleadings, motions, or briefs. Professors designing such courses and disability administrators working with faculty and students to determine appropriate accommodations should reflect on the strategies that have proved successful in legal writing courses, including light loading.

On the other hand, skills courses that primarily involve listening, discussing, or oral advising may draw on the strengths of learning disabled students and require no time accommodations. Such courses may include client interviewing, client counseling, and negotiation.

VI. CONCLUSION

Learning disabilities do exist, despite the qualms of academics who consider reading second nature. Becoming familiar with the historical development and current scientific understanding of learning disabilities can facilitate better accommodations, and thus better teaching, testing, evaluation, and grading. Schools should provide extra time in ways that address each student’s specific learning disability and respect the pedagogical goals of the various courses a learning disabled student may take.

The conundrum is that students are placed in a variety of settings and extra time is an appropriate accommodation in just

266. Action was not as immediate as one might have expected or hoped. According to a national survey, twenty-eight schools have made curricular changes in response to the report, eighty had discussed possible changes, and fifty-one had not discussed or made changes. ALWD & Leg. Writing Inst., supra n. 243, at 73.

267. Shaywitz, supra n. 5, at 126–127 (including among the common strengths of persons with dyslexia “exceptional empathy and warmth,” “high-level conceptualization and the ability to come up with original insights,” “big-picture thinking,” and “resilience and ability to adapt”).
some. Extra time will level the playing field on the typical three- or four-hour exam, though extra time may not be warranted for an eight-hour or certainly a twenty-four-hour exam. Extra time is rarely requested, and should rarely be given, in classes where the primary evaluation tool is a long, complex paper that students have an entire term to research and write.

The most challenging situations involve legal writing courses and other skills courses with deadline-driven, writing-intensive components that require large amounts of reading. In these situations, the best accommodation may be allowing the student with learning disabilities to light load during the first semester of legal writing or during any semester in which a reading-intensive skills course is taken. This accommodation would not fundamentally alter the course or impose administrative burdens on the professor, but would provide the learning disabled student with time to master the material.

While frequent light loading could require an occasional student to have to take summer courses or even to extend law school by a semester, the school could adjust tuition to reflect that the student had taken fewer courses (and thus consumed fewer school resources) during the earlier period. The student would have an appropriate accommodation under the Americans with Disabilities Act and still be assured of learning the essential skills for practicing law.

268. While the focus of this Article is the reading challenges facing law students with dyslexia, these students may have related problems with writing. See supra nn. 65, 116, and accompanying text (discussing writing challenges facing dyslexic students). For accommodations needed to address writing challenges, see Rowe, supra n. 2, at 37–41.
USING DOWRY DEATH LAW TO TEACH LEGAL WRITING IN INDIA

Marilyn R. Walter*

I. INTRODUCTION

Dowry, the money, property or other goods a bride brings with her into the marriage, has been part of Indian culture for centuries. Dowry was originally based on the practice under Hindu law of the bride’s father giving her gifts in honor of the marriage. These gifts would remain the bride’s property. Now, however, in many cases, and at all economic levels of society, the voluntary aspect of dowry and the bride’s ownership of the gifts have disappeared. Rather, before marriage, the dowry price is the subject of negotiation between the families, with the groom’s family in the position of power. Conflicts over dowry may have deadly results, as I learned on my sabbatical in India in the spring of 2008.

A month after I arrived in New Delhi, I noticed a small article in The Times of India. The headline was Dowry Angle to Death, and the article read:

* Professor of Law and Director of the Writing Program, Brooklyn Law School. The Author wishes to thank Elizabeth Fajans who made insightful comments on an earlier draft of this essay and Ved Kumari of the Law Faculty of Delhi University who made my visit to her Law Faculty possible. In addition, the Author is grateful for the support provided by the Brooklyn Law School sabbatical program.


Any property or valuable security given or agreed to be given either directly or indirectly—
(a) By one party to a marriage to the other party to the marriage; or
(b) By the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.
A 25-year-old woman was found dead inside her Sangam Vihar house on Monday night. The victim, identified as Pushpa, was found hanging in her house. After her family claimed it was dowry death, a case was registered.

Police said the victim was married to Deepak Kumar, who has been working in a private company for four years, and the couple had a two-year-old son. The father of the girl alleged that his daughter has [sic] been killed. Kumar, who is the main accused in the case, has been detained and would be arrested if the postmortem report indicts him, police added.2

By then I had been in India long enough to have learned about dowry death. I had begun my seven-week association as a Visiting Professor with the Law Faculty at Delhi University on January 28, 2008. Soon after, I heard the term “dowry death” from a group of students doing a collaborative exercise in the Clinical Lawyering course at the Law Faculty in which I was teaching. Under the facts, a woman committed suicide by hanging herself shortly after her husband harassed her for bringing bad luck to him and saying his life was miserable because of her. The students were discussing the facts and considering various theories that might be applicable. Their first response was “dowry death.” That term describes a set of shocking circumstances. It occurs when the husband physically or mentally harasses the wife or the wife’s family for dowry, and in response, the wife either commits suicide or is murdered by being set afire by her husband or in-laws dousing her with household kerosene (also called “bride burning”).3

Statistics from the National Crime Records Bureau of India indicate that 7,618 cases of dowry death were reported in 2006.4 These deaths continue to occur despite national legislation that prohibits dowry5 and provides criminal penalties for those con-

2. Dowry Angle to Death, Times of India 5 (Feb. 20, 2008).

Section 3—If any person . . . gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five
victed of dowry death and related offenses. The Indian Penal Code has three major statutes relating to this problem: section 304B dealing with “dowry death,”6 section 306 dealing with “abetment to suicide,”7 and section 498A dealing with “cruelty.”8 I used dowry death law to teach legal writing and analysis to Indian law students, choosing the topic for three main reasons: it was the subject of Moot Court materials put at my disposal, the students were familiar with the issues, and it was a fascinating window on Indian culture and society.

Although American and Indian law have much in common, particularly through their common law heritage, the dowry death cases showed real differences in the analytic approaches of Indian courts and, consequently, of Indian law students. When hearing appeals in dowry death convictions,9 the Indian Supreme Court typically gave close attention to the plain language of the relevant statutes, at times to their legislative history, and to the reasoning of prior courts. The Court would also review in great detail the facts in the case before it. However, unlike American courts, the Court would pay little, if any, attention to the facts in precedents in which the Court had previously considered if the elements of the statutes had been met. There was also less case synthesis, and more of a focus on individual cases.

Perhaps as a result, the writing of the Indian law students with whom I worked also focused on rules in precedents and rare-

6. India Pen. Code Section 304B, the dowry death statute, provides

Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called “dowry death,” and such husband or relative shall be deemed to have caused her death.

7. Infra n. 66 (providing the complete text of abetment to suicide statute).
8. Infra n. 69 and accompanying text (providing the text of the cruelty statute).
ly referred to the facts in those precedents. Moreover, the students were more likely to write their arguments by giving a series of cases in short numbered paragraphs with quotations of the rule or reasoning from each case, rather than synthesizing the cases, as is typical in American legal analysis. Accordingly, when I taught legal writing to these students, I stressed two things. First, I focused on the writing process itself, showing how awareness of the steps in analysis could lead to writing more complete analysis. Second, I emphasized that a detailed consideration of the facts in the precedent could enrich their arguments. By considering whether the facts of their problem case were analogous to or distinguishable from the facts in the precedent, they could present their arguments more fully. This approach would also facilitate case synthesis, giving their writing greater depth.

I did not expect dramatic changes as a result of a few classes. However, I did conclude that the development of legal writing as a discipline in the United States has allowed American legal writing professors to make valuable contributions in countries where law schools are just beginning to develop their legal writing programs. These are opportunities that legal writing professionals should embrace. In addition, I noted that United States-based skills in statutory analysis, case synthesis, and analogizing are useful tools that seem to be under-utilized in India. Finally, I concluded that students are open to engaging with these tools, particularly when used in the context of a familiar legal topic.

Part I of this Essay will describe the nature of Indian legal education and the impact that has on the teaching of legal writing generally. In Indian law schools, there is no universal legal writing requirement as there is in American legal education. Not surprisingly, then, the quality of the writing instruction varies significantly among types of law schools. Without this instruction, students may only write intuitively, without the benefits that formal instruction (a systematic approach) can bring. Part II will describe the Clinical Lawyering course at the University of Delhi Law Faculty in which I taught. And Part III will discuss my use of dowry death law in my classes in the Clinical Lawyering course. In all, I concluded that when instruction emphasizes a systematic approach, it can make a valuable contribution to the students’ learning. And using the law of the host country enhanced the analytic experience for the students who have a famil-
The nature in which to relate these principles to their own writing and analysis.

II. THE NATURE OF INDIAN LEGAL EDUCATION

Legal education in India generally is governed by the Bar Council of India (BCI). The BCI is similar to the American Bar Association in its functions of establishing standards of professional legal conduct, promoting standards for professional education, and accrediting law schools. However, the BCI has much greater control over the type of permissible law schools and the curriculum in those law schools. Under its Rules, the BCI permits two types of law schools leading to LL.B Degree, a five-year law school for high school graduates and a three-year law school for college graduates. The five-year program has two parts: Part I is a two-year pre-law course and Part II a three-year course in legal training. For both the three-year and the five-year programs, the BCI strictly prescribes the course of study, leaving only a little room for elective subjects. For example, the BCI mandates six compulsory subjects in Part I of the five-year program (two courses in General English, three courses in Political Science, one course in Economics, one course in Sociology, one course in History, and one course in the History of Courts and Legal Profession in India). In addition, the BCI mandates twenty-one compulsory courses for the remaining three years of the

11. Id. at § 7(i)(b) (stating, “to lay down standards of professional conduct and etiquette for advocates”).
12. Id. at § 7(i)(h) (stating, “to promote legal education and to lay down standards for such education in consultation with the Universities in India imparting such education and the State Bar Councils”).
13. Id. at § 7(i)(i) (stating, “to recognize Universities whose degrees in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities or cause the State Bar Councils to visit and inspect Universities”).
14. The Bar Council of India Rules, pt. IV (as amended up to Nov. 30, 1998) “There shall be two streams of law courses leading to LL.B Degree viz. a five-year and a three-year law course for the purposes of enrolment as advocates as prescribed under the Rules contained in Section-A and Section B respectively given hereunder.”
15. Id. at § A1.
16. Id. at § A8(3)9.
five-year program, and mandates those same courses for the three-year college graduate program.\textsuperscript{17}

The ABA, by contrast, has only a general requirement regarding substantive law (leaving it to the schools to determine what subjects are appropriate)\textsuperscript{18} and a requirement for a course in professional responsibility.\textsuperscript{19} More importantly from my perspective, ABA Standards on Curriculum explicitly require a “rigorous writing experience” both in the first year and at least once after the first year.\textsuperscript{20} There is no comparable writing requirement in the curriculum of law schools in India.\textsuperscript{21} As a result, instruction in

\begin{itemize}
  \item Each student shall receive substantial instruction in “the history, goals, structure, values, rules and responsibilities of the legal profession and its members.” \textit{Id.}
  \item Each student shall receive substantial instruction in “writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional writing experience after the first year.” \textit{Id.}
  \item The BCI did mandate six months of Practical Training beginning in 1997, which includes practical papers in the following (1) Moot Court, Pre-Trial Preparations, and Participating in Trial Proceedings; (2) Drafting, Pleading, and Conveyancing; (3) Professional Ethics; and (4) Public Interest Lawyering. However, one commentator has suggested that while the four requirements appear adequate on their face to provide basic skills training,
  \item in reality they have not met even the limited expectations of the Bar Council—let alone the long term goal of establishing a fair, effective and competent legal system, accessible to all citizens. \ldots \textit{M}ost Indian law schools are not able to implement these papers due to a lack of expertise; they have neither the infrastructure nor the personnel to implement them. Many law school faculty have no familiarity with the new subjects and, due to the no-practice rule, the majority of faculty members do not have the necessary practical knowledge or experience.
\end{itemize}

The four papers are, in effect, “paper tigers”; most schools have introduced these papers with only token compliance.

legal writing, analysis, and research varies greatly among law schools in India.

The quality of the instruction in writing and analysis generally depends on the type of law school. In India, these schools include numerous small law colleges, often not highly regarded; 22 five-year national law schools, e.g., the National Law School of India University at Bangalore; five-year private law schools, e.g., Amity Law School; and three-year law school at government-funded universities, e.g., the Law Faculty at Delhi University.

Perhaps the most dramatic innovation in legal education in India has been the establishment of elite legal education institutions—the national university law schools, beginning with the National Law School of India University at Bangalore in 1988. The guiding force behind the National Law School of India University was Dr. N.R. Madhava Menon, a long-time member of the Law Faculty at Delhi University, who envisioned “a model law teaching institution in the country . . . to . . . act as a pace setter for reforms in all aspects of professional legal education.” 23 At this time, most of the first rate law schools in India granted LL.B degrees to students who had first completed college. Menon’s greatest innovation was his proposal to adopt a five-year integrated college-law curriculum culminating in a B.S. LL.B (Hons). The curriculum was in some ways similar to the European model. However, it was unique as it would integrate social science and humanities courses and doctrinal law courses, rather than separate them. 24 In addition, it would include innovations from American law schools such as the inclusion of clinical courses and the case method of teaching.


24. See id. at 17. Dr. Menon proposed a total of sixty courses over fifteen semesters, not divided into pre-law and law, but “integrated across disciplines keeping the role of law in development and social justice.” Id.
Menon intended to raise the quality of legal education, away from what he described as the “so-called legal education which was available in abundance from way-side colleges . . . and . . . almost for nothing.”25 He noted that “[p]eople were willing to spend any amount for medical, engineering or management education. Law was reserved for the rejects from other disciplines and for those who wanted it cheap and with least effort.”26 The academic program at the new National Law School, in contrast, made unprecedented demands on its students (and faculty). Grades were not based solely on exams given at the end of the semester. Rather, the curriculum emphasized practical training and included project work in every subject.27 Project work meant that in every course, the students would investigate problems independently and write a report of fifteen to twenty pages analyzing data and articulating their findings.28

The school has been successful perhaps beyond what even Dr. Menon dreamed. It has been ranked either first or second in the country by most rankings since its inception.29 Each year, thousands of students apply to Bangalore from all over the country for one of the 80 places available.30 Admission is based on a nation-

25. Id. at 15.
26. Id. By contrast, at Bangalore, tuition is approximately 300,000 rupees ($7500.00 USD) for five years. In a country where more than one quarter of the population lives on less than one dollar a day, see Jayneth K. Krishnan, Outsourcing and the Globalizing Legal Profession, 48 Wm. & Mary L. Rev. 2189, 2231 (2007), this is a very large sum. However the school tries to ensure that every student granted admission will be able to attend, through a combination of government scholarships, educational bank loans, and school scholarships and fee waivers. For example, the web site states, “In order to attract meritorious students from the lower socio-economic strata of society, the NLSIU attempts to provide as many scholarships as possible. Besides scholarships, in deserving cases, fee concession to the extent possible is granted on the recommendations of the Scholarship Committee.” Natl. L. Sch. of India U., Scholarships & Loans, http://www.nls.ac.in/academic_programmes_undergraduate_scholarships.html (accessed Apr. 22, 2009) (under “NLSIU Scholarships/fee Waivers”).
27. Id. at 18.
28. Id.
30. In 1998, Dr. Menon wrote, “[t]he entrance examination . . . came to be taken by nearly 3,000 students from India and abroad” for the 80 available seats. Menon, supra n.
wide test.\textsuperscript{31} Since the school’s founding in 1987, other schools across the country have been established under the national law school model: the National Academy of Legal Studies and Research University (NALSAR) at Hyderabad, the West Bengal National University of Juridical Science (NUJS) at Calcutta; the National Law Institute (NLU) at Jodhpur; the National Law Institute University (NLIU) at Bhopal; the Hidayatulla National Law University (HNLU) at Raipur, the Gujarat National Law University (GNLU) at Gandhi Nagar; and the National Institute for Advanced Legal Studies (NIALS) at Kochi.\textsuperscript{32} Each of these also admits a limited number of students in each class, typically eighty. The competition to gain admission to these schools is intense. In 2008, 10,773 candidates took the Common Law Admission Test.\textsuperscript{33}

The national law schools, though slightly varied in approach, are characterized by extensive legal writing requirements and frequent feedback. This is made possible by three factors: the small number of students in each class, typically eighty, the

\textsuperscript{24} at 23. For a general description of the school, see National Law School of India University, Bangalore, available at www.nls.ac.in/academic_programmes_undergraduate_admissions.html. By law, the law school at Bangalore, like other educational institutions, must reserve certain percentages in the class as follows: Scheduled Caste: 15 percent; Scheduled Tribe: 7.5 percent. \textit{See} Clark D. Cunningham & N.R. Madhava Menon, \textit{Correspondence: Race, Class, Caste . . . ? Rethinking Affirmative Action}, 97 Mich. L. Rev. 1296, 1303–1304 (1999). Bangalore chooses to reserve five seats for foreign nationals (SAARC and other developing countries).

