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What is "Good Legal Writing" and Why Does it Matter?

Mark Osbeck
University of Michigan Law School, mosbeck@umich.edu

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WHAT IS "GOOD LEGAL WRITING" AND WHY DOES IT MATTER?

*Mark K. Osbeck**

ABSTRACT

Law schools face increasing pressure to improve instruction in practice-oriented skills. One of the most important of these skills is legal writing. The existing literature on legal writing contains various rules and suggestions as to how legal writers can improve their writing skills. Yet it lacks an adequate theoretical account of the fundamental nature of good legal writing. As a result, legal writers are left without a solid conceptual framework to ground the individual rules and suggestions. This Article attempts to fill the theoretical void in the literature by offering a systematic analysis of what it is for a legal document to be well written. It starts by examining a foundational conceptual issue, which is what legal writers mean when they say that a legal document is well written. It argues that legal readers judge a document to be well written if the writing helps them make the decisions they need to make in the course of their professional duties. The Article then provides an analysis of the fundamental qualities that enable legal writing to do this, concluding that there are three such qualities: clarity, conciseness, and the ability to appropriately engage the reader. The Article explains why each of these qualities is essential to good legal writing, and it examines the tools good writers use to make their writing clear, concise, and engaging. Lastly, the Article examines what it is that distinguishes the very best writing in the field, arguing that great legal writing is not just writing that is especially clear, concise, and engaging, but is instead writing characterized by a separate quality, elegance, that is aesthetic in nature. The Article then goes on to explore what it is that makes such writing elegant, and whether it is desirable for legal writers to strive for elegance in their own writing. The Article concludes by briefly considering the pedagogical implications of the analysis discussed in the previous sections.

* Clinical Assistant Professor, University of Michigan Law School. I am grateful to Edward Becker, Kenneth Chestek, Linda Edwards, Phillip Frost, Ryan Pfeiffer, Donald Regan, Alex Sarch, Brian Simpson, Robert Smith, David Thomson, Melissa Weresh, and J.B. White for their helpful comments. I also wish to thank the Legal Writing Institute for awarding me a grant to work on this project.

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INTRODUCTION

On April 9, 2010, Chester Paul Beach, Jr., the associate general counsel for one of America's largest industrial companies, United Technologies Corporation, spoke at a high-profile conference in New York that concerned the future of legal education. Addressing the staffing practices of corporate law firms, Mr. Beach startled the predominantly academic audience when he told them that "we're one of those firms who does not allow first or second year associates to work on our matters without special permission—because they're worthless."[1]

Mr. Beach's observation about the readiness of beginning lawyers to practice law created something of a stir in the law school community. Yet it was really just a poignant expression of an increasingly common sentiment. During the past two decades or so, law schools have come under increasing pressure from outside the academy to improve the practice-oriented skills of their graduates.

This pressure began in 1989, when the American Bar Association's Section of Legal Education and Admission to the Bar formed a task force to explore the practicing bar's perception of a significant disconnect between legal education and the practice of law. That task

1. Chester Paul Beach, Assoc. Gen. Counsel, United Techs. Corp., Address at Future Ed: New Business Models for U.S. and Global Legal Education, (Apr. 9–10, 2010), *available at* http://nyls.mediasite.com/mediasite/Catalog/Full/ac401784b0234af89d50e059b4e95c3021 (follow "Future Ed Conference - Panel 1).

force, headed by Robert MacCrate, issued what is now known as the *MacCrate Report* in July 1992.[2] The heart of the report was its *Statement of Lawyerly Skills and Professional Values*. This identified the skills the task force deemed essential to the competent practice of law, one of which was effective oral and written communication.[3] The task force stressed that it was important for law schools to focus on these skills in their instruction because "surveys understandably indicate that practicing lawyers believe that their law school training left them deficient in skills they were forced to acquire after graduation."[4]

In 2001, the ABA stepped up its pressure on law schools to improve skills education, mandating for the first time that law schools require at least one "additional rigorous writing experience" after the first year to supplement the traditional first-year legal writing and research course.[5] The ABA explained that it did so in order "to reflect the importance of legal writing instruction to the law school curriculum."[6]

The judiciary has also weighed in on the importance of improving the legal writing and other practice-oriented skills of law school graduates. For example, in a widely discussed article entitled *The Growing Disjunction Between Legal Education and the Legal Profession*, Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit observed that "many law schools—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical

2. *See generally* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, THE REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

3. *Id.* at 138–41. The Task Force Recommendations explicitly addressed the need for improvements in legal-writing pedagogy, stating that "[i]n view of the widely held perception that new lawyers today are deficient in writing skills, further concerted effort should be made in law schools and in programs of transition education after law school to teach writing at a better level than is now generally done." *Id.* at 332.

4. *Id.* at 5.

5. 2011–12 STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH., *Program of Legal Education* § 302 (a)(3) (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.pdf (last visited Mar. 21, 2012). For a thorough discussion of this revision and its impact, see Kenneth D. Chestek, *MacCrate (in)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. COLO. L. REV. 115 (2007).

6. COUNCIL ON THE SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, MEMORANDUM FROM JOHN A. SEBERT, CONSULTANT, ON 2000-2001 CHANGES TO THE STANDARDS, INTERPRETATIONS, AND RULES (June 2001) (on file with the author).

scholarship and pedagogy."[7] Judge Edwards faulted law schools for not providing their graduates sufficient training in the skills they would need to practice law, and raised his "serious concern" concerning the "lack of good training in legal writing."[8] "In my twelve years on the bench," he wrote, "I have seen much written work by lawyers that is quite appalling. Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing . . . ."[9]

Judge Edwards is not alone among members of the judiciary in his assessment of the poor writing skills of lawyers. One of the most prominent and prolific federal judges, Richard Posner, has observed that the communication skills of the advocates he sees "are often quite bad, sometimes awful."[10] Like Judge Edwards, he believes that "[m]aybe all this is the result of the growing gap between practice and the academy."[11] Other judges agree. One empirical study found that approximately 94% of both federal and state judges surveyed reported that basic writing problems routinely marred the briefs they read, and that a clear majority of respondents thought that new members of the profession did not write well.[12]

Voices from outside the bench and bar have also pressured law schools to put a greater emphasis on legal writing and other practice-oriented skills so that their students will be better prepared to practice law when they graduate. In 2007, the Carnegie Foundation for the Advancement of Teaching issued an influential report called *Educating Lawyers* (also commonly referred to as the *Carnegie Report*), which found that "[l]aw schools face an increasingly urgent need to bridge the gap between analytical and practical knowledge . . . ."[13] It accordingly recommended that law schools make a greater effort to integrate skills instruction into the curriculum in order to "more fully complement the teaching and learning of legal doctrine with the teaching and learning of practice."[14]

7. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1993).

8. *Id.* at 63.

9. *Id.* at 64.

10. Interview, *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1815 (2009).

11. *Id.* at 1816.

12. Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 85–86 (2003).

13. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, SUMMARY 8 (2007).

14. *Id.*

That same year, a committee of scholars and practitioners sponsored by the Clinical Legal Education Association issued a report entitled *Best Practices for Legal Education* that was designed to encourage a dialogue on how to improve skills training in law schools.[15] The impetus for this report was the committee's determination that "there is a compelling need to change legal education in the United States" because "most law school graduates lack the minimum competencies required to provide effective and responsible legal services."[16]

Not surprisingly, the increased pressure on law schools to improve the legal writing and other practice-oriented skills of their students has spurred a burgeoning body of academic literature on practical lawyering skills. Indeed, just in the area of legal writing (which is perhaps the most fundamental of practice-oriented skills), commentators have produced literally dozens of articles and books in recent years aimed at improving the legal writing skills of law students and lawyers.[17] And yet, while commentators have generated many helpful works on legal writing and legal-writing pedagogy, they have largely ignored the theoretical underpinnings of legal writing. Numerous books and articles offer advice on how to write better or how to teach writing better, but none provides a systematic analysis as to the fundamental goals of legal writing.[18]

This void in the literature hampers legal writers. Without an adequate understanding of the fundamental goals of legal writing, legal writers cannot make full and effective use of the individual rules and suggestions they find in the existing literature. As with practitioners in any discipline, legal writers require more than just rote memorization of various rules and suggestions if they want to become proficient in their craft; they need also to understand *why* they are being taught to write a certain way. For only then do they pos-

15. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 1 (2007).

16. *Id.* at 1, 5.

17. *See* Almas Kahn, *A Compendium of Legal Writing Sources*, 50 WASHBURN L.J. 395 (2011) (summarizing the principal works in the field).