There are variations on these percentages at other national law schools. For example, at NALSAR at Hyderabad, of the total of eighty seats, ten are allotted to Foreign Nationals. 30 percent of the remaining seventy seats are reserved for women, but as women candidates amount to about 50 percent of the applicants, this does not affect the seats in the general category. NALSAR, Academic Programs, http://www.nalsarlawuniv.ac.in/academic-programs.html (accessed Apr. 22, 2009). NLI at Bhopal, forty-one of the eighty-two seats are reserved for candidates from their state, Madhya Pradesh. NLIU, Admissions, Admissions to B.A. LL.B. Course, http://www.nliu.com/bald%20doc.pdf (accessed Apr. 22, 2009). At HNLU at Raipur, forty of the eighty seats are reserved for candidates from their state, Chhattisgarh. HNLU Academic Programmes, B.A. LL.B. Programme, http://www.hnlu.ac.in/home/ (accessed Apr. 22, 2009) (select “Academic Programmes,” select “B.A. LL.B.,” and click on page 2).

31. Currently, admission to many of the national law schools (Bangalore, Hyderabad, Bhopal, Kolkata, Jodhpur, Raipur, and Ahmedabad) is based on the Common Law Admission Test (CLAT). NALSAR, supra n. 30. The test is given on the first Sunday of May at various centers. It is graded out of 200, ordinarily lasts two hours, and typically is based on objective, short answer questions. In addition, students must pass the Higher Secondary School Examination (10 + 2) and ordinarily be less than twenty years old as of July 1 of the year of admission. \textit{Id}.

32. Bloch & Prasad, supra n. 21, at 179 n. 61.

available resources, and the commitment to writing projects as a percent of the grades in the course. For example, at the National Academy of Legal Studies and Research at Hyderabad, Examination Rules provide that for each course, out of 100 marks, 5 marks are given for attendance, 10 marks for a surprise test after one month, 10 marks for a mid-semester test, 50 marks for an end of semester exam, 20 marks for the written project, and 5 marks for the presentation of that project. Similarly, at Bangalore, in each subject students must submit a paper which carries 25 percent of the course marks and an oral presentation for 10 percent.

Amity Law School, a private law school founded ten years ago, takes a different approach to the five-year LL.B (Hons) program, but emphasizes writing as well. It was the first law school in the Delhi area to start a five-year program, and unlike the national law schools which are government sponsored, Amity is a private law school with tuition. There are approximately 120 students in each year. Legal writing is emphasized. For example, all first-year students must complete in an internal Moot Court competition, and are encouraged to compete in the competitions of other schools after the first year. Amity emphasizes the success of its Moot Court teams, and indeed the success of its teams has been extremely helpful in promoting the school’s reputation nationally. Students have had significant success not only in city-wide and regional competitions, but also at the national level. In addition to the Moot Court activities, the curriculum includes a required third-semester, five-credit course in Communication and Advocacy Skills, a short (fourteen pages) pa-

34. See Bloch & Prasad, supra n. 21, at 208. “Law Schools need financial and intellectual support from the bench, the bar, and the government.”
35. Examination Rules and Results, NALSAR University of Law, Hyderabad, www.nalsar.ac.in/examination_rules.pdf (accessed Aug. 24, 2008). The Rules refer to both the rough draft and the final draft of the project writing. Id. at 6.
36. E-mail from Sarasu Thomas, Asst. Prof. of L., Natl. L. Sch. of India U. at Bangalore, to Marilyn R. Walter, Prof. of L., Brooklyn L. Sch., Legal Writing at Bangalore (Aug. 8, 2008) (on file with Author).
39. Amity Law School, Moot Court—Activities and Achievements, http://www.amity.edu/als/mootCourt/activities.html (accessed Aug. 24, 2008); see e.g. Halsbury’s, supra n. 29, at 16, Mr. Lalit Bhasin ranked Amity as the top law school in India. Amity was ranked tenth nationally in 2007, and thirteenth nationally in 2008 by India Today. See India Today, supra n. 30.
per in the ninth semester, and a thirteen-credit dissertation in the final semester.

The final model is a leading law school in India offering the traditional full-time post-graduate LL.B program: the prestigious Law Faculty at Delhi University, established as part of Delhi University in 1924. The goal of the Law Faculty is to educate India’s students. Unlike the previously discussed national law schools and private law schools which have very small entering classes, the Faculty of Law admits 1,500 students per year (600 at Law Centre–I, 500 at Campus Law Centre, and 400 at Law Centre–II). Admissions are made through a Common Entrance Test for all three centers. Candidates must have a graduate (B.A.) degree from Delhi University or a school recognized by it. As with other law schools, there are reservations and accommodations established by law, what we would call quotas. For example, 5 percent of the total seats are reserved for Scheduled Caste persons, and 7.5 percent of the seats are reserved for Scheduled Tribes persons. However, unlike, for example, the national law school at Bangalore which reserves one-eighth of its places for foreign nationals, at Delhi University, the percent of reservations to foreign nationals is only 1 percent.

Although the Law Faculty does not work with a small, highly selective group of students, its reputation is very strong. In the 2008 ranking of law schools by India Today, the Law Faculty was

40. The Law Faculty has three centers: Law Center–I (north campus), Campus Law Centre (north campus) and Law Centre–II (south campus). University of Delhi Faculty of Law, http://www.du.ac.in/show_department.html?department_id=law (accessed Aug. 24, 2008).
41. For example, at the national law schools at Bangalore and Hyderabad, 15 percent of the 80 seats are reserved for candidates belonging to a Scheduled Caste and 7.5 percent of the seats are reserved for candidates belonging to a Scheduled Tribe. Natl. L. Sch. of India U., Bangalore, http://www.nls.ac.in/academic_programmes_undergraduate_Admisions.html (accessed Aug. 24, 2008) (under “Admissions”); NALSAR, Academic Programmes, http://www.nalsaruniv.ac.in/academic-programmes.html (accessed Aug. 24, 2008).
42. University of Delhi Faculty of Law, http://www.du.ac.in/show_department.html?id=law&coursename=LL.B&course_id=255 (accessed Aug. 24, 2008). General candidates must have at least 50 percent marks GPA from an accredited university. Candidates belonging to a Scheduled Caste (SC) or Scheduled Tribe (ST) do not have the 50 percent requirement. For those in the Children Widows (CW) and Physically Handicapped (PH) categories, relaxation of up to 5 percent of marks in the prescribed minimum eligibility is permitted. In addition, 5 percent of the total seats are reserved for SC candidates, 7.5 percent of the seats for ST candidates, 5 percent for CW candidates, and 3 percent for PH candidates. Id.
ranked third in the nation, up from fifth in 2007 and seventh in 2006. The *Halsbury’s* 2007 ranking commented that the Law Faculty was a “pioneer in the field of legal education in India,” “has some of the best teachers of law in India,” and has “always commanded immense respect.” It offers an LL.M. program as well as an LL.B. program. The Law Faculty is where I spent seven weeks on my sabbatical in the spring semester of 2008.

Professor Ved Kumari of the Law Centre–I Law Faculty was my liaison with the school and my host for the visit. When I contacted her about teaching possibilities, she was particularly interested in my legal writing background. Ultimately, I taught legal writing and legal research in her Clinical Lawyering course, gave two workshops to the Moot Court Honor Society students,

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43. Malhan, *supra* n. 29.
44. *Id.* at 14–15. This ranking placed the Law Faculty in Tier 3. Six law schools were ranked in Tiers 1 and 2. *Id.* at 13–15.
45. It is said that India is the land of contrasts, and that was certainly true at Law –I. For example, the faculty members with whom I worked were scholars whose work was of interest at national and international conferences. In addition, they were talented teachers, skilled practitioners of power-point demonstrations, and extremely knowledgeable about both Indian and other online research sources. Some had been Fulbright or Commonwealth Fellows. All of them, in addition to a law degree, either had Ph.D degrees, or were in the process of getting them.

Yet the facilities at the law school were very modest. At my law school, I have become accustomed to the support services provided at a modern American law school. So I was greatly surprised to find that except for the Professor-in-Charge at Law Centre–I, I was the only faculty member to have an office. Bar Council of India rules require only that each law school have an office for the Professor-in-Charge and a Teachers’ Common Room. See Schedule–1 to Rules in Sections A and B, section 4(3)(e)(f). Moreover, I had a computer in my office, but no access to the Internet. Internet access was available at two computers in the Teachers’ Common Room. However, the only printer was in the office of the Professor-in-Charge. (I often used the printer at the cyber-hut at the Bengali market near my B&B.) I also had Internet access at the B&B at which I stayed. But in general, I became dependant on my flash-drive in a way that had never been necessary when I worked either in my law school office or at home, where I have an attached printer. In fact, without the technology available today, (email, online research, laptops, power-points), my experience would have been much more difficult.

46. Moot Court competitions, local, national, and international are an important source of prestige among Indian law schools. Indeed, success in such competitions is one factor explicitly considered in the ranking of schools. See Malhan, *supra* n. 29, at 13. Among the criteria used in rating is “Performance at International Moot Court Competitions.” In 1999, the team from the National Law School of India University at Bangalore won the Philip C. Jessup Competition. *Id.* Moot Court success is also mentioned by the schools themselves in their promotional materials. For example, in the Amity Law School 2008 Moot Court publication, the President’s message noted, “It is a matter of great pride for us that in the recently held North Indian rounds of the Philip C. Jessup International Moot Court competition, one of our students who secured the Best Speaker prize was awarded full-scholarship for pursuing her Post Graduate studies in the National Law School of Singapore.”
gave a Law and Literature workshop for students and faculty, and made an online legal research presentation at a regional faculty training conference. While in Delhi, I also visited Amity Law School on three occasions and gave two PowerPoint presentations there, one on writing research papers and one on writing persuasively.

III. CLINICAL LAWYERING

Although the exact nature of my contribution to the educational program at Law Centre—I had not been clearly defined before my visit, I did know that I would be teaching some classes in Professor Kumari’s simulation course, “Clinical Legal Education and Practical Training for the Practice of Law,” called “Clinical Lawyering.” The course was an elective, offered in the students’ final semester of law school. It consisted of classroom work and a six-week, twenty-hour per week placement in the office of a judge, an attorney, or an NGO. The goal of this placement was to have the students learn basic skills of lawyering: reading a file, doing legal research, drafting, and client interviewing and counseling.47 Ideally, students would work on four different client files and be asked to perform research and drafting on each. Students were required to keep a journal of their field visits and observations as part of the oral exam for the course.48 The journal was to both give an account of the student’s experience and the student’s reflections on that experience.49

Although the structure of appellate briefs (called memorials) is similar to the structure used in appellate briefs in the United States, some terms are different. For example, a section called the Summary of Pleadings, though frequently written in point form, is similar to the United States brief’s Summary of the Argument. What Americans would call the Argument is typically called the Pleadings or the Statement of Pleadings. Other differences are more substantive. The Pleadings are typically written in numbered paragraphs. Perhaps because of this feature, the arguments did not seem to me to have the persuasive effect of a United States appellate brief. Moreover, the briefs tended to deal with cases separately rather than to synthesize them. Paragraphs may begin with “Further, in the case of . . .” or “Also in the case of . . .” instead of using the case synthesis that we emphasize in United States law schools to our students. Finally, the Statement of Issues and the Statement of Facts were frequently stated neutrally, rather than being presented from one side’s position.

47. Ltr. from Ved Kumari, Prof., U. of Delhi, Law Centre—I, to Placement Supervisors (Jan. 24, 2008) (copy on file with the Author).

48. Course introductory material of Professor Ved Kumari (Jan. 2008) (copy on file with the Author).

49. Id. Prof. Kumari suggests the students ask themselves questions about their experience such as, “What is exciting or surprising? What is bothering you? What are
When Professor Kumari and I met after my arrival in Delhi, she suggested that I teach a class in online research to the Clinical Lawyering students, and two classes in legal writing. In addition, I would be sitting in on some classes she taught and informally co-teaching. My first co-teaching experience showed me that students would benefit from taking a systematic, rather than an intuitive, approach to their analysis. I did an impromptu segment on statutory interpretation involving some materials students were using for a simulation on Witness Handling. In this simulation, a man was charged with two sections of the Indian Penal Code: sections 354 and 509. Section 354, Assault or Criminal Force to Woman with Intent to Outrage her Modesty, provides, “Whoever assaults or uses criminal force to any woman intending to outrage or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.” The terms “assault” and “criminal force” were defined in other statutes provided. Section 509 prohibits words or gestures intended to insult the modesty of a woman.

your questions . . . about lawyering and judging? What criticism or praise do you have for the legal system? What else would you like to be taking place in your experience?”

She suggests that when students observe court proceedings, they should ask themselves why they are observing the experience: is it to learn how to open arguments, how judges control the court, how counsel interacts with each other, how ethical questions are handled, how an abstract principle is applied in a real case.

For my online research class, I focused on LexisNexis, since the University of Delhi has a contract with LexisNexis. The all-inclusive online sources of LexisNexis and Westlaw, which United States attorneys enjoy, are not available in India. Westlaw is just beginning its program, and LexisNexis Academic, which is more established, nevertheless did not have complete coverage of Supreme Court cases after 2004. Since coverage of Indian law was limited, I decided to show them what they could look forward to when they had complete access to online research. I used my own password and gave as an example the facts of a tort problem, negligent infliction of emotional distress, set in Pennsylvania. I pointed out under United States law, there are distinct federal and state jurisdictions, in contrast to India where the courts hear both federal and state questions. Theodore A. Mahr, An Introduction to Law and Law Libraries in India, 82 L. Lib. J. 91, 109, (1990).

Ultimately, I gave this presentation in three contexts: to the Clinical Lawyering students, to a group of faculty at a Northern India Regional Training Conference at Delhi University, and to the Moot Court Honor Society students.

In addition to LexisNexis and Westlaw, there are two, more comprehensive fee-based databases, Manupatra and Indlaw, but the schools of conference participants were unlikely to be willing to pay those fees. However, very useful free government-sponsored sources are available.

Section 350 of the Indian Penal Code defines “criminal force”; section 351 of the Indian Penal Code defines “assault.”
I began by asking the students to identify the elements of sections 354 and 509. To my surprise, their suggestions were very general, referring only to the facts in the simulation they were given. They did not begin by separating the two statutes, nor did they focus on the elements of each statute. So in my discussion with the class, I presented a systematic approach, focusing on the explicit steps they should take in their analysis. The first was to separate the two statutes to identify each statute’s terms. The second was to identify the elements of each statute by parsing its language, seeking which elements were in the alternative, separated by “or,” and which was required, separated by “and.” This gave the students the large-scale organization of their analysis. The third was to identify words that were defined in other statutes, like “assault” and “criminal force” in section 354, and find those definitions. We then proceeded to parse the language of the definition statutes. From this, we were able to create an outline of the elements of the two statutes on the blackboard. I hoped that the students would be able to apply this process to other contexts in which they would be interpreting statutory language.