18. By "legal writing," I mean to include various types of expository writing that lawyers, judges, and related professionals (e.g., judicial clerks) produce in the course of their work. The prototypical examples of such writing are legal memoranda, letters, briefs, motions, and judicial opinions. I do not mean to include in this analysis academic legal writing or the products of transactional drafting (e.g., contracts), though much of what is discussed in this Article applies to these types of writing as well. Likewise, while the focus of this Article is on legal writing specifically, there is certainly a significant overlap between good legal writing and good expository writing generally.

sess an adequate conceptual framework to make sense of the individual rules and suggestions they learn.[19] Furthermore, from a pedagogical perspective, it is difficult to see how legal-writing instructors can effectively teach their students how to write well if they themselves do not have a clear understanding of what exactly good legal writing entails.

This Article endeavors to fill the theoretical void in the existing literature by providing a systematic analysis of what it is that makes a legal document well written. Part I of the Article explores the concept of good legal writing and what exactly legal readers *mean* when they say that a legal document is well written. It concludes that good writing is essentially writing that satisfies the needs and desires of the reading audience, and in the context of *legal* writing, this means writing that promotes the readers' ability to make the important decisions legal readers need to make in the course of their professional duties. Part II then analyzes the fundamental qualities[20] that enable good legal writing to do this. It argues that there are three such fundamental qualities: clarity, conciseness, and the ability to appropriately engage the reader. It examines why each of these fundamental qualities is essential to good legal writing, and it explores the various tools legal writers use to make their writing clear, concise, and engaging. Lastly, Part III discusses a separate, aesthetic quality, referred to as "elegance," which, it argues, is the hallmark of the very best legal writing. Part III then explores what it is that makes great writing elegant, and whether it is desirable for legal writers to strive for elegance in their own writing. The Article concludes by briefly considering two pedagogical implications of the analysis discussed in the previous sections.

19. Stanley Fish makes this point with regard to learning how to write good sentences: "If you learn what it is that goes into the making of a memorable sentence . . . you will also be learning how to take the appreciative measure of such sentences. And conversely, if you can add to your admiration of a sentence an analytical awareness of what caused you to admire it, you will be that much farther down the road of being able to produce one (somewhat) like it." STANLEY FISH, HOW TO WRITE A SENTENCE: AND HOW TO READ ONE 8–9 (2011).

20. By "fundamental qualities," I mean essential qualities that enable good writing and cannot themselves be reduced to other, more basic qualities. As Charles Calleros explains: "Many rules of composition are nothing more than conventions that reflect generalities about the best way to achieve clear, concise writing with effective emphasis and flow." CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 5 (5th ed. 2006). My claim is that the specific legal-writing guidelines found in the literature are all geared toward producing writing that is clear, concise, and engaging, as discussed in Part II.

I. WHAT IT MEANS TO SAY THAT A LEGAL DOCUMENT IS WELL WRITTEN

Since the principal goal of this Article is to provide a systematic analysis of good legal writing, it is important as a preliminary matter to explore what exactly it *means* to say that a legal document is well written. For without a clear conceptual understanding of "good writing," it is difficult to isolate its essential characteristics. Accordingly, this Part addresses that foundational concept.

As a starting point, it is tempting to look to the *writer's purpose* for guidance as to what it means for a legal document to be well written. In other words, it seems plausible to assert that a well-written document accomplishes (or is reasonably calculated to accomplish) the writer's purpose in writing the document.[21] If, for example, the writer's purpose in writing a brief is to persuade the court, then under this criterion, the brief is well written if in fact it persuades the intended audience (i.e., the court). Similarly, if the writer's purpose in writing a memorandum is to convey information to a client, then the memorandum is well written if it effectively conveys the writer's intended message to the client.

This criterion has a certain intuitive appeal. After all, legal writers do not write in a vacuum; they write in order to accomplish specific objectives (e.g., to persuade a court of a certain position or to explain a point of law to a client). Legal writing is an inherently social activity in which the legal writer puts pen to paper in order to have a certain effect on a target audience.[22] Thus, it would not be unreasonable to conclude that a document's being well written simply means that the writing enables the document to achieve the author's intended purpose.

On closer inspection, however, this theory does not provide an adequate account of the concept of good writing. For while it is correct to say a document that enables the writer's purpose is an *effective* document (and admittedly, from an advocate's perspective, that may well be the more important consideration),[23] such a conclusion

21. Stanley Fish takes this view: "People write or speak sentences in order to produce an effect, and the success of a sentence is measured by the degree to which the desired effect has been achieved." FISH, *supra* note 19, at 37.

22. I am indebted to J.B. White for his helpful comments on this issue.

23. Normally, an advocate's main concern is to persuade the court of a position, and if a brief succeeds in doing that, the advocate is not overly concerned with whether the court thought it was a well-written brief. For that reason, some legal-writing texts appear to focus more on the *effectiveness* of legal writing than on the writing quality *per se*. *See generally* ANNE

does not necessarily mean that the document is well written. A document can be effective even though it is not well written, and conversely, a document can be well written even though it is not effective.

A document can be effective even though it is not well written because there are other factors besides writing quality that can enable a document to advance the writer's purpose. For instance, a brief that takes advantage of a judge's known predilections or prejudices can be an effective document, even though it is poorly written; so too can a brief that is deliberately unclear.

Consider, for example, a brief in opposition to a motion for summary judgment, where the lawyer preparing the motion has a weak case and deliberately tries to obscure the material issues through murky writing in hopes that the court will be too confused after reading the brief to feel comfortable rendering summary judgment. Rule 56, which governs summary judgment, sets a high bar, requiring the court to find that there is no genuine dispute as to any material fact.[24] If the court concludes that there is any material fact in dispute that a reasonable jury could resolve in favor of the non-moving party, summary judgment is not appropriate.[25] In these circumstances, a lawyer with a weak case may rationally conclude that the most effective way to defeat a summary judgment motion is to write an unclear brief so that the judge has a hard time determining whether there are any genuine disputes. And while deliberately obscuring the issues in an attempt to confuse the court may raise concerns as to the lawyer's ethical duty of candor to the tribunal,[26] it can nevertheless be an effective litigation tactic. Yet this effectiveness does not necessarily mean that the obscure brief is well written. In fact, briefs of this nature are generally regarded as poorly written by the legal community, since clarity is almost universally regarded as the hallmark of good legal writing.[27] Therefore, it is certainly possi-

ENQUIST & LAUREL CURRIE OATES , JUST WRITING 5–161 (3d ed. 2009) (providing a "Guide to Effective Writing" in Part I).

24. *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

25. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) ("If the defendant in a run-of-the mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.").

26. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2002) ("A lawyer shall not knowingly make a false statement of law or fact to a tribunal . . . .").

27. *See infra* Part II.A.

ble for a document to be poorly written, even if the document advances the writer's purpose.

Conversely, a document can be well written even though it does not advance the writer's purpose. If a brief has weak legal arguments, for example, it is unlikely to persuade the court, even if it is otherwise well written. Likewise, the particular predilections of the target audience can influence whether a document is effective, regardless of the document's overall writing quality.

Suppose, for example, that a litigator is writing a brief to a federal district court judge on an issue of statutory interpretation. Suppose also that the litigator's principal argument is based on legislative history, even though the judge has expressed an aversion to the use of legislative history in statutory interpretation.[28] (This could just as easily be a simple stylistic preference, such as Judge Posner's aversion to footnotes in briefs.)[29] In that scenario, the litigator's failure to consider the preferences of the intended audience plainly detracts from the brief's ability to fulfill its purpose of persuading the judge, even though it is otherwise a well-written brief. Therefore, it is apparent that a document can be well written, even though it does not advance the writer's purpose.

Thus, while there is significant overlap between a well-written document and one that is effective, the two concepts are not coextensive. Some well-written documents do not achieve the writer's purpose, and conversely, some documents that do enable the writer to achieve the writer's purpose are not well written. Consequently, what it means for a legal document to be well written cannot be explained by reference to the purpose of the writer.

A more promising approach to understanding the concept of good writing is to look to the needs and interests of the reading audience. After all, whether a piece of writing is regarded as well written is a judgment of the reader; a document's quality does not depend upon the writer's own assessment of the work. A writer can reasonably determine after the fact whether a given document was an effective document (i.e., whether it achieved the writer's intended purpose). But it is the *readers* who determine whether the document is regarded as well written, based upon their perception as to

28. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 511 (2006) (Scalia, J., concurring) ("[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statue—and especially a statute that is clear on its face . . . .").