In preparing for and teaching the two classes on legal writing in the Clinical Lawyering course, I first thought about differences and similarities between law and law students in India and in the United States. For many reasons, teaching in India is well suited to American law professors. Most important, English is the language of the Supreme Court and the High Courts.\textsuperscript{52} English is the language in which many law school classes are taught.\textsuperscript{53} Moreover, India, like the United States, has the legacy of the common law system.\textsuperscript{54} Though much of Indian law has been codified by the national and state legislatures, Indian courts, like ours, customarily interpret the language of these statutes. Moreover, since 1955, scholars and foundation representatives from the United States have visited India, offering expertise, evaluation, and funds,\textsuperscript{55} and Indian professors have visited at American

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\item Jayanth K. Krishnan, From the ALR to the ILL: The Efforts to Support an American Legal Institution, 38 Vand. J. Transnatl. L. 1255, 1283 (2005).
\item Krishnan, supra n. 22, at 447.
\item See generally Krishnan, supra n. 52; Krishnan, supra n. 53; von Mehren, supra n. 54.
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law schools.\textsuperscript{56} There is one significant difference, however. Indian courts are far less likely than American courts to focus on the facts in precedent. Rather, they rely primarily on the rules and reasoning of previous decisions, even when dealing with a question of fact.\textsuperscript{57}

Before deciding what to teach, I needed to get a sense of the students’ writing skills and then decide what type of teaching materials to use.\textsuperscript{58} To get an understanding of the students’ ability to do sophisticated legal analysis, I concluded it would be better to use Indian law. Therefore, my first challenge was to learn enough about an area of Indian law to use it in teaching. For this I relied on the briefs submitted in the February 2008 All Delhi Moot Court Competition sponsored by my host, the Law Faculty at Delhi University.\textsuperscript{59} They not only indicated the Indian students’ writing and analytic skills, they also provided me with background in an area of Indian law that became very important in my teaching—dowry death.

In addition to deciding what type of materials I would use, I needed to decide what to teach in my two classes. I decided to ignore sentence-level problems and focus on the broader and more important issues of organization and analysis. The first class would deal with large-scale organization,\textsuperscript{60} and the second class would deal with small-scale organization.\textsuperscript{61} Accordingly, my first class dealt with how to identify the issues in a statutory or common law claim, and how to use those issues to organize a written analysis. Here I primarily used United States law and examples, focusing on a systematic approach.

- First, separate the legal claims.\textsuperscript{62}

\textsuperscript{56} E.g. von Mehren, \textit{supra} n. 54, at 10.
\textsuperscript{57} See e.g. \textit{supra} n. 9 (citing Indian Supreme Court cases on dowry death).
\textsuperscript{58} Knowing that I would be teaching in Professor Kumari’s course, I brought various materials with me on a flash drive and had print materials and books sent ahead.
\textsuperscript{59} I reviewed the two briefs submitted by the Moot Court Honor Society at the Law Faculty (one of which was recognized as the best brief of the competition), and a sampling of briefs submitted from the other schools. These materials identified the relevant statutes, the cases interpreting the statutes, and the legal arguments.
\textsuperscript{60} Helene S. Shapo, et al., \textit{Writing and Analysis in the Law} ch. 4 (5th ed., Found. Press 2008).
\textsuperscript{61} Id. at ch. 5.
\textsuperscript{62} As an example of separating legal claims, I used the two criminal statutes regarding assault or gestures that intended to insult the modesty of a woman. This exercise was based on the materials they were using in the Clinical Lawyering course and that I had
• Second, with a statutory claim, analyze the terms of a statute to determine if the statute applied to your case. If it does, then identify the elements of the statute. The elements will become the legal issues you must analyze.
• Third, with a common law claim, identify the elements of the claim and synthesize the case law on each element.

To do this last exercise, my materials described a series of cases in which the Pennsylvania courts developed the tort of negligent infliction of emotional distress. The students were lively participants. However, my assessment of the success of the class was overwhelmed by one thing—the students’ lateness. Although I had observed this phenomenon in classes I audited, this was the first time that I had to teach a class in which only a handful of students were there on time. It was frustrating. Many of the students eventually came to the class, but I felt they had missed important material by being late. Their lateness also puzzled me as it was inconsistent with their general attitude towards faculty, which was respectful and warm. However, lateness was not a problem in my second class in which I used Indian law as the basis of my instruction.

IV. DOWRY DEATH

My second class on analysis was based on the Indian law topic of dowry death. The materials were based on the fact pattern in the All Delhi Moot Court Competition of February 2008 and two Indian Supreme Court cases on dowry death. The purpose of this class was to continue the in-class work on statutory interpretation and to instruct the students on the important topic of discussed with them briefly in an exercise on statutory interpretation. Supra pp. 230-231.

63. Through reading one case at a time, we were able to identify the elements of the tort, list them, and for each, identify the cases analyzing each element. I showed them how this provided an outline from which a detailed analysis could be based. To aid them in focusing on issues and not cases, I also distributed a chart in which I had identified the cases down the left side and the issues across the top. I had completed all but one case in the chart and had them complete the chart in class.

64. For example, students would stand up when the professor entered the room. I noticed this respectful attitude in other contexts as well. When faculty were sitting and chatting in the Teachers’ Common Room, they, too, would stand up when a senior faculty member entered the room.

small-scale organization (analyzing case law, synthesizing cases, and comparing the facts in the problem to the facts in the precedent). The complicated statutory framework of the dowry death statutes provided the basis of a very challenging class in which the students would have to resolve questions of law and questions of fact. But the use of Indian law enabled the students to learn analytic principles in a familiar context.

I began the class on analysis by having the students tell me the relevant facts of the problem case and its procedural history. According to the fact pattern, Sanjana and Manoj Kumar were married on January 23, 1993. After their marriage, Manoj taunted Sanjana for bringing insufficient dowry to the marriage, though her father had given Manoj Rs.50,000 ($1,250 US) a few days after the marriage so he could start a business. Manoj squandered that sum and made a further demand of Rs. 2 lakhs (Rs. 200,000), which Sanjana’s father refused. Sanjana’s ill treatment and harassment by Manoj and his family became worse when she was not able to conceive. In addition, Manoj’s parents told her that their son was planning on marrying another woman. Some years later, in 1999, Sanjana gave birth to a daughter. Soon after, however, Manoj was paralyzed in an accident. Following this incident, Manoj told Sanjana that she brought bad luck to him and his family. On their seventh wedding anniversary in January 23, 2000, Manoj told Sanjana that while she enjoyed her life, he was living in hell because of the bad luck that she and her daughter brought. At 2:00 a.m. on January 25, Sanjana committed suicide by hanging herself from the ceiling fan in her home. No suicide note was found.

Manoj and his parents were charged under three statutes in the Indian Penal Code dealing with the death of a married woman under abnormal circumstances: sections 304B (dowry death), 306 (abatement of suicide), and 498A (cruelty). The trial court convicted them of violating sections 306 and 498A, but not section 304B. The High Court (intermediate appellate court) set aside the claim under the abetment of suicide statute, section 306, but

66. The High Court’s reasoning in rejecting the abetment to suicide charge included the statement that “[i]t often happens that there are disputes and discords in the matrimonial home and a wife is often harassed by the husband or her in-laws. This, however, in our opinion would not by itself and without something more attract Section 306 IPC.” This language was directly taken from Bhagwan Das v. Kartar Singh (2007) INSC 556 (May 14 2007), the case on which this Moot Court competition was based.
affirmed the section 498A cruelty conviction and held that section 304B relating to dowry death was inapplicable because the death occurred more than seven years after the marriage date. To have the students consider the possible result in the Kumar case in an appeal to the Indian Supreme Court, I then discussed with them the two Indian Supreme Court cases, Satvir Singh v. State of Punjab, 67 and Hans Raj v. State of Haryana. 68 In these cases, the Court analyzed the meaning of the three statutes dealing with the death of a married woman under abnormal circumstances. Each of the statutes included terms defined in other statutes. In determining how these cases related to the Manoj Kumar case, I again used a structured, systematic approach. I instructed the students to use this general pattern:

- First, analyze the statutory language to interpret the statute and identify the legal issues.
- Second, analyze the facts and reasoning of the cases interpreting the statute.
- Finally, compare the facts of your own case to the facts in the precedent and conclude.

The students and I first analyzed the statutory language to determine the issues in the problem. We began with section 306 dealing with abetment to suicide. Section 306 provides that “If any person commits suicide, whoever abets [the] suicide [is liable] for imprisonment . . . and fine.” 69 “Abetment” is defined in section 107 as instigating or engaging with others in conspiracy. 70 Where there is no direct evidence, the prosecution may rely on section113-A of the Indian Evidence Act that permits a court to presume, “having regard to all the circumstances of the case,”

69. India Pen. Code Section 306, Abetment of Suicide, states, “If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”
70. India Pen. Code Section 107, Abetment of a thing, states, “A person abets the doing of a thing, who—First, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy; and in order to the doing of that thing; or Thirdly, intentionally aids, by any act or illegal omission, the doing of that thing.”
that a married woman’s suicide within seven years of her marriage was abetted by her husband.\textsuperscript{71} The presumption is rebuttable and proof must be made beyond a reasonable doubt. Courts use the definition of “cruelty” provided in section 498A, that is “any willful conduct . . . likely to drive the woman to suicide or to cause grave injury” or “harassment of the woman . . . with a view to coercing her or any person related to her to meet any lawful demand for any property or valuable security.”\textsuperscript{72} There is no requirement in section 306 that the action of cruelty occur soon before the woman’s death (as is the case with section 304B).

After we analyzed the terms of the statute on abetment to suicide, the second step was to consider how the terms were interpreted by the courts. The \textit{Hans Raj} case was particularly helpful. The prosecution had alleged that Hans Raj’s wife, Jeeto, committed suicide by poisoning because Raj assaulted and harassed her. Allegedly, Raj was addicted to drugs and beat his wife whenever she attempted to prevent her husband from taking them. The case was based on the evidence of Jeeto’s father and brother. Although they did not so testify in the proceedings below, at trial, the two offered additional evidence to the effect that Raj used to taunt Jeeto because she was not good-looking and said he would remarry, and that Jeeto had come to the father’s house in an injured condition. The trial court imposed the presumption under section 113-A of the Indian Evidence Act, concluding that Raj had not offered a suitable explanation of the circumstances under which Jeeto committed suicide, and convicted him. The High Court affirmed. The Supreme Court, however, reversed, concluding that the original factual record was weak and did not support a conviction under section 306. But the Court’s reasoning in this case focused on a question of law where factual comparisons would not be relevant: the interpretation of the presumption under section 113-A. It concluded that section 113-A must be applied strictly.

\textsuperscript{71} Indian Evidence Act Section 113-A, Presumption of Abetment, states, “When the question is whether the commission of a suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the circumstances of the case, that such suicide had been abetted by her husband or by any such relative of her husband.”

\textsuperscript{72} India Pen. Code § 498A: Cruelty.
The Court’s method of statutory interpretation was familiar. It first gave a “bare reading” to the language of the statute (like the United States plain meaning rule). It then quoted a precedent that gave the legislative history of the statute. The Court stated that the statute had been enacted by the Criminal Law (Second) Amendment Act, 1983, and its purpose was to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house.73

However, the Court noted that the presumption was rebuttable.74 Because it operated against the accused in the field of criminal law, a foundation had to exist. The statutory language “having regard to all the other circumstances of the case” suggested the need to find a cause and affect relationship between the suicide and the cruelty.75 Moreover, the charges had to be proven beyond a reasonable doubt.76 Since the evidence at trial went beyond previous statements of the witnesses, and other evidence was irrelevant, the Court set aside the decision below relating to the conviction under section 306. The facts were enough to prove cruelty under section 498A, a lesser charge, but not a violation of the more serious charge under section 306.

The final step in the analysis with the class was to apply the reasoning in the precedent to the facts in the Kumar case. The Court’s reasoning in Hans Raj and its conclusion in light of those facts suggest that the facts in Kumar’s case would not be sufficient to raise the presumption of abetment of suicide. Although Manoj Kumar said Sanjana and his daughter brought him bad luck, he had made that statement before, and the reference to his living in hell and bad luck could have referred to his paralytic condition. His role in her suicide was not sufficiently active and there was no suicide note to show a connection. Nor did Manoj

75. Id.
76. Id. at 10 (quoting State of West Bengal v. Orilal Jaiswall, (1994) 1 S.C.C. 73).
suggest to Sanjana that she commit suicide as had happened in the *Satvir Singh* case.\(^{77}\) Accordingly, after this discussion, the class and I concluded that the Supreme Court would affirm the High Court’s reversal of Kumar’s conviction under section 306 (even if it affirmed the conviction under section 498A).

I went through a similar process with the class in discussing Manoj Kumar’s possible conviction under the Dowry Death statute, section 304B. This statute, even more than the others, reflected a grave Indian problem and the government’s attempt to deal with it. The initial effort of the government of India was the Dowry Prohibition Act of 1961.\(^{78}\) Because of the Act’s failure to solve the problem, the Indian Parliament added section 498A (the abetment to suicide statute) in 1983, and section 304B (the dowry death statute) in 1986. To strengthen these Penal Laws, the Indian Evidence Act was amended in 1983 with section 113-A\(^{79}\) creating a presumption of guilt under section 498A, and, in 1986, with section 113-B\(^{80}\) creating a presumption of guilt under section 304B. Nevertheless, despite extensive national and state legislation, one commentator recently noted that dowry was “a major social evil and . . . a burning problem of today. It is a curse vitiating and undermining the family peace, harmony and growth.”\(^{81}\)

Again in the class, I emphasized a systematic approach. The class and I first considered the elements of section 304B, and then we analyzed the cases interpreting the statute. Section 304B(1) of the dowry death statute requires the prosecution to prove the following elements:\(^{82}\)

- the death of a woman
- caused by burns or bodily injury, or
- which occurs otherwise than under normal circumstances
- within seven years of marriage, and
- soon before her death,

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\(^{79}\) See Indian Evidence Act § 113-A.

\(^{80}\) Indian Evidence Act Section 113-B, states: “Presumption of dowry death: When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.”


\(^{82}\) Elements are often referred to as ingredients in India.
• the woman was subjected to cruelty and harassment
• by her husband or any relative of her husband
• in connection with a demand for dowry.83

If the elements are proven, the husband is presumed to be guilty under section 113B of the Evidence Act.84 The Explanation (official interpretory language) to section 304B adopts the definition of “dowry” in section 2 of the Dowry Prohibition Act,85 that is, property given by one party or the parents of one party to the marriage at or before the marriage and in connection with the marriage.

In the second case I gave the students, Satvir Singh v. State of Punjab,86 the Indian Supreme Court considered a case brought under section 304B and, again, strictly interpreted the statute (though the Court again affirmed the conviction under the cruelty statute, section 498A). Here the Court was presented with both a question of law and a question of fact. In this tragic case, the wife threw herself in front of a railway train and suffered major injuries, leaving her in a vegetative state. The court hypothetically considered (since she did not die from her injuries) whether the prosecution could prove a violation of section 304B. According to the facts, the wife’s family gave the husband dowry at the time of the marriage, but the husband and his parents started harassing the wife five months after the wedding for not including a house and car as part of the dowry. Over the next two and a half years, she gave birth to two children. Three years after the marriage, the wife’s father gave the husband Rs.20,000, possibly so he would desist from harassing the wife. One night, five years after the marriage, the husband and his parents criticized the wife for putting too much salt in the food at dinner. The husband and parents were angry and said to the wife, “Why not end your life in front of one of the trains running nearby?” She did so and was

83. India Pen. Code Section 304B(2) provides penalties of imprisonment for a minimum of seven years to life.
84. Indian Evidence Act Section 113-B, Presumption, provides, “When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.”
grievously injured. The Supreme Court, however, reversed the husband’s conviction for dowry death, requiring strict adherence to the terms “in connection with the marriage” and “soon before her death.”

First, the Court reasoned that no harassment specifically regarding dowry occurred after the fifth month of marriage. The later payment of Rs.20,000 by the wife’s father was not necessarily “in connection with the marriage,” since that payment occurred after the birth of the second child. More important, the demand for dowry must be made “soon before her death.” The Court noted that the phrase was “an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it.” Nevertheless, the Court suggested that the legislative intent in enacting those words was “to emphasize the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment.” The Court strictly construed this language, noting that “the proximity to her death is the pivot indicated by that expression” and that there should be a “perceptual nexus between her death and the dowry related harassment or cruelty inflicted on her.” Where the interval is wide, the Court reasoned that a court would assume that the harassment would not have been the immediate cause of her death. 87

At this point in the opinion, I would have expected that the Court would refer to examples from precedents where the courts determined that the events either were or were not “soon before her death,” a step an American court would likely take. But that approach is far less common in Indian law and did not occur in this case. Later courts interpreting the phrase “soon before her death” quoted the reasoning from Satvir Singh, but made no references to the facts in that case or its result. 88 Ultimately, the Satvir Singh Court found insufficient evidence under the facts to show harassment for dowry soon before the wife’s suicide attempt.