29. *See* Richard A. Posner, *Against Footnotes*, 38 CT. REV. 24, 24 (2001) (taking issue with Bryan Garner's suggestion that lawyers and judges should put citations in footnotes when writing briefs and opinions).

whether the writing meets their expectations. If the readers determine that the writing style tracks their needs and interests, and therefore advances *their* purpose for reading the document, then it will be considered a well-written document. The writer's purpose and the writer's own assessment are immaterial. This is true not only of legal writing, but of all writing. At bottom, "good writing" means writing that fulfills the expectations (i.e., satisfies the needs and interests) of the intended audience.

In the context of *legal* writing, the lawyers and judges who comprise the intended audience have very particular needs and interests when they read legal documents. Unlike readers of fiction, they are not looking for writing that entertains them or edifies them in some way. Rather, lawyers and judges read legal documents because they need to extract information from these documents that will help them make decisions in the course of their professional duties.[30] For example, a partner in a law firm reads an associate's memo in order to obtain information concerning the law and its application to the facts. This in turn helps the partner decide how to advise the client, or how to approach a strategic decision the lawyer needs to make with respect to a case or a transaction. Likewise, a judge reads a lawyer's pre-trial brief in order to obtain information about the case and in order to understand the parties' arguments. This in turn helps the judge decide how to rule on a motion. And similarly, a lawyer reads a judicial opinion in order to obtain information about the law and how it is likely to be interpreted or applied in a future case. This information in turn helps the lawyer decide how best to make an argument, structure a transaction, or advise a client as to a proposed course of action.

In each of these instances, the legal reader's purpose for reading the document is to extract information that will facilitate the reader's decision-making. And thus, the legal reader will regard a document as well written if and only if the writing facilitates that decision-making. Good legal writing, therefore, is best understood as writing that helps legal actors make decisions in the course of their professional duties.

30. *See* RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING 51 (6th ed. 2009) ("Think of memoranda and briefs as manuals to guide the reader's decision-making.").

II. THE THREE FUNDAMENTAL QUALITIES THAT ENABLE GOOD LEGAL WRITING

The previous Part argued that a legal document is well written if the writing facilitates legal decision-making. This Part advances a theory as to the fundamental qualities that enable legal writing to do this. It concludes that there are three such qualities: clarity, conciseness, and the ability to engage the reader. It then discusses the nature of these fundamental qualities, examines how these qualities facilitate the reader's ability to make professional decisions, and explores the tools good legal writers use to incorporate these qualities into their writing.

A. Good Legal Writing Is Clear

While the existing literature on legal writing lacks a systematic analysis of the fundamental qualities of good legal writing, there does appear to be a consensus in the literature—as well as in the practice of law—that the chief hallmark of good legal writing is *clarity*. As Justice Benjamin Cardozo put it, "there can be little doubt that in matters of literary style the sovereign virtue for the judge is clearness."[31] Likewise, most contemporary commentators on legal writing exalt clarity above all else. In their book *Making Your Case*, for example, Brian Garner and Justice Antonin Scalia claim that "one feature of a good style trumps all others. Literary elegance, erudition, sophistication of expression—these and all other qualities must be sacrificed if they detract from clarity."[32]

So what accounts for the exalted status of clarity? If, as discussed in Part I, good legal writing is writing that facilitates legal decision-making, the answer becomes apparent. The legal reader picks up a document in order gain information that will help the reader make a decision: an associate reads an opinion in order to better understand the law and to better predict what a court is likely to do in a given factual scenario; a partner reads an associate's memo in order to gain a better understanding of the legal challenges facing the client; and a judge reads a brief in order to better understand the facts and the lawyer's arguments. In each of these scenarios, the reader's objective will be frustrated if the reader cannot understand the writer's

31. BENJAMIN N. CARDOZO, LAW AND LITERATURE (1931), *reprinted in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 7 (Fred B. Rothman, & Co.,1999).

32. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 107 (2008).

message. As Bryan Garner puts the point, "A lawyer should keep in mind that the purpose of communication is to communicate, and this can't be done if the reader or listener doesn't understand the words used."[33] Clarity, therefore, is the most basic quality of good legal writing. For it is only when writing is clear that the reader can accurately comprehend the writer's message and use that information to facilitate professional decision-making.[34]

So if clarity is the legal writer's primary goal, then the next question is: what makes writing clear? Here, the legal-writing literature is fairly well-developed. As a starting point, clarity requires proper (i.e., conventional) grammar and punctuation.[35] And while there is not a lot of discussion as to *why* writers need to follow conventional grammatical rules in order to be clear, it is apparent that language has to have certain agreed-upon rules to govern its basic functioning. Otherwise, there would be no possibility of shared meaning, and therefore no possibility of language itself.[36]

To be sure, language speakers can debate the wisdom of certain minor rules that reside around the periphery of a system of linguistic rules. For example, rules such as not ending a sentence with a preposition, or requiring that commas and periods be placed inside quotation marks, are certainly not essential to understanding the

33. BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 183 (2d ed. 2002).

34. *See* CALLEROS, *supra* note 20, at 3 ("The importance of clarity in legal writing should be obvious: Your legal memorandum will not enlighten, nor will your brief persuade, unless the reader of each can understand it.").

35. *See generally* Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation*, 3 J. ASS'N LEGAL WRITING DIRECTORS, 75, 75–107 (2006). *See also* JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 200 (3d ed. 2007) ("Errors in grammar, punctuation, and spelling suggest that the writer is sloppy and careless—qualities that people do not want in a lawyer. Minor errors distract the reader from the message to be conveyed. Major errors may distort the message or make it unintelligible."); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK 607 (5th ed. 2010) (noting that effective and correct writing "depends on understanding the grammar of an English sentence"); NEUMANN, *supra* note 30, at 224 (stating that correct punctuation and grammar make writing clearer and easier to understand); WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 1–14 (4th ed. 2000) (devoting the first chapter to basic rules of grammar and usage); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 84 (5th ed. 2005) (noting in the final chapter devoted to punctuation that "when you write, you should punctuate carefully, in accordance with ordinary English usage"). *But see* JOHN BRONSTEEN, WRITING A LEGAL MEMO 35–37 (2006) (arguing that conforming to grammatical rules is frequently "an enormous waste of time").

36. *See generally* STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 25–32 (2007) (discussing the role of basic grammatical rules in enabling children to learn language).

English language.[37] And there may even be instances when ignoring some of these minor rules rather than following them rigidly advances clarity.[38] But the writer who disregards in a significant way the rules of the language—particularly its core rules—makes it difficult, if not impossible, for readers accustomed to following those rules to understand the writer's message. Imagine, for example, a brief that consistently misuses verb tenses, or that contains no verbs at all, or worse still, scrambles the words in sentences in completely unconventional ways. Generally, the greater the deviation from the core rules of grammar, syntax, and semantics, the more difficult it will be for the reader to understand the writer's message.[39]

Of course, clear writing requires more than just staying within the rough confines of conventional grammar, syntax, and semantics. The conventional rules have a fair degree of flexibility, and so the writer still has to make choices with regard to sentence structure and word usage from within the universe of acceptable conventions. How then does a skillful writer do this in order to maximize clarity?

The most common prescription in the literature is to use ordinary words[40] and simple sentence structures.[41] Richard Wydick, for example, states in his classic book *Plain English for Lawyers* that "good legal writing is plain English."[42] And Joseph Williams, in his well-known book *Style: Lessons in Clarity and Grace*, states that "[i]n general, your sentences should begin with elements that are relatively short: a short introductory phrase or clause, followed by a short,

37. *See generally* JOSEPH M. WILLIAMS & GREGORY G. COLOMB, STYLE: LESSONS IN CLARITY AND GRACE 13–23 (10th ed. 2010) (distinguishing "Real Rules" of grammar that affect meaning from essentially arbitrary "Invented Rules" that grammarians think writers should follow).

38. BRONSTEEN, *supra* note 35, at 36.

39. *Cf.* FISH, *supra* note 19, at 25–33 (explaining how the possibility of meaning derives from the logical forms of sentences).

40. *See, e.g.*, DEBORAH E. BOUCHOUX, ASPEN HANDBOOK FOR LEGAL WRITERS 98–101 ("[Legalese] results in incomprehensible writing"); BRONSTEEN, *supra* note 35, at 33–35 (using short, simple words aids clarity); NANCY L. SCHULTZ & LOUIS J. SIRICO, LEGAL WRITING AND OTHER LAWYERING SKILLS 90–91, 93–94 (5th ed. 2010) (use of simple, concrete words and avoiding legalese advances goal of clarity); WYDICK, *supra* note 35, at 56–58.