After the class discussion of the meaning of section 304B, instead of comparing the facts of Satvir Singh with the facts of Manoj Kumar’s case, in the remaining class time I asked the students to write a summary of the facts and reasoning in the Satvir Singh case. Putting the exercise in context, I told them this

87. Id.
would be part of a brief in which they would be arguing that the High Court correctly concluded that Manoj Kumar was not guilty of violating section 304B. My observation from reading sample Moot Court briefs from various law schools was that students tended not to treat the facts and reasoning in the precedent in detail. Therefore, I decided that requiring each of them to write a summary would be useful. Since the remaining time was not sufficient, I asked the students to e-mail me their summaries and said that I would comment on and return them. This seemed more helpful to the students, would give me a good sense of their writing and analytic skills, and enable me to give them individual as well as in-class feedback.

I concluded this exercise by returning the students’ answers along with two comment sheets. The first was my own summary of the three steps in analysis I was suggesting for them: the analysis of the statute, the analysis of the facts and reasoning in the relevant precedent, and the comparison of the facts in their case with the facts and reasoning in the precedent. The second was a sample answer that included the third step, that is, the comparison of their facts with the facts in the precedent.

I reflected on this class later, asking myself why it seemed more successful than the first one. I was certainly pleased that

89. I returned the summaries to the students with my comments, which were incorporated using Track Changes.

90. The students’ factual descriptions of the Satvir Singh case varied, but there were some general problems: the omission of important facts and the drawing of unwarranted conclusions—problems we have all seen in students’ work in the United States. For example, some students did not include the date of the marriage, but the dowry death statute only applies when the wife dies within seven years of the marriage. In addition, some students concluded that the Rs. 20,000 gift, given after three years of marriage was a dowry gift, when that was one of the issues the court had to decide, and the money could also have been a gift connected with the birth of the two children.

However, the students’ analysis of the reasoning in the Satvir Singh case was quite well done. All of them realized the significance of the elements of the statute and all based their analysis on the statute in one way or another. This focus on statutory language may be the result of the court’s focus on it. Some students organized their analysis as I would have suggested: start with the statutory language, summarize its elements, and then relate the facts of the case to these elements in turn. Others did not have an overview of the statute, but used the elements of the statute as the organizing principle of their analysis and then related the facts to the specific elements as they went along. Not all of the students of the students realized the significance of the Court’s analysis of section 304B. Since the victim did not die, the Court could have simply stated that and dismissed the charge. However, the court apparently wanted to make a point about how the statute should be interpreted—likely the meaning of the phrase “soon before her death.” The stronger students included this in their analysis.
more students were both in class on time\textsuperscript{91} and in attendance generally. But I think my using Indian law was much more significant. To teach large-scale organization, the American law case summaries on negligent infliction of emotional distress worked well. But my using Indian law to teach analysis was more meaningful to the students. They were able to focus on the analysis itself, rather than on an unfamiliar area of law.

\textbf{V. CONCLUSION}

In India, I felt that I was part of an international legal education community as well as a particular legal educational institution. I learned a great deal from both students and faculty and am grateful for their kindness, interest, and support. I also learned about a fascinating area of Indian law that enabled me to teach Indian law students using materials that were relevant to them. I saw the similarities and differences between American and Indian law and realized the gap between them was not large. My knowledge and experience teaching American law was certainly transferrable to the Indian context. Finally, I realized that legal writing professionals have something valuable to offer to students and faculty in law schools around the world.

\textsuperscript{91} One of the students in the class invited me to her home for dinner, and as we rode together on the bus, I asked her about the persistent lateness in classes. (I noticed the same thing when I was participating in the Regional Teachers' Training Conference, so the custom was not limited to students.) Her explanation was that in college, students were closely supervised in class and so they relished the freedom that they had in law school to come when they chose. In addition, I noted that although 60 percent class attendance was mandated, attendance was taken at the end, not the beginning of the class.
WRITING ACROSS THE CURRICULUM: PROFESSIONAL COMMUNICATION AND THE WRITING THAT SUPPORTS IT

Andrea McArdle*

I. INTRODUCTION

As professionals-in-training, law students must become fluent in the written forms by which legal practitioners communicate information and professional analysis to and on behalf of their clients—in various documents such as client letters, office memoranda, and briefs to a court. Generated in the context of representing clients, formal law-practice-based writing should reflect an accurate understanding of a client’s concerns, goals, and expectations.

If we agree that formal legal writing is organic to the attorney-client relationship, then helping students form a writing identity that is attentive to all dimensions of that professional relationship seems critical to a law school’s professionalizing mission. The goal of building a client-centered writing identity, then, would be to produce writing that is rigorously precise and accurate, as well as clear, engaged, evocative, and humane. To that end, legal educators need strategies that speak to the multiple contexts in which lawyers engage in client-centered professional writing. At the 2008 Annual Meeting of the Association of American Law Schools, the program for the Section on Legal Writing, Reasoning, and Research considered in depth one such strategy: the set of theories and practices known as Writing across the Curriculum (WAC), an educational initiative that originated in Britain at the secondary school level in the 1960s, and was adapted to

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* Professor of Law and Director of Legal Writing, City University of New York School of Law. This essay is based on presentations given at the Association of American Law Schools (AALS) Annual Meeting, Section on Legal Writing, Reasoning, and Research, New York City, New York, January 4, 2008.
undergraduate higher education in the United States in the 1970s.\(^1\)

**II. WAC AND LEGAL EDUCATION**

Associated principally with a movement to increase low- and higher-stakes writing opportunities throughout the college curriculum,\(^2\) writing pedagogy in American law schools typically has not been conceptualized and framed in terms of the ideas, practices, vocabulary, and values identified with WAC, with one exception. Legal educators have embraced the relevance of teaching professional writing (hence, law schools’ acknowledged function of helping students “learn to write” in the discipline—i.e., like a lawyer).\(^3\) There has, however, been less institutional or scholarly assessment of how research about WAC’s other theoretical focus, “writing to learn” (writing as a mode of learning),\(^4\) might apply to law school curricula to complement the disciplinary focus of law school writing. It is also unusual for law schools to differentiate writing according to the “transactional,” “expressive,” and “poetic” functions that WAC scholarship has identified,\(^5\) much less to af-

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2. *Id.* at 15.


4. For the classic exposition of this idea in Writing-Across-the-Curriculum (WAC) literature, see Janet Emig, *Writing as a Mode of Learning*, in *Landmark Essays on Writing across the Curriculum* 89, 91 (Charles Bazerman & David R. Russell eds., Hermagoras Press 1994). For a thoughtful application of this concept to law school pedagogy, see Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 Leg. Writing 1, 20–24 (2000) (identifying a range of writing activities that can promote learning such as case briefing, responding to questions, outlining, and lawyering assignments). Although legal writing scholars have noted connections between writing and cognition, see e.g., Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader (and Writer, Text and Context)*, 49 J. Leg. Educ. 155, 159–160 n. 35 (1999) (applying insights from New Rhetoric); Philip C. Kissam, *Thinking (By Writing) about Legal Writing*, 40 Vand. L. Rev. 135, 136–137 n. 5, 138–141 (1987) (distinguishing critical from purely instrumental writing), the American Bar Association, the principal institutional gatekeeper of the writing curriculum in United States law schools, does not refer to the conceptual framework and vocabulary of “writing to learn,” or to WAC’s differentiation of writing according to function, see *footnote 4 infra*, in its curricular standards. See ABA Standard 302(a)(3); Interpretation 302-1.

5. The delineation of writing functions as transactional (generally, truth-based expos-
ford students regular opportunities to write within each of these categories.

Rather, American law schools have adopted a gradualist approach: to date, only a few have approved a WAC requirement or participate in a cross-university initiative implementing Writing across the Curriculum/Writing in the Disciplines (WAC/WID). There is a growing and valuable body of scholarship embracing writing across the law school curriculum, but this work has focused mainly on a single, albeit vitally important aspect of WAC pedagogy. It supports increasing the amount of transactional writing in law school, which, in the lexicon of WAC, is writing within professional genres that results in instrumental and typically audience-directed documents. This writing, commentators argue, should occur more regularly in doctrinal courses to deepen students’ subject-matter knowledge and analytic skill, and improve their proficiency in professional writing conventions.

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See supra n. 5. This use of “transactional writing” is distinguishable from the more specific understanding of the term in law practice and legal education, in which typically the writing is associated with contract drafting.

E.g. Elizabeth Fajans, Learning from Experience: Adding a Practicum to a Doctrinal Course, 12 Leg. Writing 215 (2006); Eric Goldman, Integrating Contract Drafting Skills and Doctrine, 12 Leg. Writing 209 (2006); Pamela Lysaght, Writing across the Law School Curriculum in Practice: Considerations for Casebook Faculty, 12 Leg. Writing 191 (2006); Lysaght & Lockwood, supra n. 3. Several other scholars of legal writing and pedagogy have discussed WAC methods in articles addressing broader questions of law school pedagogy. See e.g. Barbara J. Busharis & Suzanne E. Rowe, The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses, 33 John
Others advocate importing doctrinal teaching into legal writing classes for this same purpose—to enhance students’ learning to write in the discipline.11 In addition to learning directly about professional genres, however, novice writers benefit from opportunities to rework ideas and language that they encounter in formal contexts by turning to other, non-transactional WAC-identified writing. This non-formal writing includes the expressive mode (reflective and introspective writing that reflects the “ebb and flow” of the writer’s ideas and emotions), and poetic and other creative, literary modes that are attentive to the formal aspects of writing.12 Although most scholarship on WAC within the law school curriculum has focused on transactional writing, some authors have also examined how introspective and creative writing also serves legal education’s professionalizing work. This scholarship has examined, for example, how such writing can promote self-awareness and help students develop a professional identity.13 Thus far, however, scholarship on expressive and poetic writing has not emphasized how non-formal writing can itself help develop law students’ skills in using the forms and genres of professional writing.

Fortunately, educators in other disciplines have relevant experience to offer on the broader use of non-transactional writing in professional education. Drawing in part on these insights, the contributors to this panel illuminate for us the role that reflective,
narrative, and other imaginative writing can play both in forming a professional self-concept and in strengthening and enlivening writing in professional genres. Collectively, the essays demonstrate how a broad spectrum of writing modes can function in professional education, and they support the case for increasing the amount of non-transactional writing in doctrinal and clinical law school courses.

III. NON-TRANSACTIONAL WRITING IN LAW SCHOOL

Scholars of professional education conclude that adult learners tend to learn more and more deeply when their assignments require them to produce non-transactional, critically reflective writing. Literature on adult learning theory recognizes that student experience with non-transactional expressive writing can promote the goals of adult-centered learning, particularly critical examination of long-held assumptions.14 This literature appreciates that course work in which students keep writing or reading journals15 can serve as a means of learning through reflective practice. Expressive writing of this sort offers psychological space allowing writers to cast off habitual ways of thinking and reorienting themselves through “reflective withdrawal and reentry.”16 One scholar in particular, Janet Emig, focused her research on exploring the connection between writing and learning and has developed some hypotheses for why a self-reflective process achieved through writing has particular benefits for the developing professional.

Drawing on the work of cognitive psychologists Jerome Bruner and Lev Vygotsky, among others, Emig concluded that higher-order cognitive functions seem to develop most fully through reading, writing, listening, and speaking, particularly writing, because it expands our thinking and makes it concrete by memorializing it in visible product. Writing also is particularly effective at

15. See e.g. Elizabeth Fajans & Mary R. Falk, Against the Tyranny of Paraphrase: Talking Back to Texts, 78 Cornell L. Rev. 163, 202–204 (1993) (describing use of reading journals in which law students record their questions and critical responses to judicial opinions that they have read, instead of paraphrasing the opinions).
developing higher order cognitive processes because people tend to write more slowly than they speak, and because written speech expands one’s “inner speech” and expresses connections among ideas more clearly.\textsuperscript{17} Emig further argued that writing is “epigenetic,” that is, it makes visible an ongoing record of developing thought.\textsuperscript{18} In this way, writing can help to make what we think about a topic more intelligible to ourselves.\textsuperscript{19}

If we accept Emig’s premises and conclusions, then a turn to expressive writing should help law students write their way through a difficult legal question. Writing that is free of the formal structures of CRRACC or IRAC and is based on a self-reflective process can help students to develop and continually revise their thoughts as they work through an analysis.\textsuperscript{20} The opportunity afforded to lay claim to an insight by writing reflectively about it demonstrates “writing to learn” in operation. Incorporating such reflective writing in a range of law courses—doctrinal, clinical, and simulation-based—offers the potential for supporting deeper learning as well as metacognition,\textsuperscript{21} that is self-awareness about skills development\textsuperscript{22}—and which learning theorists consider to be a hallmark of professional growth and identity.

Narrative writing—and the narrative reasoning that such writing can illuminate—is equally critical to effective professional communication. As Anthony Amsterdam and Jerome Bruner demonstrate in their magisterial \textit{Minding the Law},\textsuperscript{23} narrative is an important way of drawing meaning from experience, a form of knowing and reasoning\textsuperscript{24} that is distinct from the logical capacity that legal education particularly emphasizes.\textsuperscript{25}Positing that

\begin{itemize}
  \item \textsuperscript{17} Emig, supra note 4, at 91, 93–94. And in inscribing experience into the graphic symbolic system of verbal language, it deals with what Jerome Bruner has named as three principal ways of dealing with the world: doing (hand), depicting (eye), and restating in words (brain). \textit{Id.} at 92.
  \item \textsuperscript{18} \textit{Id.} at 95–96.
  \item \textsuperscript{20} See Lukinsky, \textit{supra} n. 16, at 230–232 (summarizing cognitive uses of journaling).
  \item \textsuperscript{21} Williams, \textit{supra} n. 19, at 30.
  \item \textsuperscript{22} J.P. Ogilvy, \textit{The Use of Journals in Legal Education: A Tool for Reflection}, 3 Clin. L. Rev. 55, 71, 80–81 (1996).
  \item \textsuperscript{23} Anthony G. Amsterdam & Jerome Bruner, \textit{Minding the Law} (Harvard 2000).
  \item \textsuperscript{24} \textit{Id.} at 116–117.
  \item \textsuperscript{25} \textit{Id.} at 127, 134–135, 141. Some theorists argue that narrative is innate, that we are hardwired to experience the world in terms of narratives; others ground our resort to
\end{itemize}
“narrative imagination” is crucial for the education of citizens, humanities scholar and legal philosopher Martha Nussbaum has argued that the study of narrative is essential in legal education: “the imagination of human predicaments is like a muscle: it atrophies unless it is constantly used. And the imagination of human distress and desire is an important part of the lawyer’s equipment.”

Reading and writing texts through a narrative lens makes it possible to think about law beyond the purely cognitive domain—to understand it both more particularly, in a textured, contextual way, and holistically. Narratives draw on larger values that animate law, such as questions of responsibility, equity, and policy that might otherwise go unasked and unnoticed. For example, a writing assignment that asks students to reconstruct a judicial opinion narratively makes it possible to ask, and answer, significant questions that may not surface under traditional rule-based analysis: How are human agency, motivation, and character addressed in the opinion? Whose voices or perspectives are present and whose are absent or silent?

Narrative writing, and the broader category of imaginative or literary writing within which it falls, is important to the development of the legal writer because it encourages exploration of the creative dimensions of a lawyer’s work. Giving law students permission to work in literary genres—writing short stories, essays, and poetry—may seem far removed from the professional writing contexts that lawyers must learn. But, like the benefits of writing reflectively, writing in a literary mode (“poetic” writing in the WAC lexicon) allows a writer to step back from habitual, formal ways of thinking and engage in an intuitive form of thinking that “can help surface deeper, stronger, more authentic arguments.” Writing in this mode can take a number of forms. Most obviously, it will use literary forms to address legal content. Mark Weisberg of the Queen’s University law faculty in Ontario has described narrative on cultural factors—the narratives we tell are the value-bearing narratives of our culture’s historic experience—of loss, redemption, triumph—and that we use these narratives to make sense of our own daily experience. Id. at 115–117.

27. Id. at 324.
how he uses the essay form in his Legal Imagination course for this purpose. Pointing to essays that his students have written about their engagements with law in a broader social context, Weisberg identifies why the essays are persuasive and poignant: they are “specific, focused, [and] personal” stories written in “distinctive, strong voices.”

Tapping into creativity to understand law can also work in the other direction: rather than relinquishing the formal structures of professional legal writing, we can adapt those same structures to non-legal contexts. To point to just one example, a now-graduated student from CUNY School of Law, where I teach, used the form of a judicial opinion to illuminate a narrative about a relationship—a writing partnership—that had become irretrievably broken. Here, the student’s ability to concentrate on approximating judicial discourse—with its authoritative voice, its modeling of a reasoning process, and its acknowledgment of the ways in which rules and procedures constrain judicial decision making—was aided by the fact that the writer had detached legal form from content.

Encouraging legal writers to experiment with non-traditional, literary approaches to writing of either sort can help these writers gain a surer sense of their own voice and instill confidence in their ability to engage with legal form and content. And, I would suggest, writing in a legal genre such as a judicial opinion or a law office memorandum without bearing the additional “cognitive burden” of writing about legal doctrine can have pedagogic value for novice legal writers because. This type of writing focuses effort on developing proficiency in the forms of law—a skill that can seem so daunting to writers who are still becoming socialized into legal language. Affording space for imaginative writing in law school also hammers home an often overlooked point: the day-to-day work of professional legal education—

30. Id. at 423.
31. The student writer produced this opinion as part of an extracurricular writing workshop that the School of Law’s Writing Center organized, but a writing exercise of this sort would also be appropriate in a “workshop-style” classroom context.
32. The opinion is posted on the law school’s writing website under a section that features a wide range of student writing, at www.law.cuny.edu/academics/WritingCenter/forum/creative-writing-group/conti-cook.html.
33. Weisberg, supra n. 29, at 424, 431–432.
reading cases, drafting Moot Court briefs, communicating with clients in the law clinic—requires a well-developed capacity to imagine another's perspective and alternate ways of thinking about legal problems.

An openness to working in creative and literary modes would bring legal education more closely in line with the turn to the humanities in the training of physicians. An increasing number of medical clinicians assign reading and writing in the humanities to guide their mentees toward a more reflective, empathetic approach to professional practice. The Narrative Medicine Program at Columbia Presbyterian College of Physicians and Surgeons offers a case in point. The program seeks to cultivate “narrative competence” among physicians, nurses, social workers, and therapists by “developing the capacity for attention, reflection, representation, and affiliation with patients and colleagues.”\(^35\) Program director Dr. Rita Charon has written extensively on narrative medicine and has designed curricular modules to develop narrative competence. Currently she offers a fourth-year narrative medicine “immersion” course in close reading and narrative writing that has generated evidence of improvement among students in “attentive and effective patient care.”\(^36\) Panel participant Danielle Ofri,\(^37\) physician, author, and editor-in-chief of the Bellevue Literary Review, similarly integrates attention to humanities and medical practice in her clinical teaching at New York University Medical Center. She holds “literary rounds” and asks interns to read and reflect on poems to help them develop the capacity to listen—to “hear the metaphor” behind a patient’s speech.\(^38\)

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These humanities-based approaches are equally relevant in the law school context. Just as surely as medical professionals must keep the humanity of their patients in constant view, lawyers in their interactions with clients need to keep in check the tendency to engage in purely technical problem solving, framed in the hard-edged, often ungainly language of law. Incorporating writing in the humanities into legal education focuses attention on practice skills that require an open mind and ear. It encourages a sense of client-centered communicative practice—professional writing that is clear and sharply focused because it “hears” a client’s voice and centers a client’s concerns and experiences. Using literature to help professional students develop the capacity to hear “metaphorically” illuminates this too-rarely-appreciated insight: the literary imagination and the specialized writing of professional genres are not incommensurable. When we bring into contact these seemingly discontinuous writing contexts and genres, we allow students to use both poetic writing and professional legal education to inform and enrich one another.

**IV. A SYNTHESIS OF WAC-INFORMED APPROACHES**

The subjects and approaches that the following conference papers have taken up weave together the multiple strands of WAC. They illuminate for us that it is in the conjunction of non-transactional and transactional writing that professional education can be particularly effective. The essays point to ways in which exposing novice legal writers to non-transactional writing can help to deepen their understanding of course content; heighten their insight into their own process of learning and professional growth; enable them to consider critically the relationship among social policy, theory, and professional practice; and help them to communicate that understanding more effectively in their transactional writing. These essays show that reflective, narrative, and creative writing modes allow writers to step back from the structures and rhetoric associated with formal analytic writing, reconnect with their own sense of voice, and develop and revise their thoughts in their own words. This disaggregating of analytic work from for-

mal legal language reduces the cognitive burden of working in an unfamiliar discourse and instills a measure of confidence among writers who are struggling to become socialized into a professional discourse community.40

Narrative and other poetic writing modes offer an additional benefit by encouraging legal writers to tap into intuitive forms of thinking that can help them imagine a client’s situation and perspective. Taking steps to center a client’s priorities and concerns can, in turn, sharpen understanding of the context, contours, and urgency of her legal problem. And it is attaining such a client-centered analytic focus that, in the end, is the point of most formal writing.

Connecting analytic, narrative, and intuitive thinking with a capacity to hear a client’s voice and modulate one’s own embodies the kind of integrative approach to teaching formal legal writing that the recent Report of the Carnegie Foundation for the Advancement of Teaching recommends for legal education generally.41 Using this approach, law schools can better support client-centered professional communication, with all of the possibilities and challenges presented when law students write their way—as they must—into professional identity.

40. Williams, supra n. 19, at 9, 13–15, 18, 28.
41. See generally Sullivan et al., supra n. 39 (identifying interdependent capacities—cognitive, practical, and ethical-social “apprenticeships”—as essential to professional formation).
Pull up a chair. Let me tell you a story.

I was listening to NPR’s *Humankind* program. A professor of education asked his class to write an autobiographical piece. At the end of the class in which he gave the assignment, a student hesitantly approached him and asked, “Is it ok if we use the word ‘I’ in our paper?” The professor said that he almost burst out laughing, because it seemed like such a silly question, but he was glad that he didn’t, because he might have hurt this student who had made himself vulnerable by asking the question. So the professor just said, “Yes, that is fine. In fact, I don’t think you could do this assignment without using the word ‘I’ quite a bit. But I’m curious, why do you ask?” The student replied, “Well, I’m a history major, and every time we use the word ‘I’ in any paper, they mark us down a full letter grade.”

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* Curators’ and Edward D. Ellison Professor of Law, University of Missouri-Kansas City School of Law. The following friends and colleagues—who, happily, are the same universe of people—offered excellent advice and comments: Jasmine Abdel-khalik, June Carbone, Tim Geary, Barbara Glesner Fines, Lawrence MacLachlan, Andrea McArdle, Marcia McCormick, Allen Rostron, Paul Secunda, Barbara Snell, and Wanda Temm. This Article benefited from the exceptional research assistance of Lara Pabst and Andrew Schermerhorn. I also want to express thanks to Terry Pollman and David Ritchie who offered very helpful critiques. This essay is based on presentations given at the Association of American Law Schools (AALS) Annual Meeting, Section on Legal Writing, Reasoning, and Research, New York City, NY, January 4, 2008.

It is experiences like these that may help explain the most common question law students ask when one is trying to teach them about reflective journaling practices: “Do you want citations with that?” Students who have been taught to cleanse their writing of all first-person perspectives may have difficulty developing into storytellers who have their own opinions.

I. INTRODUCTION

Writing Across the Curriculum is still in its nascenty in law schools. Promoting reflective writing in law schools—across the curriculum—is a real uphill battle. But as some of the critical theorists who first brought storytelling to law can attest, the Sisyphean challenges are the ones worth undertaking: “The struggle itself toward the heights is enough to fill a man’s heart.”

Others have written about the benefits of journaling and other exploratory writings in clinical practice. This Article concentrates on the theory of narrative or storytelling and then addresses the reasons why it is vital to encourage its practice in law schools in non-clinical or primarily doctrinal courses. Not all reflective writings are narratives (and some narratives are not particularly reflective). My interest in this Article is in storytelling

2. See Louis N. Schulze, Jr., Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer, 55 Clev. St. L. Rev. 59, 98 (2007). Part of the Writing Across the Curriculum movement is a "writing throughout the curriculum" approach. A few law schools have integrated writing components in doctrinal courses—typically in small sections, such as Contracts Plus Drafting, with assignments appropriate to the substantive area. See e.g. Pamela Lysaght & Cristina D. Lockwood, Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications, 2 J. ALWD 73, 99–104 (2004); see also Larry Dubin, Bringing the Spirit of Martin Luther King Jr. into a Legal Ethics Course, 85 Mich. B.J. 49 (June 2006) ("The Writing Across the Curriculum program at the University of Detroit Mercy School of Law requires every course after the first year to have a writing assignment worth at least 15 percent of the final grade.").


or narrative (and I use those terms interchangeably at times) as a particular type of reflective writing.

Part I traces the advent of storytelling in legal theory and practice: while lawyers have long recognized that part of their jobs is to tell their clients’ stories, the legal academy was, for many years, resistant to narrative methodologies. Part II examines students as legal storytellers and the current applications of Writing Across the Curriculum in law schools. Most exploratory writing tasks in law school come in clinical courses, although a few adventurous professors are adding reflective and narrative assignments in doctrinal classes. This section explores the value of narrative writing in encouraging students to sharpen their legal analysis and to reflect on their ethical responsibilities.

Part III considers three interrelated advantages of teaching students to encode legal information in story form. It makes the argument that narrative could even be considered imperative. First, emerging evidence from neuroscience indicates that people remember stories much better than they recall snippets of fact. Second, narratives pay attention to humans—and this emphasis on identity, voice, perspectives, and lived experiences offers more accurate representations of human conditions than legal doctrines can capture. Third, narrative writing is a particular type of advocacy that appears in legal briefs and opinions. Use of storytelling as a persuasive technique may encourage courts and academia to probe more deeply for the criteria of narrative truths. Finally, Part IV concludes by urging attention to the stories told in legal practice and at law firms.

II. STORYTELLING IN LEGAL THEORY AND PRACTICE

Despite some contentious debate in the early 1990s about whether storytelling constituted credible legal scholarship,¹ storytelling has become firmly entrenched not only in jurisprudence, but, more fundamentally in the ways we think about teaching and

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practicing law. The idea that stories are a useful method of provoking thinking about law has sifted into the legal academy.

Storytelling is an essential method of legal practice, teaching, and thought. In the days of the classical Greek orators who were lawyers, telling stories was a primary technique for practicing law. Good lawyers have always had the ability to tell stories. The best lawyers, as Tony Alfieri and others have observed, and this is a slightly different point, pay attention to the stories their clients want them to tell.

Good advocacy—both oral and written, in trial and appellate work—demands the ability to capture the audience’s attention through the recitation of facts. Two things are new: as legal education has broadened beyond the appellate case, more attention is focused on elements of advocacy once left to practice, and storytelling is integral to this broader education.

The use of outsider narratives has a particular place in the development of critical theory. When feminist and critical race theorists began to tell stories of discrimination to demonstrate the effects of particularly oppressive legal rules, traditionalists responded that stories had no place in law school or legal theory and should not factor into legal decisions. Critical theories responded that legal decisions really were stories—but they were simply ones that told a dominant narrative. As Catharine MacKinnon wryly observed, “Dominant narratives are not called

7. See M. Fabius Quintilanus, The Institution Oratoria of Quintilian (H.E. Butler trans., Harv. U. Press 1966). This was also the original way cultures and laws were passed from one generation to the next; it was the most primitive form of law-giving. A colleague and I have elaborated on this theory of the embrace of storytelling in jurisprudence in Nancy Levit & Allen Rostron, Calling for Stories, 75 UMKC L. Rev. 1127 (2007).
9. I am indebted to June Carbone for this point.
10. See e.g. Farber & Sherry, supra n. 5.
11. See e.g. Richard Delgado, The Rodrigo Chronicles: Conversations about American and Race 194–195 (N.Y.U. Press 1995) (“White folks tell stories, too. But they don’t seem like stories at all, but the truth. So when one of them tells a story . . . few consider that a story, or ask whether it is authentic, typical, or true. No one asks whether it is adequately tied to legal doctrine, because it and others like it are the very bases by which we evaluate legal doctrine.”).
In the 1980s critical theorists in the legal academy began to tell counterstories to question and resist the traditional canon. Stories thus became not just the dominant discourse, but also a tool of liberation.

In the late 1980s, law professors began to write law review articles in the form of stories. Some used fiction as an approach to critique doctrine; others told the stories of factual events, often from the perspective of outsiders to law and the legal academy. Legal theorists began to appreciate what historians and trial attorneys had long known—the extraordinary power of stories. Stories are one of the primary ways that humans understand situations. People remember events in story form. Stories illuminate diverse perspectives; they evoke empathic understanding; and their vivid details engage people in ways that sterile legal arguments do not. As Derrick Bell says simply, “People are moved by stories more than by legal theories.”

15. See Hayman & Levit, supra n. 6, at 398 (suggesting that narratives provoke critical thinking because they force a consideration of context and because they engage in “dialogic, rather than dialectic, discourse”).
18. See e.g. Reid Hastie et al., Inside the Jury 22–23 (Harv. U. Press 1983); see also James W. McElhaney, Just Tell the Story, 85 ABA J. 68 (Oct. 1999) (“The story is the tool that people have used since before recorded history to grapple with events and try to understand their meaning.”). Some cognitive psychologists made the connections to narrative a little earlier. See e.g. Jerome Bruner, Actual Minds, Possible Worlds (Harv. U. 1986).
19. Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds? 87 Mich. L. Rev. 2099, 2104 (1988) (citations omitted) (describing how there are “stories that bridge, providing connections between people of different experience, stories that explode (like grenades) certain ways of thinking, stories that mask, devalue, or suppress other stories, [and] stories that consolidate, validate, heal, and fortify (like thea-
Think about the role of stories as an instrument of restorative justice. When organizations like Human Rights Watch and Amnesty International gather stories from victims or witnesses to arbitrary detention, forced labor, rape, torture, and cultural genocide, they are doing much more than simply illuminating these violations of rights. They are creating institutions to listen to people whose voices would otherwise be silenced. The United Nations has also recognized the importance of storytelling. The U.N. Security Council established a Commission of Experts to investigate whether to set up an international criminal tribunal to address the allegations of war crimes in the former Yugoslavia. The Commission gathered testimony and catalogued stories of thousands of human rights violations and created the International Criminal Tribunal for the former Yugoslavia.

The South African Truth and Reconciliation Commission pursued a similar, although more adjudicatory, project. Although the Commission did not seem to elicit heartfelt admissions of guilt, but victims wanted the opportunity to tell their stories—and they testified repeatedly that speaking the truth was healing. When more than seven thousand victims told of the atrocities they had suffered and witnessed, those narratives provided some measure of “human justice” that no court could ever impose.

This consciousness of a different method of resolution serves as a broader critique of the limits of litigation. Perhaps also the


stories can at least help prevent the errors of history and evil from recurring. Tribunals that publicize victims’ testimony not only acknowledge their suffering, but also contribute to the restoration of post-conflict peace by discouraging victim retribution.26

When we teach students to write reflectively across the curriculum, we are teaching them so much more than simply the art of storytelling. One is to give voice to experiences that might otherwise be lost . . . or denied. Maybe as part of this we are implicitly teaching them to seek out the position of persistent oppression, and identify with it. We are also teaching some of the psychological dimensions of client relations—such as closure for victims. This social justice aspect of stories is precisely why reflective writing belongs in doctrinal classes: stories are evidence of importance; nonmainstream stories are part of this country’s social reality; and students need to learn how to express the ways that legal doctrines have marginalized and silenced various types of minorities—how to tell their stories.

But couldn’t law students just read good reflective writing? A little Gabriel Garcia Marquez, Love in the Time of Cholera (the book, not the movie), to understand that stalking behavior has been romanticized.27 Maybe some Camus, to understand rebellion as a positive force: “The logic of the rebel is to want to serve justice so as not to add to the injustice of the human condition, to insist on plain language so as not to increase the universal falsehood, and to wager, in spite of human misery, for happiness.”28 Why do law students have to write it?