41. A number of legal-writing texts emphasize the importance to clarity of simple, subject-and-verb sentences. *See, e.g.*, BRONSTEEN, *supra* note 35, at 19–29; VEDA R. CHARROW ET AL., CLEAR AND EFFECTIVE WRITING 163–165 (2007); LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 225–26 (5th ed. 2010); TERRI LECLERCQ, GUIDE TO LEGAL WRITING STYLE 23–31 (4th ed. 2007); NEUMANN, *supra* note 30, at 227–28; OATES & ENQUIST, *supra note* 35, at 77–78; SCHULTZ & SIRICO, *supra* note 40, at 98–99; WYDICK, *supra* note 35, at 41–43.

42. WYDICK, *supra* note 35, at 5; *see also* Julie A. Baker, *And The Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 U.M.K.C. L. REV. 287, 289 (2012) (discussing how psychological theory pertaining to "cognitive fluency" bolsters the argument that readers generally prefer plain language).

concrete subject, followed by a verb expressing a specific action. After the verb, the sentence can go on for several lines, if it is well-constructed. . . ."[43]

Judge Cardozo's description of the facts in his famous opinion in *Palsgraf v. Long Island Railroad Co.*[44] provides a good example of this type of simple, concrete writing. There, Cardozo summarizes the complicated events that led to the plaintiff's injuries in a lucid and succinct fashion:

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.[45]

Even though this factual scenario is fairly complicated, Cardozo makes it easy to follow. The reader needs to read the paragraph only once to understand what happened and to gain a clear idea of what caused the plaintiff's injuries. Cardozo accomplishes clarity by using ordinary language and a series of simple sentences that employ Professor William's prescription for clarity: a concrete subject at or near the beginning of the sentence, followed by a verb that expresses a specific action.[46]

The legal-writing community now widely accepts the view that writers should adopt a "plain" style of writing in order to maximize clarity. This acceptance is due in large part to the efforts of the so-

43. WILLIAMS & COLOMB, *supra* note 37, at 85.
44. 162 N.E. 99, 99 (N.Y. 1928).
45. *Id.*
46. WILLIAMS & COLOMB, *supra* note 37, at 85.

called "Plain Language Movement."[47] This movement is led by an influential group of legal scholars, judges, and practitioners who seek to advance clarity in legal writing by purging it of cumbersome sentence constructions and empty legal jargon.[48] Proponents of the movement apply this prescription broadly to legislative and transactional drafting,[49] as well as to expository legal writing.

The Plain Language Movement has undoubtedly advanced the cause of clarity in legal writing. Yet some critics of the movement have argued that this comes with a cost. Specifically, they argue that focusing too much on the use of ordinary terms at the exclusion of technical terms inhibits the *precision* of legal writing. They assert that, particularly in the context of transactional drafting, ordinary terms can be vague and ambiguous,[50] whereas technical legal terms can add increased precision.

If these critics of the Plain Language Movement are correct, their critique creates a dilemma for legal writers who are trying to write clearly because an important aspect of clear writing is the ability to convey information with an appropriate degree of precision. Suppose, for example, I leave written directions for my auto-mechanic to check out the low-pitched grinding sound coming from the driver's side of the engine, just above the axle. That precise description makes the mechanic's job much easier than if I just say that the car is

47. The seminal work that gave rise to the Plain Language Movement is DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963). Perhaps the most significant work in recent years is JOSEPH KIMBLE, LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE (2006). For a short history of the Plain Language Movement, including an interesting discussion of George Orwell's influence on the Movement, see Judith D. Fischer, *Why George Orwell's Ideas About Language Still Matter for Lawyers*, 68 MONT. L. REV. 129, 132–35 (2007).

48. *See, e.g.*, Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 5–38 (1996–97) (summarizing various studies that show readers have a preference for plain language).

49. *See generally* Wayne Schiess, *The Art of Consumer Drafting*, 11 SCRIBES J. LEGAL WRITING 1, 1–22 (2007) (arguing that the use of short, simple sentences and simple words advances clarity in transactional drafting).

50. *See, e.g.*, Jeffrey Barnes, *The Continuing Debate*, 27 STAT. L. REV. 83, 91 (2006); David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 715 (2001–02); Brian Hunt, *Plain Language in Legislative Drafting: Is It Really the Answer?*, 23 STAT. L. REV. 24, 27–36 (2002); *see also* Rabeea Assy, *Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language*, 38 J. L. & SOC'Y 376, 402 (2011) (arguing that there is an inevitable linguistic gap between technical legal terms and ordinary language terms because the former are closely tied up with a body of theories, doctrines, principles, and rules that the speaker must have some understanding of in order to use legal language effectively), *available at* http://ssrn.com/abstract=1906372.

making a funny noise. By being more precise, I have made my communication clearer.[51]

Supporters of the Plain Language Movement counter that it is merely a myth that plain language is at odds with precision.[52] They argue that plain language is generally just as precise—and often more precise—than traditional legalese.[53] And that may be true. No one can seriously dispute that a great number of "lawyerly" terms are mere jargon and add nothing to their plain-language equivalents.

Yet even plain-language advocates admit that there are times when plain language is less precise than more technical language. They merely maintain that such instances are relatively uncommon in legal writing and do not detract in any significant way from their general prescription against using legalese.[54] But while plain language advocates and their critics may disagree as to how *frequently* plain language and precision actually come into conflict, it is hard to deny that on at least *some* occasions, communications can be made clearer by the use of more precise technical terms. This is true in the legal context and more generally. An emergency-room physician, for example, is not likely to tell the on-call cardiologist that the patient has a "rapid heartbeat." Rather, the physician is likely to report that the patient has a "ventricular tachycardia" because that is the level of specificity the cardiologist requires. Likewise in the context

51. One could argue that precision is a separate quality from clarity, rather than a component of clarity. But for present purposes, it does not really matter. In either case, the same dilemma confronts the plain-language advocate: *either* precision is a component of clarity, in which case the writer needs to balance precision against the benefits of using plain language in order to maximize clarity, *or* precision is actually an independent quality, distinct from clarity, that the writer needs to balance against the goal of clarity in order to maximize the overall quality of the writing.

52. *See, e.g.*, BRYAN A. GARNER, *The Myth of Precision*, *in* A DICTIONARY OF MODERN LEGAL USAGE 580, 580 (2d ed. 1995); Joseph Kimble, *The Great Myth that Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 110–11 (1998–2000); David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423, 423–24 (1983); Wayne Schiess, *What Plain Language Really Is*, 9 SCRIBES J. LEGAL WRITING 43, 158–59 (2003–04).

53. *See, e.g.*, Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 53–55 (1994–95).

54. *See id.* at 54 ("Plain-language advocates have said repeatedly that technical terms and terms of art are sometimes necessary, and that some legal ideas can be stated only so simply. But technical terms and terms of art are only a small part of any legal document—less than 3% in one study. This hardly puts a damper on plain language."); GARNER, *supra* note 52, at 663 ("Of course, where clarity and precision are truly at loggerheads, precision must usually prevail. But the instances of actual conflict are much rarer than lawyers often suppose. Precision is not sacrificed when the drafter uses technical words where necessary and avoids JARGON that serves no substantive purpose.").

of legal writing, it is sometimes clearer—depending on the audience—for a lawyer to use terms of art such as *preliminary injunction*, *promissory estoppel* or *quantum meruit* than to try to translate those concepts into "plain language."

The basic prescription to use ordinary language in legal writing, therefore, cannot, without further elaboration, provide much meaningful guidance to the legal writer because it glosses over some important contextual considerations. When someone says that legal writers should use plain language, the question inevitably arises: plain to whom? What constitutes a "plain" or "ordinary" term is ultimately relative to the audience and depends upon contextual considerations, such as the readers' vocabulary, language proficiency, and background knowledge. Scalia and Garner say that the good legal writer does not use words that require the judge to get out a dictionary.[55] But even that depends on the judge: a wordsmith such as Justice Scalia likely requires the use of a dictionary less frequently than some other judges.[56] So the legal writer following the Garner and Scalia "dictionary" rule would need to adapt it to the intended audience, writing in language that is simpler for some judges than for others.

In the final analysis, therefore, a general prescription to use plain language is helpful only if it is understood to be shorthand for a more nuanced rule,[57] such as the following:

> When you use distinctive technical or legal terms, consider whether the terms add any value beyond their ordinary-language equivalents. If not, use the ordinary term. If so, then consider the nature of the audience to determine whether the increased precision resulting from the technical

55. SCALIA & GARNER, *supra* note 32, at 107.

56. However, even he needed it for one word that came up in oral argument: "orthogonal." *See* Robert Barnes, *Supreme Court Justices, Law Professor Play with Words*, WASH. POST, Jan. 12, 2010, at A03 (describing Justice Scalia's delight in learning a new word during Professor Richard Friedman's oral argument).

57. Plain-language devotees may not object to this rule. In fact, some of them seem to suggest that their prescription to use plain language is actually just shorthand for some more nuanced rule like this one. Bryan Garner, for example, grants that simple language is not appropriate in every context:

> Despite the myth to the contrary, no formula unfailingly produces a good prose style. Much hangs on the context and the purpose. So the 'plain English' movement in the law—a salutary force in almost every respect—would be misguided to the extent that some of its advocates might believe that every motion can be simply expressed. Though it is true that lawyers have often obscured simple thoughts by using murky language, it is also true that complex expressions are sometimes unavoidable.

BRYAN A. GARNER, GARNER ON LANGUAGE AND WRITING 48 (2009).

> term outweighs any loss of clarity that may result from using a term that may not be familiar to all members of the intended audience.[58]

The benefits of using precise technical terms, in other words, must be balanced against the benefits of using language that is clear to a broader audience. Technical terms may sometimes aid precision, but they also inhibit clarity if the reader does not understand them. Thus the writer needs to take into account contextual considerations, such as the background knowledge of the intended audience, in order to strike the appropriate balance.[59]

Thus far, this Part has examined how the use of conventional grammar, simple sentence structure, and (appropriately) plain language advances clarity. But there are other prescriptions for clarity discussed in the literature as well. One such prescription involves eliminating unnecessary words and phrases from sentences that may impede the reader's comprehension.[60] Sometimes referred to as "clutter," this verbiage impedes clarity because it distracts the reader's attention from the writer's intended message.[61] According to William Zinsser, removing clutter is an essential component of clarity because "[c]lutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon."[62]

The literature also stresses the appropriate use of repetition to make writing clearer. Using a particular term consistently and avoiding what is sometimes called "elegant variation" in word choice[63] can avoid needless confusion on the part of the reader. This

58. Professors Enquist and Oates offer a similar test that is a bit simpler: "Given the document's reader, writer, purpose, and surrounding circumstances, does the legalese increase or decrease communication between writer and reader?" *See* ENQUIST & OATES, *supra* note 23, at 128.

59. Linda Edwards summarizes this point nicely:

> When writing to a law-trained reader, you may choose to use some legal terms unfamiliar to laypersons because those terms communicate legal concepts more clearly and concisely than non-legal terms would. But do not resort to the jargon of law unless it is necessary to convey your point more clearly and concisely.

EDWARDS, *supra* note 41, at 228.

60. *See, e.g.*, EDWARDS, *supra* note 41, at 341; OATES & ENQUIST, *supra* note 35, at 121–26; STRUNK, JR. & WHITE, *supra* note 35, at 23–25; WYDICK, *supra* note 35, at 7–22; WILLIAM ZINSSER, ON WRITING WELL 6–16 (7th ed. 2006).

61. EDWARDS, *supra* note 41, at 347 ("Clutter reduces clarity, irritates the reader, and deemphasizes the important facts.").

62. ZINSSER, *supra* note 60, at 6.

63. *See, e.g.*, BOUCHOUX, *supra* note 40, at 92 ("[L]egalese results . . . in incomprehensible writing"); WYDICK, *supra* note 35, at 69–70.

is particularly true in the context of transactional drafting, where the reader may incorrectly assume that synonyms have slightly different connotations, but it also applies in the context of expository writing.[64] Repetition is also helpful for emphasis. Repeating key words or phrases in a document can be an effective way to highlight them for the reader.[65] And while there are sometimes downsides to this type of repetition (e.g., redundancy can make the writing less engaging and less concise),[66] its judicious use makes the writer's key points more pronounced.

The legal-writing literature discusses a number of other factors that make writing clear.[67] These include the following: eliminating meta-discourse (sometimes referred to as "throat-clearing phrases"),[68] not overusing negatives,[69] avoiding noun strings[70] and nominalizations,[71] and preferring the active voice.[72] More recently, commentators have discussed how the format of the printed page and the typography of a document can affect the reader's ability to comprehend the text.[73] And while it is beyond the scope of this Article to discuss all of these factors in detail, there is one other factor

64. EDWARDS, *supra* note 41, at 228; OATES & ENQUIST, *supra* note 35, at 546.

65. *See, e.g.*, BRONSTEEN, *supra* note 35, at 59; ENQUIST & OATES, *supra* note 23, at 2 ("[S]killful legal writers often use selected repetition to emphasize a point.").

66. LECLERCQ, *supra* note 41, at 52 ("[R]epetition results in lengthy documents and uninteresting reading.").

67. For a good overview on writing clear paragraphs and sentences, see generally HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 209–48 (5th ed. 2008).

68. By "meta-discourse" or "throat-clearing phrases," the writers mean introductory phrases that add little or no meaning to a sentence (e.g., "It should be noted . . . .,"or "It is important to point out . . . ."). *See* EDWARDS, *supra* note 41, at 279–80; *see also* CHARROW ET AL., *supra* note 41, at 163–65; NEUMANN, *supra* note 30, at 229; OATES & ENQUIST, *supra* note 35, at 115–17.

69. BOUCHOUX, *supra* note 40, at 83–84; WYDICK, *supra* note 35, at 71–72.

70. *See, e.g.*, WYDICK, *supra* note 35, at 71; CHARROW ET AL., *supra* note 41, at 192–93.

71. EDWARDS, *supra* note 41, at 223–24; LECLERCQ, *supra* note 41, at 58–59; WILLIAMS & COLOMB, *supra* note 37, at 33 ("No element of style more characterizes turgid writing, writing that feels abstract, indirect, and difficult, than lots of nominalizations, especially as the subjects of verbs."); WYDICK, *supra* note 35, at 23–25.

72. *See, e.g.*, CHARROW ET AL., *supra* note 41, at 173–76; EDWARDS, *supra* note 41, at 222–23; NEUMANN, *supra* note 30, at 230–31; SCHULTZ & SIRICO, *supra* note 40, at 91–93; WYDICK, *supra* note 35, at 27–28.

73. *See, e.g.*, Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASS'N LEGAL WRITING DIRECTORS 108, 110–11 (2004) (explaining why an "argument must be presented in a visually effective manner so the reader can more easily understand the argument and retain more of the material"); MATHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS (2010) (explaining how typographic style affects clarity and persuasion in legal writing and providing a primer on how lawyers can use typography effectively).

that merits special consideration here—namely, the organization of a document, for most commentators agree that "[g]ood organization is crucial in legal writing."[74] This is because legal readers expect to see material presented in a certain manner and will struggle to follow the writing if the organization is unconventional.[75] And while writing authorities outside of the law also stress organization as an important aspect of clarity,[76] the need to follow conventional organization is particularly emphasized in legal writing, where an almost formulaic organization tends to be associated with professionalism.[77] For that reason, teaching students the conventional forms of organization (e.g., the IRAC format) tends to occupy a significant part of the first-year legal writing curriculum in most law schools.[78]

To sum up, there is no simple prescription for clarity. Clarity is dependent on a number of different factors, and it is context-dependent. The legal writer must consider carefully the purpose of the writing, as well as the needs, interests, and background knowledge of the intended audience when deciding what is appropriate for a particular document. But it is important for the legal writer to keep in mind that clarity is the paramount goal of legal writing, since readers can only make effective use of a document to aid their professional decision-making if they understand the writer's
message.

74. NEUMANN, *supra* note 30, at 55.

75. *See, e.g.*, *id.* at 91–102; BOUCHOUX, *supra* note 40, at 109–18; CALLEROS, *supra* note 20, at 240 ("[A]n important element of clarity in any legal document is effective organization on all the levels . . . ."); DERNBACH ET AL., *supra* note 35, at 115–32; LECLERCQ, *supra* note 41, at 7–22;. SHAPO ET AL., *supra* note 67, at 117–59.

76. *See, e.g.*, STRUNK, JR. & WHITE, *supra* note 35, at 15 ("[I]n most cases, planning must be a deliberate prelude to writing. The first principle of composition, therefore, is to foresee or determine the shape of what is to come and pursue that shape."); WILLIAMS & COLOMB, *supra* note 37, at 178–85 (discussing how proper organization creates "global coherence" within a document).

77. *See* ENQUIST & OATES, *supra* note 23, at 36 (following the IRAC format is the common practice in the legal profession and expected for memos and briefs).

78. Almost everyone who has taken an introductory legal writing course in an American law school during the last fifteen to twenty years is familiar with some variant of the IRAC format for organizing legal analyses. For a detailed discussion of that format, see CALLEROS, *supra* note 20, at 71–94.