III. STUDENTS AS LEGAL STORYTELLERS AND REFLECTIVE WRITING IN LAW SCHOOLS

Whether law students become lawyers who do transactional work or litigation, they will always be professionals who tell stories and people who understand experiences in narrative form. Susan Bandes capsulized it well when she said, “metaphor is not

merely an optional, rhetorical flourish. It is our most pervasive means of ordering our experience into conceptual systems.”

This is a skill only learned by doing.

In addition to learning how think in metaphor—and to develop empathy for human conditions—students can use narratives to learn how to distill analysis into succinct packages. This is one of the key insights of Writing Across the Curriculum: “to write is to learn.” Related to this is another central proposition—that writing “must be practiced and reinforced throughout the curriculum.” These propositions are supported by the work of legal writing theorists, who have long observed that students need multiple opportunities outside the confines of legal research and writing courses to practice their skills. Part of this need for repeated writing opportunities is simply that the more they practice, the better they’ll get, but part also relates to the fact that writing is learning.

Students will learn best by writing about a subject; thus, they need to write in every one of their doctrinal classes to get the most out of them. Writing about a subject encourages students to “explore the nuances of law and fact and reflect on the social policies underlying legal issues.” Emphasis on the skills necessary to communicate arguments also develops analytical abilities—it helps students “think about and better understand the material they are writing about”—so this kind of writing is appropriate throughout the law school curriculum. Writing assignments in doctrinal classes reinforce the lessons taught in legal research.

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32. Id.
and writing classes. In addition, being given writing assignments in doctrinal classes emphasizes to students the centrality of writing to the profession.

The use of writing as a conduit to absorbing, understanding, and seeing multiple dimensions of subjects is summarized by Kenney Hegland: "[T]here is no better way to learn something than to write about it. Not only do we understand our topic better but it will stay with us much longer."36 Despite these understandings about the values of both storytelling and repeated practice of skills, the use of student narrative writing exercises has remained limited primarily to clinical courses and externships.

A. Reflective Writing in Clinical Courses and Externships

Many, if not most, clinical professors require students to keep journals of their experiences.37 These journals are more than just a record of the time spent and the work done. Some professors urge students to choose one observation or experience and write a reflection on it. Others ask students to reflect and write about specific topics with guided prompts,38 or about their goals and objectives.39 These journal entries are critical tools for students to transform a passive experience of observation into active learning. Perhaps even more importantly, they prompt students to explore their own professional identity, values, and emotions as they engage the world of clients and their problems.40 "Journaling assignments require students to reflect upon personal values, ethics, morality, and the psychological aspects of dealing with clients, as well as the emotions and personal beliefs that are

38. See Gharakhanian, supra n. 4, at 82.
involved in the decision making process.”

Telling the stories of their clients—and their own internal stories in response—encourages reflection, awareness, and self-discovery. It also enhances empathy and professionalism. Teaching students to reflect critically on and learn from their experiences trains them to be responsive to new situations, so that they will be ready to do that in practice as the law evolves and changes.

Barbara Glesner Fines, who teaches a course in poverty law and supervises a legal aid clinic, observes that journaling exercises have encouraged students to write about their preconceptions—about poor people or poverty, about poverty lawyers, about judges and other attorneys. Since reflective writing is much more private than a discussion, students are willing to reveal more about their own biases and assumptions.

Many students write about themselves—their growing confidence, their fears, their resolutions to practice this way or not to practice that way. Some students reflect on the law or the legal system in fundamental ways that we would love to hear in the classroom on a more regular basis. The lived experience of their clients gives their reflections on structural and policy backdrop of the law a grounding much more immediate and real than these same abstract discussions in the classroom.

Faculty who assign reflective journaling exercises do note that the assignments impose time demands to respond to each writing exercise. However, one colleague said that the most difficult part was that many law students simply did not know how to write reflectively. The most common question students would ask when she assigned them to write a personal or reflective essay was: “Do you want citations?”

To get students started on exploratory writing, particularly with respect to client interactions, it is useful to offer examples. Numerous superb examples can be found in the critical lawyering

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42. See Gerdy, supra n. 30, at 45.
43. I am indebted to Terry Pollman for this point.
44. E-mail from Barbara Glesner Fines, Assoc. Dean for Faculty Ruby M. Hulen Prof. of L., UMKC Sch. of L., to Nancy Levit, Curators’ & Edward D. Ellison Prof. of L., UMKC Sch. of L., Legal Storytelling (Nov. 6, 2007) (on file with Author).
literature. Professors in the clinical area have broadened the idea of reflective papers to give students assignments of writing how the course’s materials, cases, or social science information relate to their experiences of handling cases; this adds a dimension of critical thinking to the introspection (and also ensures the reading of materials that will not be covered on an exam). Others have offered suggestions on whether and how to grade student reflective writings. Those who assign some form of journaling or reflective writing seem agreed that it can promote not only self-directed learning and self-awareness, but also independent problem-solving abilities. When students are able to reflect on their own reactions and analyze why they had those reactions, they are better able to critically evaluate the stories others present to them. The question is whether these methods can be used and advantages can be gleaned from reflective writing in doctrinal courses.

B. Reflective Writing in Doctrinal Classes

The hardest case to make, it seems, and the one that has attracted the least attention, is for reflective writing in doctrinal courses. Reflective writing is a way of comprehending doctrinal

45. See e.g., Louis S. Rulli, Too Long Neglected: Expanded Curricular Support for Public Interest Lawyering, 55 Clev. St. L. Rev. 547, 571–572 (2007) (recommending Lucie E. White’s article, Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1 (1990), and noting “the article contains the author’s thoughtful observations about the attorney-client relationship, and reflects upon several important themes such as client voice, lawyer-filtering of client stories, and tensions that arise between lawyer and client in developing and implementing a theory of the case”); see also Alfieri, supra n. 8.


48. See e.g., Ogilvy, supra n. 4, at 63; Greg Sergienko, New Modes of Assessment, 38 San Diego L. Rev. 463, 479 (2001).

49. A number of professors who see the value of writing across the curriculum are integrating writing exercises in doctrinal classes, see e.g., Laurie C. Kadoch, The Third Paradigm: Bringing Legal Writing “Out of the Box” and Into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine, 13 Leg. Writing 55 (2007); Michael J. Madsen, Writing to Learn in Law and Writing in Law: An Intellectual Property Illustration, 52 St. Louis U. L.J. 823 (2008); Scott A. Schumacher, Learning to Write in Code: The Value of Using Legal Writing Exercises to Teach Tax Law, 4 Pitt. Tax Rev. 103 (2007). These are wonderful projects and I do not mean to diminish them at all; I am concerned here with something different—reflective writing (in which students comment on their
law, legal issues, and ethical responsibilities. Let me just offer a couple of examples to make this point. We are moving here from the theory of reflective writing to its practice.

Although this is the newest venture, several professors, in a variety of doctrinal and theoretical courses—from Civil Procedure to Civil Rights—have asked students to keep journals or diaries to articulate doctrinal understandings or to develop illustrative scenarios to make sure they understand a point of law.\textsuperscript{50} For journal assignments in substantive classes, the entries could cover "what was learned from simulation experiences; whether a certain technique was more or less effective compared to one used in a previous exercise; and how particular reading assignments or class discussions have impacted the student’s perception" of the topical area.\textsuperscript{51} Keeping a journal offers students the opportunity to organize and revise information, and to engage with it on a deeper level than simply recording.\textsuperscript{52}

Other professors have become more experimental in bringing literary or creative models into doctrinal classes. Andrew McClurg asked his students to write a poem about \textit{Katko v. Briney}, the spring gun case, from Torts—which raises the issue of whether an older couple could protect their property from thieves by use of a spring gun when they were not home.\textsuperscript{53} This is a case in which the thief, whose leg was blasted by a spring gun, was able to recover $20,000 in actual damages and another $10,000 in punitive damages. This elderly couple (mental picture: American experiences and those of others) and storytelling (in which students learn how to tell stories) in doctrinal classes.


\textsuperscript{52} Ogilvy, supra n. 4, at 65.

Gothic, aged about twenty more years and weathered by farm life) literally had to auction off a portion of farmland to pay the judgment. This set up—of a thief recovering compensatory damages from a homeowner—usually incenses students (especially those students who own guns and are disappointed that the Second Amendment did not come in first place). One of his students, Laurie Peterson, wrote,

The Old Farmhouse
Twas nighttime in the country
And all through the farmhouse,
Not a creature was stirring
Except Katko, the louse.
All the windows were boarded
With precision and care,
In hopes that all criminals
Would keep away from there.
Then inside the house
There arose such a clatter,
Katko looked at his feet
To see what was the matter.
And what to his wondering eyes
should appear?
But a gaping hole in his shin
And with no doctor near.
“I’ve been shot? I’ve been shot!
Oh, this must be a tort!
I will sue the old couple,
I will take them to court!”
From the high court of Iowa
The edict came down,
All the neighbors were shocked
In the small farming town.
The Brineys had lost,
Their farm had to be sold.
Katko was the winner,
A criminal—brazen and bold!
Deadly force is not right
Just to protect your land,
A life is more important,
The high court took this stand.  
So protect your home well,  
You do have that right,  
But you must sleep in the house  
To shoot someone at night!\textsuperscript{54}

McClurg said that the poetry assignment caused students to hone in on the fundamental principle for which \textit{Katko} stands, as well as to express the moral outrage they felt about the inability to use deadly force in defense of property.\textsuperscript{55}

If you want even more conciseness of thought, try a haiku contest, like my friend and co-author Rob Verchick does. Seventeen syllables. Below are just a few examples from contests he originated and that he and I have run at our respective schools over the years.

\textbf{Teaching Evolution in Public Schools}

Did Darwin figure,  
Examining finches’ beaks,  
There’d be a Kansas?  
--Doug Linder

\textbf{Class Participation}  
Nothing makes me more uncertain of who I am than quiet whispers.  
--BTD

A law faculty:  
Too big to be a jury,  
Too small for a mob.  
--Mike Waggoner

“I am color-blind,”  
said Justice Clarence Thomas

\textsuperscript{54} Id. at 837.
\textsuperscript{55} Id. at 825.
(Just like Justice Brown).\textsuperscript{56} --Richard Delgado

Other professors have made haiku assignments part of substantive or clinical classes.\textsuperscript{57}

Reflective writing (and especially particular forms of it) demands more than succinctness. It sharpens analytical skills; it insists that its authors have the ability to shift perceptual frameworks. Exploratory writings are not vague or abstract or sterile—they are detailed, contextualized, and concrete. When students are asked to write poems, essays, or op eds, their writing becomes animated, thoughtful, nuanced, and engaged.\textsuperscript{58}

It may not even be a matter of assigning an entire writing project. You can get mileage in class (in the form of student engagement and in training storytellers) if you simply ask your Criminal Law students to give the closing argument in a case they have read. For example, Marcia McCormick has her students make explicit the two different stories that could be told about the defendants in the principal cases. Patty Hearst is a good example of this—on the one hand, maybe she’s a kidnapping victim, brainwashed, afraid, and incapable of thinking clearly after two months of beatings, sexual violence, and deprivations of food, sleep, and movement. On the other hand, maybe she’s simply a spoiled rich girl who enjoys the excitement of the radical SLA activities and the positive attention from its members. McCormick says, “When the students see that these two stories are

\textsuperscript{56} See \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).

\textsuperscript{57} See \textit{e.g.} Gail Hammer & James Celto Vaché, \textit{A Conversation Between Friends: Adventures in Collaborative Planning and Teaching Ethical Issues in Representation of Children}, 75 UMKC L. Rev. 1025, 1041 (2007) (“Writing haiku is an exercise in discipline and creativity, both of which are important for attorneys representing children. We are convinced that this form of poetry both gives vent to creativity for students and imposes a discipline that is helpful in their development as professionals.”); Kathleen Magone & Steven I. Friedland, \textit{The Paradox of Creative Legal Analysis: Venturing into the Wilderness}, 79 U. Det. Mercy L. Rev. 571, 585–586 (2002) (offering extra credit in legal writing, property, and constitutional law classes for creative projects expressing interest in knowledge of the subject matter; the authors note that “students wrote haiku, created cartoons and montages, painted, and submitted audiotapes. The students depicted scenes in cases, from class, and the outside world. Students created stories around legal rules, around class examples, and about how the rules affected them in their real-world lives.”).

competing in their heads, they understand how a case might come out either way and how a lawyer might use the story to do some of the work of persuasion.”

Assigning the writing of poetry to comprehend and respond to legal cases is not just stimulating and engaging (or good for a laugh). Why is creative writing good for legal analysis? It rewards original thought, forces conciseness, and promotes independent thinking. The writing is not judged by standard community norms.

C. The Development of Professional Identity

Another reason to encourage students to write in creative ways in a variety of doctrinal classes is that reflective writing is essential to professional development. Others writing in this symposium, like Andrea McArdle, have written about the importance of narrative writing in forming a professional identity: preserving students’ individual voices and promoting ownership of ideas and writing. Writing reflectively about morals and ethics in the specific context of human relationships, rather than in disengaged law school hypotheticals, offers the prospects for self-critical assessment and consideration of the complexities of legal practice.

The dean at our law school, Ellen Suni, has long been one of our ethics wizards. In her Professional Responsibility course, Suni requires students to submit several anonymous journal entries (just two typed pages) each semester and then she writes responsive comments. The questions she has students address include:

Discuss a real situation (either from observation at work, as a client, through knowledge of a friend or family member’s experience, from news reports) or a fictional situation (either from books, movies, TV, etc.)

59. E-mail from Marcia L. McCormick, UMKC Asst. Prof, Samford U. Cumberland Sch. of L., to Nancy Levit, Curators’ & Edward D. Ellison Prof. of L., UMKC Sch. of L., Truth and Reconciliation (June 4, 2008) (on file with Author).
61. See generally McArdle, supra n. 58; see also Grearson, supra n. 60, at 75.
involving lawyers and assess the lawyer’s conduct in light of material in the readings and/or in class. Discuss a rule that you have serious concerns about. Explain why you have these concerns and how you might deal with them. . . . What issue do you expect to be the most troublesome for you when you get out in practice? Why? How do the existing Rules help or hamper your dealing with that issue? How do you think you will address it when it arises? . . . 63

Dean Suni says that ninety percent of all lawyers who have been disciplined sat in a classroom at one point and read the cases of lawyers being sanctioned and said, “This isn’t me. I’ll never do something like that.” And yet they did. How did that happen?

Lawyers are always going to be asked to make professional decisions for themselves in a world that is complex, murky and may have norms of practice that conflict with the Model Rules. Studies show that norms replace Model Rules, especially in smaller firms; that norms are forged early in students’ careers and are hard to change.64 Students need to learn to make conscious decisions about what they are doing and why. Unless the law students can empathetically imagine themselves in a world where they will have to resist temptations, understand the interplay of norms and rules, and make professional decisions for themselves, they won’t be able to do it.

The ethical rules are one set of rules with which every lawyer must meaningfully engage. Other teachers of ethics have encouraged engagement by assigning students to write responsive commentaries on how an essay by Dr. Martin Luther King on “The Ethical Demands of Integration” was relevant to the ethical responsibilities of lawyers.65 Perhaps if we keep reminding students about the ennobling stories of our profession, it will remind

65. See Dubin, supra n. 2, at 49.
them not only of why they came to law school, but of the kind of lawyers they want to be.66

Reflective writing is not only useful for students’ professional development, it merges with developing curriculum requirements. In 2001 the ABA Standards for Accreditation began to require a “rigorous” upper level writing experience.67 That standard was amended in 2005 to require both “writing in a legal context” and “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”68

The law and narrative or storytelling movement and the reflective writing push are both often treated as nice-but-frills stuff. I am going to make the stronger argument that narrative is necessary.

IV. Narrative Is Imperative69

Teaching students how to tell stories offers numerous advantages to this pool of lawyers-to-be. First, scientific information is emerging that people remember stories better than simply sets of facts. Second, stories offer more accurate depictions of human experience than sterile legal arguments. Third, stories persuade in ways that doctrinal arguments do not, and they may encourage greater probing for narrative truths.