B. Good Legal Writing Is Concise

The second fundamental quality of good legal writing is *conciseness*.[79] Conciseness is often confused with *brevity*, but concise writing is not merely brief, or brusque.[80] Rather, it is *efficient*. Concise writing conveys the writer's points succinctly, without superfluous words, and with an appropriate level of detail.[81]

What constitutes the appropriate level of detail for any given document depends on the context. Often, it is simply not possible to explain a complex idea with the same degree of economy as one can express a simple idea.[82] A motion *in limine* on a minor point of evidence and a complicated appellate brief on an important matter of constitutional law may both be written in a concise fashion, even though the appellate brief is much longer and more detailed than the motion *in limine*. The difference in length and detail is appropriate not only because of the relative complexity of the issues, but also because the appellate court has more time to give a careful reading to each brief. The interests and needs of the intended audience are paramount here: the appellate judges likely have more time and a greater inclination to read a more detailed and nuanced brief than a trial judge with a crowded docket. Concise writing, therefore, is often brief, but it is always efficient. Within any given context, the writing makes its points in the most economical way.

Consider the following excerpt from Judge Posner's dissent in *Jordan v. Duff & Phelps, Inc.*:[83]

> A corporate employee at will quit, owning shares that he had agreed to sell back to the corporation at book value. The

79. Most legal-writing texts extol the virtues of concise writing. *See, e.g.*, BOUCHOUX, *supra* note 40, at 102–07; DERNBACH ET AL., *supra* note 35, at 195–98; NEUMANN, *supra* note 30, at 217–19; ENQUIST & OATES, *supra* note 23, at 295 ("In all types of expository prose in the United States, conciseness is heralded as a writing virtue.").

80. STRUNK, JR. & WHITE, *supra* note 35, at 23 ("This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.").

81. To exemplify colloquially the difference between the two prongs of conciseness: efficiency means not using ten words to say what can just as well be said in six words, while employing the appropriate level of detail means not telling someone about the history of watchmaking when they ask what time it is.

82. GARNER, *supra* note 57, at 48 (noting that it is not possible to convey all concepts in simple language and that "complex expressions are sometimes unavoidable"); WILLIAMS & COLOMB, *supra* note 37, at 118–19 ("Despite those who advise against long sentences, you cannot communicate every complex idea in a short one: you have to know how to write a sentence that is both long and clear.").

83. 815 F.2d 429, 444 (7th Cir. 1987).

> agreement was explicit that his status as a shareholder conferred no job rights on him. Nevertheless the court holds that the corporation had, as a matter of law, a duty, enforceable by proceedings under Rule 10b-5 of the Securities Exchange Act, to volunteer to the employee information about the corporation's prospects that might have led him to change his mind about quitting, although as an employee at will he had no right to change his mind. I disagree with this holding. The terms of the stockholder agreement show that there was no duty of disclosure, and since there was no duty there was no violation of Rule 10b-5.[84]

In one short paragraph, Posner effectively describes the essential facts, the majority's position, and the basis for his dissent. Wasting no words in dealing with a matter of some complexity, the paragraph is (fittingly, for a Law and Economics guru such as Judge Posner) a model of efficiency.

So what is it about conciseness that makes it a fundamental quality of good legal writing? Most commentators seem to just take it as an article of faith that conciseness is a virtue. Strunk and White, for example, tell us: "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines, and a machine no unnecessary parts."[85] But they do not state that reason, nor is it at all obvious that conciseness in writing can be justified on the same grounds as not adding a superfluous part to a machine, or not adding an extra line in a drawing.[86]

One possible rationale, as some legal writing texts note, is that concise writing is *clearer* than writing that is not concise.[87] Because it is less complex, concise writing is generally easier to digest. A second possibility, as discussed in the subsequent Section, is that conciseness is part of what makes writing *engaging*.[88] Writing that is not

84. *Id.*

85. STRUNK, JR. & WHITE, *supra* note 35, at 23.

86. *See id.* at 23–24. Are we to assume, for example, that a drawing that depicts a flock of birds in flight has more birds than necessary if it has twelve birds in the picture rather than eleven, or perhaps ten? How would that determination be made? And does it really involve the same rationale as eliminating superfluous words from a sentence?

87. *See, e.g.*, NEUMANN, *supra* note 30, at 217–19 ("[C]oncise writing is by nature more clear . . . ."); ELIZABETH FAJANS ET AL., WRITING FOR LAW PRACTICE 163 (2d ed. 2010) ("Roundabout, repetitive, and wordy sentences are difficult to understand . . . .").

88. STRUNK, JR. & WHITE, *supra* note 35, at 23 ("Vigorous writing is concise.").

concise is frequently turgid and ponderous;[89] the reader tends to lose interest having to slog through an unnecessarily long text in order to grasp the writer's meaning.

But conciseness cannot be a *fundamental* quality of good writing if these are its only virtues. For if conciseness were valuable only because it made writing clearer and more engaging, it would merely be an extrinsic good—not something valued for its own sake, but rather a virtue ultimately reducible to the qualities of clarity and engagement. If conciseness is a fundamental (i.e., irreducible) quality, then there must be something more to it—something that makes it valuable in its own right. What is it? To answer that question, we need to return to the initial premise from Part I that good legal writing is writing that facilitates the reader's ability to extract information from the document that will aid the reader's professional decision-making. A legal reader has limited time to devote to a document and a limited attention span. A concise piece that makes its point efficiently and with an appropriate level of detail does not waste the reader's time and takes full advantage of this limited window of opportunity. Conciseness may not be essential to all types of writing,[90] but it is essential in the context of *legal* writing because the "reader of legal writing has no time to spare and either will resent inflated verbiage or will simply refuse to read it."[91] So conciseness is fundamental to good legal writing because it helps readers make effective use of their limited time. That promotes efficient decision-making by allowing legal actors to devote the appropriate amount of time to each of their decisions, rather than spending an excessive amount of time on one decision and having to shortchange another as a result.

How then does a writer make writing concise? At first blush, that would seem to be an easy question—just shorten the document. But the answer is actually more complicated. For concise writing, as discussed above, is not principally about brevity; rather, it is about efficiency and conveying the appropriate level of detail. Concise writing is writing that is as succinct as possible without unduly restricting the amount of information conveyed. As Strunk and White

89. NEUMANN, *supra* note 30, at 217.

90. For example, literature that is read purely for pleasure or for its aesthetic appeal may not be subject to this consideration—indeed, readers of fiction sometimes wish a piece could go on longer, just because it is an enjoyable read.

91. NEUMANN, *supra* note 30, at 217.

propose, the writer must eliminate all unnecessary words from sentences, and all unnecessary sentences from paragraphs.[92]

The tricky part, of course, is in knowing what words and sentences are "unnecessary." If one or more words can be eliminated from a sentence without impairing the meaning in any way, then making the sentence more concise is easy. And making a sentence more concise can make it clearer as well.[93] As discussed in the previous section on clarity,[94] most of us can benefit from meticulous editing of our own work to eliminate clutter.[95] But sometimes the task is more difficult. Occasionally conciseness can be achieved only by eliminating qualifiers from a sentence that make the sentence slightly more accurate but that are not essential. And sometimes conciseness can be achieved only by eliminating details that make a paragraph slightly more thorough. In these situations, the legal writer needs to make a judgment call as to whether being a bit more accurate or thorough justifies lengthening and increasing the "working parts" of the document.[96] While there are no simple rules of thumb to guide the legal writer in making these decisions, the legal writer should keep in mind the important role conciseness plays in facilitating the reader's professional decision-making when attempting to strike the appropriate balance.

C. Good Legal Writing Is Engaging

Good legal writing is clear and concise—almost no one disputes that.[97] However, there is more to it than just those two qualities. Good writing, as opposed to merely competent writing, also *engages*

92. *See supra* text accompanying note 85.

93. Eliminating unnecessary qualifiers is one way that conciseness can enhance clarity. *See* Nelson P. Miller, *Why Prolixity Does Not Produce Clarity: Francis Lieber on Plain Language*, 11 SCRIBES J. LEGAL WRITING 107, 108 (2007) ("Prolixity does not produce clarity. An attempt at 'perfect perspicuity' is in effect 'a matter of impossibility.' Rather, it only produces confusion." (citation omitted) (quoting Francis Lieber)).

94. *See supra* text accompanying notes 60–62.

95. For a helpful discussion of the different types of clutter that can inhibit conciseness, see WILLIAMS & COLOMB, *supra* note 37, at 100–11.

96. *See id.* at 64 ("When you read or write [in] a style that seems complex, you must determine whether it needs to be so complex to express complex ideas precisely . . . . [A] style should be as complex as necessary, but no more." (emphasis omitted)).

97. In fact, a survey of judges, lawyers, and legal-writing professors found that "all [groups] rank clarity and concision as the two most essential elements of good writing." Kosse & ButleRitchie, *supra* note 12, at 85; *see also* Kristin K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257, 284 (2002) ("The overwhelming message from judges is that they want briefs that are concise and clear.").

the reader.[98] This Section discusses why engaging the reader is important to good writing and what it is that makes writing engaging. It then examines the potential for conflict between the qualities of engagement and clarity, and the need for the legal writer to strike an appropriate balance between these two fundamental qualities.

1. The importance of engaging the reader

Lord Denning, a well-known British jurist, described the importance of engaging the reader as follows:

> No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers—or your readers—will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice. They will listen as if spellbound. They will read you with engrossment.[99]

In other words, readers will not want to keep reading a document, no matter how clear and concise it is, if it does not engage their interest.[100]

To appreciate the importance of engagement as a fundamental quality of good legal writing, consider the following paragraph:

> Our client is Bill Smith. Smith has filed a lawsuit in federal court. It is a personal injury case. Smith was watching a softball game. Smith got hit with a softball. He was injured. He suffered a concussion. Smith received treatment at Methodist hospital. He now seeks damages. He claims to have mental and physical injuries. Smith doesn't know if he is entitled to damages for mental injuries. He wants us to find out. This memo addresses that issue.

This paragraph is unquestionably clear and concise, just like the paragraph from Lord Denning. But unlike Denning's paragraph, it would be a stretch to call it well written. Why? Well, because the style is tedious and monotonous. It is the writing equivalent of the

98. I do not include transactional documents in this analysis of the fundamental qualities of legal writing, even though there is certainly overlap between the qualities of good writing and the qualities of good drafting. For example, contracts that are drafted in a clear and concise style are considered better drafted, other things being equal, than contracts that are not clear and concise. Engagement, however, is not a significant area of overlap.

99. GARNER, *supra* note 57, at 39 (quoting LORD DENNING, THE FAMILY STORY 216 (1981)).

100. ZINSSER, *supra* note 60, at 5 ("Good writing has an aliveness that keeps the reader reading from one paragraph to the next . . . .").

children's song: simple and straightforward, but lacking any stylistic depth that would make it interesting.

Contrast it with the following excerpt from Justice Brandeis's concurrence in *Whitney v. California*:[101]

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.[102]

The Brandeis excerpt is unquestionably clear and concise. But it also commands the reader's attention. It is crisp and powerful, and compels the reader to keep reading.[103] It encourages the reader to engage with the material by agreeing with it, disagreeing with it, reconstituting it into the reader's own ideas, etc. In other words, writing that is engaging stimulates the reader's thinking. And it is this quality that separates truly good legal writing from merely competent legal writing. Engaging writing makes the reader's job easier, just as clarity and conciseness make the reader's job easier. Writing that does not engage the reader's attention makes it more difficult for the reader to glean necessary information from a document because it makes the reading process more laborious. And that in turn hinders the reader's ability to make professional decisions based upon the document.

101. 274 U.S. 357 (1927).

102. *Id.* at 377.

103. As one commentator puts it, good writing is not just clear and concise, it also "sing[s]." Philip Frost, *Plain Language in Transition*, 84 MICH. B. J. 46, 46 (2005).

2. *What makes writing engaging*

What, then, makes writing engaging to the reader? On this point, the legal-writing literature is fairly extensive. This Section discusses the main tools good writers use to engage the reader.

One simple tool is variety. The writer's use of varied sentence structures, for example, can make the text more engaging.[104] Writing that is overly repetitive in its syntax gets tedious; conversely, writing that has appropriate variation in the length and pattern of the sentences, with smooth transitions between sentences, has a natural flow[105] that helps to maintain the reader's interest, in the same way that variation in speech patterns enlivens conversation.[106] And the same holds true with respect to individual words: using a more expressive vocabulary[107] adds interest to writing.[108] As Joseph Williams puts it, "Your readers want you to write clearly, but not in Dick-and-Jane sentences."[109]

In addition to variety, other, more abstract factors also determine whether the writing will engage the reader. The writer's *voice*, for example, contributes significantly. If the writing style seems stilted, overly casual, or artificial, the writer's ability to connect with the reader is diminished.[110] Some law students seem to emulate the style they see in older cases when they first try to write legal memoranda and briefs, apparently thinking that this is the way lawyers are sup-

104. BOUCHOUX, *supra* note 40, at 98 ("[Y]ou do not want a project filled with sentences of approximately the same length. Such a writing would be tedious to read."); OATES & ENQUIST, *supra* note 35, at 598 ("[V]ariety in sentence length helps create an interesting and varied pace."); WYDICK, *supra* note 35, at 36 ("To keep the reader's interest, you need variety in sentence construction . . . .").

105. For more on creating a sense of "flow" in writing (i.e., cohesion between sentences), see WILLIAMS & COLOMB, *supra* note 37, at 68–69. "Sentences are cohesive when the last few words of one set up information that appears in the first few words of the next." *Id.* at 69 (emphasis omitted).

106. *See* SCALIA & GARNER, *supra* note 32, at 112.

107. *Id.* ("With words, ask yourself whether there's a more colorful way to put it.").

108. For this reason I take issue with the advice of certain commentators who set out an overly simplified writing style as a model for lawyers to emulate. *See, e.g.*, MARK HERRMANN, THE CURMUDGEON'S GUIDE TO PRACTICING LAW 1–8 (2006). Such writing may be clear, but it can also be torturous in large doses. Nevertheless, I have had some success referring particularly wordy students to Herrmann's book. What I tell them, which seems to work well, is to strike a happy medium between the Spartan style of writing they see in that book and their current writing style.

109. WILLIAMS & COLOMB, *supra* note 37, at 43.

110. *See* GARNER, *supra* note 57, at 400 ("[I]f you wish to write well, you'll have to resist sounding like a machine. Or an old-fashioned pontificator. You'll have to learn to sound like the best version of yourself.").

posed to write. But the result is writing that is artificial-sounding and lifeless, full of legal jargon and stilted constructions. Other students come to law school having learned to write in a stuffy, intellectual style that they apparently picked up from their exposure to academic writing in college. Superficially it sounds "intelligent," but it is ponderous and dense, using a lot of words to say relatively little.

These types of writing fail to engage the reader because they employ a voice that is not authentic.[111] The writing style comes across as artificial to the reader. A writer who writes in an inauthentic voice tends to produce tepid prose.[112] It is not necessarily bad; it just lacks character and individuality. J.B. White, one of the principal figures in the law and literature movement, describes the development of an authentic writer's voice as central to the enterprise of becoming an effective lawyer:

> Law, as you can see, is for me a kind of writing, at its heart less of an interpretive process than a compositional one. The central task for the lawyer from this point of view is to give herself a voice of her own, a voice that at once expresses her own mind at work in its best way and speaks as a lawyer, a voice at once individual and professional.[113]

It is difficult to define the concept of voice.[114] Basically, though, it refers to a style that comes naturally to the writer, so that a glimmer of the writer's personality reveals itself through the text.[115] A writer's authentic voice lets the reader see that there is a real person behind the document.[116] Consider, for example, Justice Holmes's infamous pronouncement in favor of forced sterilization in *Buck v. Bell*:[117]

111. For an interesting book-length treatment of the topic of voice, see TOM ROMANO, CRAFTING AUTHENTIC VOICE (Lisa Luedeke ed., 2004).

112. *Id.* at 5 ("[S]ome writers' presence is aloof and distant, so abstractly intellectual and fraught with jargon that their words are impenetrable, like an unyielding brick wall.").

113. JAMES BOYD WHITE, THE LEGAL IMAGINATION, at xv (abr. ed. 1985).

114. *See* J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING, 67, 74–77 (2009) (providing a brief history of the concept of voice and describing the difficulties in defining the concept).

115. *See* ZINSSER, *supra* note 60, at 25 ("But whatever your age, be yourself when you write.").

116. *See, e.g.*, RALPH FLETCHER, WHAT A WRITER NEEDS 68 (1993) ("When I talk about voice I mean written words that carry with them the sense that someone has actually written them. Not a committee, not a computer: a single human being. Writing with voice has the same quirky cadence that makes human speech so impossible to resist listening to.").

117. 274 U.S. 200, 207 (1927) (citation omitted).

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[118]

The reasoning and result of this decision may be open to question, but is there any question as to its authenticity? Holmes's commanding presence comes through loud and clear, and the power of Holmes's voice is likely a factor in why only one member of the Court dissented from such a dubious holding.

Of course, in the context of legal writing, individuality is constrained to some extent by lawyers' notions of a professional tone and their desire for uniformity. A law firm, for example, may impose certain style limitations on its lawyers in order to bring a level of consistency to the firm's work product.[119] Still, legal writers need not aspire to rigid conformity. Even within the confines of legal writing, there is room for individuality. The legal writer who is able to project an authentic voice while still maintaining a professional tone will produce a more engaging style of writing.