66. To this end, the UMKC Law Review has added a Law Stories section to one issue every year: to collect the oral narratives, history, and fiction about legal practice and legal education. See Levit & Rostron, supra n. 7, at 1128.
67. ABA Stands. § 302(a)(2).
68. ABA Stands. § 302(a)(3)-(a)(4). Kenneth Chestek suggests that these requirements dovetail naturally with the broader academic movement of Writing Across the Curriculum, and that all three goals could be furthered by an integrated writing plus skills approach:

   Students taking a Business Associations course could be required to draft a partnership agreement or corporate bylaws. Students taking a course in Intellectual Property could draft a licensing agreement. Students taking Professional Responsibility might be asked to draft an ethics opinion. Students taking Evidence could draft a motion in limine and a supporting memorandum of law.

Chestek, supra n. 35, at 144.
A. The Neuroscience of Narrative

Stories are the way humans learn best. Research is emerging in cognitive neuroscience that “[t]he brain is structured, or ‘wired,’ to detect patterns” and that stories are a better way than simply the conveyance of facts to “encourage . . . the recognition of new patterns and relationships among objects and ideas.”\(^70\) Magnetic resonance imaging studies show that stories activate different regions of the brain than those stimulated when the brain is processing information encoded in sentences.\(^71\) Narratives “light up” the areas of the brain that produce an affective response.\(^72\)

In the world of brain science, facts, information, and cases that come “with an inadequate narrative charge do not and cannot produce this neocortical experience . . . the arousal and emotive response critical to the learning experience.”\(^73\) But it is not just an\(^{-emotional}\) response that is triggered. Narratives trigger a release of neuro-transmitters (catecholamines, such as epinephrine and dopamine) that affect both hemispheres of the brain—and this leads to holistic learning.\(^74\)

When people tell stories or listen to them, they form mental images that are stored in memory as symbols. Studies show that while people retain “only 20% of what they read, . . . they recall 80% of symbols.”\(^75\) In law, jury studies confirm that jurors recall more specific facts when cases are presented to them as narratives rather than simply as issues.\(^76\) The narratives help jurors

\(^73\). Id. at 22.
\(^74\). Id. at 25.
\(^75\). Michael Berman, \textit{A Few Words on Story-Telling}, 5:3 Humanising Language Teaching (May 2003) (available at http://www.hltmag.co.uk/may03/pubs4.htm).
create a coherent picture—and then they merge these facts with the legal issues.\textsuperscript{77}

\textbf{B. Stories and Humanness}

We spend most of at least the first year of law school teaching students to be skeptical of intuitive and emotive responses. We teach students to write in a professional voice—which often means to sanitize their writing by removing emotion and certainly by eliminating the horror of a first-person response. This system of disinfecting legal writing by eliminating the humanness creates outsiders and distances students from themselves.\textsuperscript{78}

Stories, in many ways, are more faithful representations of the human condition than doctrinal arguments. Stories challenge the view that truth is singular and recognize that lived experiences have plural truths.\textsuperscript{79} Stories insist on acknowledging perspective and voice—and differences in racial, cultural, economic, and ethnic backgrounds.

This is the theory behind Foundation Press’s new \textit{Law Stories} series—a set of companion readers for doctrinal areas such as family law, torts, and employment discrimination that illuminate the background stories behind landmark cases.\textsuperscript{80} When students read about the people behind the celebrated cases, they better understand the social conditions of the people bringing the suits, the history of the litigation, the legal system in that time or place, and the human emotions attendant to cases that play out over years. Conscious attention to narratives in doctrinal classes can make dessicated appellate cases come alive.

\begin{itemize}
\item \textsuperscript{77} Hastie et al., \textit{supra} n. 18, at 97 (describing the way that in jury deliberations, a “substantial proportion of the discussion made simultaneous reference to both facts and legal issues”); see also W. Lance Bennett & Martha S. Feldman, \textit{Reconstructing Reality in the Courtroom} 4 (Rutgers U. Press 1981) (“The structural features of stories make it possible to perform various tests and comparisons that correspond to the official legal criteria for evaluating evidence (objectivity, reasonable doubt, and so on.”).
\item \textsuperscript{79} Hayman & Levit, \textit{supra} n. 6, at 398–399, 426.
\end{itemize}
C. Persuasion

Another distinct purpose of teaching students to write reflectively across the curriculum is to introduce them to a different method of advocacy. Andrea McArdle has written on the importance of drawing student attention to “rhetorical features bearing on persuasiveness.” 81 Critical race and feminist legal theorists have long recognized that stories are an incredibly powerful tool to persuade people to revisit long-held beliefs. Stories, unlike logical or doctrinal arguments, “are insinuative, not frontal; they offer respite from the linear, coercive discourse that characterizes much legal writing.” 82 Stories create a sense of connection between the reader and the story’s author or characters. 83 These “empathic narratives” 84 work “not by convincing others to change their values, but by making them aware of values they already have which they simply had not initially thought were relevant.” 85 Numerous resources exist to convey to students how stories are acts of persuasion, the role of narrative in various legal venues (such as mediation, appellate argument, and sentencing), as well as techniques of storytelling in persuasive advocacy. 86

One of the best uses of clients’ stories in appellate litigation has been the National Abortion Rights Action League’s “Voices Brief.” 87 Submitted as an amicus brief in major Supreme Court abortion cases, the brief contains letters and accounts from women who have had both legal and illegal abortions. The idea of this brief was to have women tell their stories directly to a Court now composed of eight older men and a single older woman—to tell the Justices the many circumstances that can compel the need for an

81. McArdle, supra n. 58, at 518.
82. Delgado, supra n. 5, at 2415.
85. Singer, supra n. 83, at 2456.
abortion and that the decision whether to have an abortion is not made thoughtlessly or easily. This technique of sharing women’s stories in a brief was intended to convey through experience and empathy what sterile legal arguments about the right of choice could not. It said to the Justices that women—women you now know—will be in terror and some of them will die if the rights protected in Roe v. Wade are taken away.  

Students can learn this theory of persuasion—that “moral convictions are changed . . . not through argument,” but through empathetic imagination. They can develop a sensitivity to the details of clients’ lives. They can learn how to tell what abstract rights mean in the reality of people’s lives. They can learn that law is not about rules, but about people.

Yet stories are not just a tool of the political left. In Gonzales v. Carhart, in 2007, the Supreme Court reversed the position it took seven years earlier in Stenberg v. Carhart, and upheld the Partial Birth Abortion Ban Act. Citing to an amicus brief filed by a right-to-life group, Justice Kennedy concluded that some women who have had abortions regret their choice and suffer anguish and depression.

Which of these stories is true? Perhaps both. Perhaps whichever is told more persuasively—although something about that sounds glib and rings partly false. Unpacking the idea of “regret” indicates that the Carhart Court is using the term too sweepingly to refer to a constellation of emotions—sadness for being in a difficult situation, disappointment over past behavior.

88. Robin L. West, The Constitution of Reasons, 92 Mich. L. Rev. 1409, 1436 (1994). The Supreme Court has never cited to the “Voices Brief.” However, some evidence indicates that these or other stories may have prompted some empathetic insights among some of the Justices. In Planned Parenthood of Southeastern Pennsylvania v. Casey, for example, when the Court held unconstitutional the spousal notification provisions in Pennsylvania’s abortion law, the plurality discussed the prevalence of domestic violence and recognized that married women who have suffered spousal abuse may have good reasons to not inform their husbands about their pregnancies. Nancy Levit & Robert R.M. Verchick, Feminist Legal Theory: A Primer 142 (N.Y.U. Press 2006).

89. West, supra n. 88, at 1436.


92. “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” Gonzales, 550 U.S. at 159; see generally Allen Rostron, Right to Life Movement, in Encyclopedia of the Supreme Court of the United States 256 (Gale Publg. 2008).
regarding the use of contraceptives, and regret at the decision to terminate a pregnancy. The Court, however, conflates all of these different types of regret into a single package, and then leverages that regret into a justification that the law should have restrained them from action. Preventing people from doing things they may regret has never been a legitimate, let alone, compelling governmental interest. Also, information from social psychology about the ways regret actually operates indicates that people overestimate the regret a situation is likely to produce, find ways of dampening regret they do feel, and use regret as a learning tool to avoid similar future situations. Thus, the Court’s invocation of an emotion that some women might feel—for varied reasons and in different ways—as an invitation for further abortion regulations is improper.

One lesson to draw from this battle of narratives in the realm of abortion is that perhaps we should search more deeply for the criteria of narrative truth. Hopefully, the legal academy is moving toward greater acceptance of the value of stories—particularly when those stories comport with and are bolstered by empirical data from a variety of disciplines.

Teaching students about the importance of narrative is an essential first step in encouraging them to learn how to become storytellers.

V. CONCLUSION: STORIES ABOUT LIFE AND LAW

In this Article, I have encouraged the use and teaching of storytelling in doctrinal courses. The Article traced the fairly recent emergence of narrative in the legal academy and developed the idea that stories are a powerful way to evoke understanding. Then it turned to reasons for adding and ideas on ways to include

95. See id.
97. See Hayman & Levit, supra n. 6, at 422.
reflective writing components in doctrinal classes. Last, it addressed the neuroscience of narrative—that people remember more if events are told in story form—as well as the advantages of stories in better representing the human condition and persuading listeners. The Article concludes with the point that for students to pay attention to stories and to become storytellers themselves, they need to understand the importance of stories.

Narratives can emerge in small ways, and not just as major projects. The stories that are told tell a great deal about the humans who are telling them. Perhaps your students ask you for ideas about interviewing with firms. One question to suggest they ask is: “Who are the heroes in this firm?” If the associates and partners at the firm regale the student with the tale of “So-and-so who got the $14 million verdict,” that tells them something about the firm. If the associates and the partners tell the story of the modern day Thurgood Marshalls, Belva Lockwoods, or Atticus Finches or the office manager who is indispensable, that tells them something else.98

Law schools train students to constantly verbalize. It is perhaps more difficult to train students toward silent observation and listening well.99 Encourage students to listen to stories about legal mavericks, innovative thinkers, and lawyers who have developed a reputation for professionalism and the quality of service they deliver—entrepreneurs who spun off into boutique specialties or female headed smaller practices;100 lawyers who created new specialty areas of practice (such as cyber law, law and entrepreneurship, animal rights, or transnational law); and attorneys who developed stellar reputations for trustworthiness, fair play, and an exemplary work ethic.101 Stories raise themes about the structural features of law firms, like the gendered organization of

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98. See e.g. Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society 90 (Farrar, Straus & Giroux 1994) (“The stories lawyers told themselves about professionalism were not just self-serving facades. They were efforts to answer Holmes’s question of questions (by no means unique to lawyers): does all this ‘make out a life’?”).


legal practice or questionable billing practices.\textsuperscript{102} Stories inform about a firm’s culture, history, and expansion, and they indicate what a firm values.

The stories told about life in practice tell about ethical codes, human relationships, the craft of law—about what is important. If we train students while they are in law school to write their stories with care, with attention to detail, and with passion—and to pay attention to their own roles in the life of the law—we will be training a generation that cares about people and fair treatment of them. The narrative form—of stories, chronicles, parables, poems—encourages writers to imagine different versions of events. Perhaps ultimately, storytelling can encourage the re-imagination of law.

\textsuperscript{102} See generally e.g. William R. Keates, \textit{Proceed With Caution: A Diary of the First Year at One of America’s Largest, Most Prestigious Law Firms} (Harcourt Brace Leg. & Prof. Publications 1997); Cameron Stracher, \textit{Double Billing: A Young Lawyer’s Tale of Greed, Sex, Lies, and the Pursuit of a Swivel Chair} (W. Morrow & Co. 1998).
WHAT WILL I DO ON MONDAY, AND WHY AREN’T WE DOING IT ALREADY?:

REFLECTING ON THE VALUE OF EXPRESSIVE WRITING IN THE LAW SCHOOL CURRICULUM

Carol McCrehan Parker

I. INTRODUCTION

A central task for law students is learning to think as lawyers think. To accomplish this task, students must create their own understanding of the law as they interpret authoritative texts and observe life through the lens of the law. This process of creative discovery requires both imagination and discipline.

Writing assignments in law school usually emphasize the process of creating formal professional documents, such as memos, briefs, and more recently contracts. The iterative process focuses on producing a document that will serve a particular purpose and audience most effectively. In shaping documents that conform to their intended readers’ expectations as to content, organization, and language, students develop critical-thinking skills that will serve them throughout their professional careers.

Writing-to-communicate to a distant and impersonal professional audience, however, is not the only kind of writing that is valuable to legal education. Also essential to the development of critical understanding is writing to express the writer’s thoughts to the writer herself and perhaps an audience of trusted others, writing to reflect and to make sense of texts, writing to explore

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1. Art Young, Teaching Writing Across the Curriculum 5 (3d ed., Prentice Hall 1999). This monograph offers a wealth of suggestions for using writing in and out of the classroom to improve the quality of students’ thought and expression.
the realm of knowledge and experience, and writing to exercise authority over texts and give voice to the writer’s experience. Expressive writing provides a means for students to reflect on texts and practice, experience, and bridge gaps created by linguistic distance embodied in legal texts—“to give voice to experiences that might otherwise be lost or denied.” Writing to express thoughts serves to form those thoughts: through expression, thoughts are revealed and shaped.

Although writing to create meaning is an essential step in the process of writing to communicate to a particular audience to serve a particular purpose, attempting to do both at the same time may stifle creative thinking and yield superficial analysis and stilted prose; without independent thought, writing to communicate becomes writing to conform. By rarely assigning exploratory writing—writing that may be subversive because it is personal—in law school, we miss opportunities to bring the discipline of writing to the process of creating meaning.

Providing such opportunities in law school, however, may provide an important foundation for professional growth. Research in the acquisition of expertise consistently finds the key to be deliberate practice, i.e., to perform an authentic task of appropriate difficulty, and after feedback, to do it again—better this time. Assigning expressive writing in law school offers students a vehicle for sustained, deliberate practice of the legal imagination, a means of surfacing and developing students’ perceptions, thoughts, and judgment as they enter the profession. Deliberate practice of reflective and exploratory expressive writing fosters development of authentic professional identity and voice.

2. Id. at 9.
3. Nancy Lester, Panel Remarks, Writing to Learn How to Think In and On Actions: The Role of Writing in Becoming a Professional (New York City, N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference).
4. Peter Elbow, Teaching Thinking by Teaching Writing, Change 37 (Sept. 1983).
5. Id.
II. HOW EXPRESSIVE WRITING CAN SERVE EDUCATIONAL GOALS

The preceding essays\(^7\) illustrate the power of writing to construct meaning and generate understanding and suggest the variety of forms expressive writing assignments may take. These assignments interrupt automatic thinking to awaken awareness and encourage reflection and original thought.

A. Reflecting on Texts

Throughout her professional career, a lawyer learns from legal texts and through her written expression contributes to the development of the law. Learning to read and interpret legal authorities is a fundamental lawyering skill and central to case-method instruction in law school. Immediately upon arriving at law school, beginning law students learn to identify and summarize the component parts of judicial opinions through preparing case briefs. Although students are encouraged to reflect on the implications of the opinions and raise question in class discussions, they may discount their own observations (and those of their classmates) as they seek the “right answer.”\(^8\) Reflective writing may promote deeper reading of texts by asking students to articulate their responses to texts and to reframe texts in relation to other texts, thereby building a foundation for synthesizing authorities.

For example, Nancy Lester, a professor of literacy education, “promotes expressive, critically reflective writing” by assigning “learning logs.”\(^9\) Her instructions are simple: “As you are reading, note down any excerpt from the text that causes you to stop and think. Place this excerpt in the left hand column. In the right-hand column, note down your reaction/response to the excerpt.”\(^10\) Using this informal format, students explore their thoughts about

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7. The authors discussed their ideas as members of a panel entitled Writing Across the Curriculum: Professional Communication and the Writing that Supports It, presented by the Section on Legal Writing, Reasoning, and Research at the 2008 Annual Meeting of the Association of American Law Schools (New York, N.Y., Jan 4, 2008).
9. Lester, supra n. 3
10. Id.
texts as they read; they notice the surprises and work through their questions to create their own understanding of the texts.\textsuperscript{11}

The goal of the assignment is for students to “acquire knowledge in a way that ensures they will be able to use that knowledge, not only to practice, but to describe and explain why they practice as they do.”\textsuperscript{12} Such critically reflective writing helps students develop “authoritative voices that reflect mastery of the subject matter,”\textsuperscript{13} and make “meaningful connections from the known to new understandings.”\textsuperscript{14} Professor Lester notes,

When students use writing as a way of thinking in their learning logs, opportunities for taking risks or making cognitive leaps are expanded, since producing polished ideas and correct answers without having opportunities to mess around with or tinker with their sketchy shaping of those ideas leads to shallow exercises in regurgitation.\textsuperscript{15}

B. Discovering the Stories behind the Texts

Beginning law students often hope that their professors possess and will someday share law’s equivalent of the decoder ring—something that sets out the Law for every situation. Because they have entered law school—not fact school, they may resist thinking carefully about the factual complexity underlying the heavily edited cases they read for class—assuming that an opinion’s recounting of “the facts” is the singularly correct representation of the underlying human circumstances. Later, in reaction to the alarming discovery that multiple representations are possible, some students may conclude that law—at least case law—amounts to little more than the measure of the “chancellor’s foot.”\textsuperscript{16} Legal education can offer students a path toward finding

\begin{itemize}
\item \textsuperscript{11} For a discussion of the value of this sort of “problematizing” reading strategy, see Dorothy Deegan, \textit{Exploring Individual Differences Among Novices in a Specific Domain: The Case of Law}, 30 Reading Res. Q. 154 (1995).
\item \textsuperscript{12} Lester, \textit{supra} n. 3.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. For an extended discussion of transfer of learning from one context to new contexts and its importance in learning, see \textit{How People Learn: Brain, Mind Experience, and School} 51–78 (John D. Bransford et al. eds., expanded ed., Natl. Academy of Sci. 2001).
\item \textsuperscript{15} Lester, supra n. 3.
\item \textsuperscript{16} See e.g. H. Jefferson Powell, “Cardozo’s Foot”: The Chancellor’s Conscience and Constructive Trusts, 56 L. & Contemp. Probs. 7, 7 (Summer 1993) (stating that “[t]is all one as if they should make the Standard for the measure we call A foot, to be the Chancel-
meaning within indeterminacy by providing experiences in reading and recounting stories embodying the human dimension that may be lost in the highly abbreviated representations of facts found in law students’ casebooks.17

Medical students may face a similar challenge reconciling scientific principles with human complexity, a challenge that may be addressed by exploring the imaginative possibilities suggested in literary texts. For example, Danielle Ofri, professor of medicine, has incorporated five minutes of “something literary” into morning rounds, reading an essay or poem aloud and asking for discussion, because she believes that “medicine—like law—can streamline the thought process into a very cramped indurate style.”18 Reading literature and composing narratives, on the other hand, require “neurologic loop-de-loops involving keen observation, description, action, emotion, language, and esthetics,”19 and nuanced interpretation of metaphor. Dr. Ofri observes, “These are the skills of creative thinkers . . . [who can] approach problems from diverse perspectives.”20

In addition to reading literary writing to explore the human experience and to reject the conventional boundaries, Dr. Ofri assigns “narrative write-ups” that challenge and illuminate the genre of the “patient write-up,” which is a standard medical history with formalized sections, usually written in a “carefully honed argot of passive voice and specialized vocabulary designed to keep the doctor and the patient at a healthy linguistic distance.”21 The patient’s voice is absent from the write-ups, which are tedious to read; Dr. Ofri likens them to “the interrogation of a corpse.”22

In a narrative write-up, by contrast, students must tell the patient’s story as a story in plain language (e.g., a forearm is a

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18. Danielle Ofri, Panel Remarks, Injecting Homer into Hippocrates: Using Literature to Teach Medical Students (N.Y.C., N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference) (notes on file with Author).
19. Id.
20. Id.
21. Id.
22. Id.
forearm, not a “distal upper extremity”). After overcoming their resistance to this departure from all they had worked so hard to learn, students discovered that they uncovered critical clinical facts that would not have come to light in the standard write-up.”23 Rejecting the conventions of a standard genre in medical education thus served to interrupt students’ habitual practice and routinized thinking and writing, so that they may notice more, understand more, and better respond to the unique circumstances surrounding their patients.

Nancy Levit, professor of law, likewise argues that discovering and telling stories in legal education promotes development of professional identity and that narrative is a powerful mode of learning,24 noting that research in cognitive neuroscience indicates that narratives trigger both hemispheres, leading to holistic learning.25 The role of metaphor in legal thought has been described as “our most pervasive means of ordering our experience into conceptual systems.”26 Accordingly, creative writing in law school “sharpens analytical skills—it insists that its authors have the ability to shift perceptual frameworks.”27 Many of Professor Levit’s examples take the form of poetry, but other assignments, such as asking a criminal law student to give the closing argument in a case read for class, may provide experience in reframing facts, while additionally drawing attention to modes of persuasion.28

C. Giving Voice to the Writer’s Experience

In addition to supporting professional communication, expressive writing may itself be that communication. Although writing courses in law schools necessarily emphasize writing for law practice and the expectations of readers of legal documents, an education in law should also include experience in formulating and expressing original thought on issues of importance to the student and to society.

23. Id.
25. Id. at 277.
26. Id. at 266 (quoting Susan Bandes, Empathy, Narrative and Victim Impact Statements, 63 U. Chi. L. Rev. 361, 383–384 (1996)).
27. Id. at 273.
28. Id. at 273–274.
Ruthann Robson discussed her use of scholarly writing projects in her seminar on law and sexuality, in which students gave voice to their own moral reasoning on highly controversial issues. The assignments challenge students to take risks as they create within a limited realm of legal doctrine and to communicate their own position in a voice that is both professional and authentic.

D. Providing Alternatives to Conventional Modes of Assessing Learning

Finally, expressive writing assignments are valuable tools for assessment of law students’ learning. Derrick Bell has offered a variety of creative alternatives to final exams for assessing what students have learned—and for facilitating their learning more in the process. While these methods may involve more work for teachers and students, they promise benefits of greater depth of understanding and fuller development of an authentic professional voice. How we assess law students' performance sends a clear message to students about what skills are valued. If the three-hour examination is our only means of evaluation, we miss opportunities to encourage reflection and creative exploration of ideas. Why is it the favored form?

III. WHAT WILL I DO MONDAY—AND WHY AREN’T WE DOING IT ALREADY?

These panelists persuasively demonstrate the potential of expressive writing assignments to encourage students to think about the law and to become reflective practitioners. They challenge teachers to ask not only how these ideas can be applied in

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29. Ruthann Robson, Panel Remarks, Sexual Justice, Student Scholarship and Some Thoughts on the So-Called Seven Sins (N.Y.C., N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference) (notes on file with Author).
30. Derrick A. Bell, Jr., Panel Remarks, Writing Across the Curriculum: Professional Communication and the Writing that Supports It (N.Y.C., N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference) (notes on file with Author).
31. Id.
law school curricula, but also what barriers impede inclusion of writing-to-learn activities in law-school courses—that is, what will we do Monday, and why aren’t we doing it already?

My first encounter with these essays left me brimming over with ideas I wanted to express—the first sketchy shaping of plans to incorporate reflective and expressive writing into my classes—and wondering which of this rich mix of ideas I use might in class next Monday. I was especially excited about assigning learning logs. That idea clicked for me immediately because I want to encourage students to follow the surprises they encounter in texts, to identify questions and seek to resolve them, but I have not been entirely satisfied with my attempts to do so, in part because I lacked the right vocabulary. Next, I vowed to become more intentional about bringing stories into the classroom to encourage students to think beyond the texts—to seek out in the linguistic distance the human stories underlying legal disputes, so as to be able to faithfully translate clients’ stories into law’s metaphors. And I decided to encourage students to think about lawyers’ stories, as well—including their own—to encourage development of professional identity and voice.

Reflecting further, though, I realized that while incorporating expressive and reflective writing into small upper-level classes has seemed easy and natural to me, I have been far less creative in assigning writing in large-section doctrinal classes. Why would that be, when I am entirely convinced of the educational value of writing in law school? Having thought for pages about the reasons for assigning expressive, exploratory writing, I’d like to muse a bit about why we might not do so.

First, we simply may not think of it, and we certainly have enough other things to think about. Expressive writing likely had little role in our own legal education, and we may fear student resistance to an unfamiliar teaching method.  

33. See e.g. Philip C. Kissam, Thinking (By Writing) About Legal Writing, 40 Vand. L. Rev. 135, 149 n. 40 (1987) (noting his own and a colleague’s experiences of student evaluation ratings that declined when ungraded writing assignments were required and returned to their previous levels when writing exercises were not assigned). Professor Kissam observed that “writing exercises in a basic doctrinal course are likely to violate the general norms and expectations of the law school community. Under these conditions, the student ratings of the professor’s work quite possibly could decline.” Id. at 149. For a discussion of students’ silence in response to unconventional teaching methods, see Ofri, supra n. 18.

It is possible, though, that at least for some kinds of courses, those norms and expectations have changed in recent years, making students more receptive to writing
On the other hand, though, many of us are troubled by studies that show, as Nancy Lester noted, that “expressive writing—writing to think, to reflect, to take chances, to work through understanding, to question—is virtually absent from school settings.” Moreover, having graded three-hour exams, we have direct experience in reading “the shallow regurgitation that can result when students are asked to produce polished ideas and correct answers without having opportunities to mess around or tinker with their sketchy shaping of these ideas.”

Second, we may not have used writing in doctrinal courses before and may fear that we don’t know how to design effective assignments. On the other hand, we do know our course goals, and thinking about what we would hope to accomplish through writing assignments suggests ways to achieve those goals. As Art Young has observed, “Successful assignments are embedded in the unique goals of each course and are integral to the building of knowledge in that course. Effective writing assignments are not ‘add-ons.’”

Writing in law school can help students relate their study of law to their personal experiences and to their understanding of society and culture. Writings of various length and degrees of formality can encourage students to think about the complicated factual circumstances and values surrounding legal issues. Reflection papers and journals can help students grapple with material on a personal level and build habits of life-long learning in the profession. Seminars and other “paper courses” offer opportunities for students to use writing to focus their thinking as they explore specialized areas of interest.

Even in large classes, students benefit from writing assignments designed to support the more sophisticated learning necessary for them to make sense of complicated areas of law. The hard work of distilling, reformulating, and expressing the applications of key ideas embodied in texts promotes deeper learning of underlying principles and policies. Potential assignments range from asking students to generate hypotheticals that might be exercises and more appreciative of teachers who assign them. See e.g., Susan L. DeJarnatt, In Re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing, 50 J. Leg. Educ. 50, 69 (2000).

34. Lester, supra n. 3.
35. Id.
36. Young, supra n. 1, at 9.
governed by authorities discussed in class, to short papers or outlines supplying factual background surrounding legal issues to be discussed in class, to position papers, testimony for legislative committees, comments on proposed administrative rules, amicus briefs, and law review comments.

The preceding panelists offered numerous examples of expressive-writing assignments, such as learning logs to facilitate engagement with texts, seminar papers for which a key purpose is to encourage exploration of and reflection on moral issues, and use of stories and poems and genre-bending to deepen contextual understanding. Legal-writing teachers have an important role to play in uncovering these possibilities for our less-experienced colleagues.

Third, our courses are overloaded already, and writing is time-consuming. A teacher who assigns writing in a survey class may have to sacrifice some coverage in favor of the purposes served by writing. The opportunity that writing affords students to consider a narrower set of topics in more depth, however, may justify that sacrifice. In addition, it is possible to use writing assignments to increase the breadth of coverage to include topics that will not be discussed in class. For example, a teacher can enrich the content of a survey course by providing a list of topics suitable for short, exploratory papers.

Paradoxically, coverage concerns themselves may provide good reasons for assigning writing: tools for self-education are most needed when doctrine is complicated and evolving. Accordingly, developing skills of synthesis and selection through written assignments may be increasingly important. Electronic media brings information to students in torrents—uncatalogued and random. The vast resources present educational challenges as well as benefits. As Molly Lien wrote in her article, Technocentrism and the Soul of the Common Law Lawyer,37 “Students appear to equate the ability to access the material with mastery of the material. They view downloaded information as learned information.”38 Writing forces students to make sense of the vast informational resources. In an increasingly interactive learning

38. Id. at 118.
environment, writing affords time to process information and to reflect on its meaning.

In any event, the choice to assign writing in a course or not to do so should be a deliberate choice. Teachers designing courses should examine the educational benefits of writing and weigh them against the benefits of breadth of coverage.

Fourth, we don’t have time to grade writing assignments. Evaluating written work is time-consuming, and teachers may worry that not to grade written work will remove students’ incentive to do good work and serve as tacit endorsement of mediocre writing. However, other methods of providing feedback are available: class discussion, exercises requiring students to test the document by using it for its intended purpose, teacher-generated models to which students may compare their work, peer evaluation, general oral comments from the teacher, guided self-evaluation, comments but no grade, comments on only specific aspects of the assignments, check-list comments, or simple check-off lists that each student has completed the written work.

Another method of reducing grading time is to assign collaborative writing tasks. Using collaborative groups reduces the number of assignments for the teacher to read, and the experience of working with others may help students develop professional judgment. Lawyers often write in collaboration with other lawyers, and collaborative assignments can teach important lessons in offering and receiving constructive criticism within a group of their peers.

For some purposes, these methods may even be preferable to reading and grading every piece of written work that each student produces. Responding to writing without “final grades” may encourage students to use writing to help them organize their thoughts, rather than thinking of writing only in terms of the end product, and it may help students develop their ability to evaluate their own work.

On the other hand, grading does serve important purposes by providing students with both useful information and incentive to improve their work in successive assignments. It may be possible

39. On the other hand, much of the important work done by students in law school is ungraded. Examples include class preparation, moot court, and extra-curricular activities. Sometimes students are motivated to do good work by the hope that it will pay off in graded assignments; sometimes social rewards provide incentive.
to achieve these benefits without requiring much more than the usual amount of grading time. For example, by substituting a short writing assignment for one examination question, a teacher can spread out grading over the semester rather than concentrating that work in the short, intense period following semester examinations. Even the simple step of including a take-home portion in an end-of-course examination, which need not add to grading time at all, may serve writing goals of encouraging both creative and critical processes by giving students sufficient time to rewrite their responses.40

Derrick Bell has challenged us to think about the effectiveness of the writing we do have time to grade: examinations. Are they the most effective modes of assessment? What are we measuring? Why do we choose this mode of assessment over other possibilities?

IV. CONCLUSION

Writing is a tool for constructing meaning. Writing provides a vehicle for reflection and a discipline to focus thinking and perhaps to liberate thought. By writing, students connect the dots of experience, integrating the various aspects of their legal education, described in the Carnegie Report as “knowledge, know-how, and ethical judgment.”41 To be able to draw connections between fragments of information drawn from multiple sources is increasingly more important and difficult, as those fragments increase in quantity and instantaneous availability.

Expressive writing is integral to the process of developing critical understanding and provides deliberate practice in reflection, itself an essential professional skill.42 Reflective-writing assignments encourage students to connect with parts of themselves they may be silencing during their law school experience and may ameliorate feelings of alienation experienced by some, perhaps many, law students.43

41. Sullivan et al., supra n. 32, at 81–82 (noting the importance of integrating these types of intelligence in the practice of law).
42. See Becky L. Jacobs, Teaching and Learning Negotiation in a Simulated Environment, 18 Widener L.J. 91, 100 (“Reflective inquiry is itself a professional skill, critical for assimilating learning experiences.”).
43. See e.g. Student Author, Making Docile Lawyers: An Essay on the Pacification of
ing from journal entries to law review articles, students may discover and test their own thoughts, find their professional voices, and develop the self-awareness that is the foundation of professional integrity. Three-hour examinations given at the end of each semester do not provide sufficient writing experience to achieve these educational goals.

The preceding essays and other panel presentations invite law teachers to explore the idea of assigning expressive writing and to reflect on its possibilities for enhancing legal education. What will you do on Monday?

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Law Students, 111 Harv. L. Rev. 2027 (1998). One of my former students, describing a class in which students were required to keep journals, told me that her law school experience had been transformed by the opportunity that journal assignment gave her “to tell someone and have them listen.”