Occasionally, as in a work of fiction, the writer may make effective use of a voice that is not the writer's own, but rather a character the writer wants the reader to identify with. Chief Justice Roberts's amusing dissent in *Pennsylvania v. Dunlap*,[120] for example, illustrates this technique. In his recitation of the facts, he cleverly employs the point of view as well as the voice of the arresting officer in order to help the reader appreciate the officer's perspective on whether there was probable cause to make an arrest:

> North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.
>
> Devlin spotted him: a lone man on the street corner. An-

118. *Id.*

119. *See, e.g.*, HERRMANN, *supra* note 108, at 1–8 (describing the rules that govern writing style in the author's law firm).

120. 555 U.S 964 (2008) (Roberts, J., dissenting), denying cert. to Commonwealth v. Dunlap, 941 A.2d 671 (Pa. 2007).

> other approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.[121]

For the most part, however, the most effective voice in legal writing is the writer's own. It is not precisely the same as the way the writer would normally speak.[122] But it does reflect a style that comes naturally to the writer, rather than a style that the writer mimics or assumes for effect.[123]

Another tool that can make writing engaging is the writer's ability to incorporate humor into writing.[124] The occasional use of humor in the appropriate context makes the experience of reading more enjoyable for the reader (assuming the reader has a sense of humor), which alone makes it easier for the writer to hold the reader's interest.

Humor can be particularly effective in legal writing when it is used to soften the blow of an unpopular message. Consider, for example, Judge Cardozo's opinion in *Murphy v. Steeplechase Amusement Company*.[125] There, the New York Court of Appeals held that the assumption-of-risk doctrine prevented recovery by a young man injured on an amusement-park ride that was aptly named "the Flopper." Justice Cardozo expressed the rationale for the decision as follows:

> One who takes part in such a sport accepts the dangers that

121. *Id.* at 448; *see* Melissa H. Weresh, *Chief Justice John Roberts' Blog-Style Dissenting Opinion Garners Mixed Reviews*, 68 THE IOWA LAW., Dec. 2008, at 12, 12-13 (2008) (analyzing the Chief Justice's writing style in *Dunlap*, including the appropriateness of its humorous tone).

122. *See* BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 48–50 (2001). Garner suggests that a writer's natural voice resembles the writer's spoken voice, and that a skillful writer needs to develop a good ear for how his writing sounds in order to develop a natural voice. He also offers several tips on how the writer can enhance the natural, "spoken" quality of writing.

123. ZINSSER, *supra* note 60, at 25 ("Think of [voice] as a creative act: the expressing of who you are. Relax and say what you want to say. And since style is who you are, you only need to be true to yourself to find it gradually emerging from under the accumulated clutter and debris, growing more distinctive every day. Perhaps the style won't solidify for years as *your* style, *your* voice. Just as it takes time to find yourself as a person, it takes time to find yourself as a stylist . . . .").

124. For a good overview of the effective use of humor in judicial opinions, see Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869 (1993).

125. 166 N.E. 173 (N.Y. 1929).

> inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.[126]

By using a dry, tongue-in-cheek tone to suggest that a vigorous young man who elects to jump on a ride called "the Flopper" might reasonably expect to be flopped about, Cardozo makes the application of an otherwise harsh doctrine seem more palatable to the reader. The mildly humorous tone disarms the reader's natural sympathies for the injured plaintiff and invites the reader to conclude that the plaintiff voluntarily assumed the risk of injury. This type of humor is what William Zinsser refers to as the "secret weapon" of the nonfiction writer. "It's secret," he claims, "because so few writers realize that humor is often their best tool—and sometimes their only tool—for making an important point."[127]

Of course, contextual considerations are important when it comes to humor. At times the subject matter at issue may make humor inappropriate or even in bad taste.[128] And inappropriate humor is actually counter-productive because it causes the reader to disengage from the text. Some commentators, in fact, think that humor should be avoided altogether in legal writing because it too often backfires by trivializing serious matters.[129] So in every instance the legal writer should carefully weigh the advantages and disadvantages of employing humor, and use it in legal documents only with considerable discretion.

126. *Id.* at 174.

127. ZINSSER, *supra* note 60, at 207.

128. *See* Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter*?, 41 HASTINGS L. J. 175, 179 (1989) (lamenting the excessive and inappropriate use of humor in judicial opinions).

129. *See, e.g.*, EDWARDS, *supra* note 41, at 215; MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS 266 (2009) ("The law is too serious of a business for humor.").

Another important component of engaging writing is the writer's ability to tell a compelling story.[130] Outside of a purely academic setting, the law is inherently tied up with events in the lives of real people. Briefs and memoranda do not just concern arcane legal concepts; rather, they concern the problems and challenges people face in their everyday lives, individually or collectively.[131] And when people discuss these problems and challenges, they do so by telling stories. As J.B. White puts it, "The story is the most basic way we have of organizing our experience and claiming meaning for it. We start telling the stories of our lives as soon as we have language, and we keep it up until we die."[132] So the legal writer who can effectively convey factual information through narrative is much more likely to engage the reader's attention than one who merely enumerates the facts in cut-and-dried fashion.

Consider, for example, how Lord Denning describes the facts in *Miller v. Jackson*,[133] a case concerning some rather simple allegations of negligence and nuisance:

> In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The cricket area is well rolled and mown. The outfield is kept short. It has a club house for the players and seats for the onlookers. The village team plays there on Saturdays and Sundays. They belong to a league, competing with the neighboring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for

130. *See* ZINSSER, *supra* note 60, at 261–62 ("[N]arrative—good old-fashioned storytelling—is what should pull your readers along without their noticing the tug."). For a good overview on why storytelling is effective and how writers construct a compelling story, see RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING 199–204 (2008).

131. *See* Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 130 (2008) ("Law, and the legal system, should be about people . . . . It is a tool to enrich and order peoples' lives. So why do legal briefs focus so much on the abstract law and overlook the people?").

132. WHITE, HERACLES' BOW 169 (1985).

133. [1977] Q.B. 966, 976 (Eng.).

> him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden, or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.[134]

In one long paragraph composed almost entirely of simple, plain sentences, Lord Denning is able to spin a very compelling narrative. It provides the reader with all the essential facts. But it does so in a way that is highly persuasive as well as engaging. The narrative sets up an almost archetypal conflict between happy villagers and a troublesome interloper that practically begs for resolution in favor of maintaining the villagers' traditional ways.

Judge Learned Hand's opinion in *Sheldon v. Metro-Goldwyn Pictures Corp*.[135] provides another good example of effective storytelling. In that opinion, the court awarded injunctive relief as well as compensatory damages to the authors of a play who had brought a copyright infringement action against a movie producer. Judge Hand's opinion first tells the historical story that provides the basis for the plot in both the play and the movie: the story of a young woman named Madeleine Smith who faced trial in Scotland in 1857 for allegedly poisoning her lover with a cup of arsenic-laden hot chocolate. The opinion then goes into significant detail comparing the specific plots and dramatic techniques of the play and the movie. It also discusses the plot of a contemporaneous novel—again based upon the story of Madeleine Smith—which the defendant movie-producer claimed the movie was based upon. (The movie-producer

134. *Id.*

135. 81 F.2d 49 (2d Cir. 1936).

had purchased the rights to the novel but not the play.) After summarizing all three stories in a lively manner worthy of a novelist, and demonstrating the significant overlap among them, Judge Hand succinctly concludes, "if the picture was not an infringement of the play, there can be none short of taking the dialogue."[136]

Unfortunately, storytelling ability like Judge Hand's and Lord Denning's is uncommon in legal writing. And far too many legal writers disregard storytelling altogether, merely reciting factual material in a dry, mechanical way, as if the "facts" were simply data points rather than stories about real people. But in doing so, these writers lose a powerful persuasive tool. A growing body of literature indicates that most people, including judges, make decisions more readily on the basis of stories that they can relate to their own experiences than they do through argument, statistics, or logic.[137] As the Denning and Hand opinions illustrate, effective storytelling enhances the reader's receptivity to the writer's message.[138] And thus a document that effectively blends legal analysis with narrative will be more engaging and persuasive than a document that focuses solely on legal arguments and the dry recitations of facts.[139]

136. *Id.* at 56.

137. *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 81–90 (1981) (using studies of jury trials to argue that jurors rely primarily on stories told by the witnesses and lawyers to process and organize information and to assess the credibility of the parties' competing claims); STEVEN LUBET, NOTHING BUT THE TRUTH: WHY LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH 1 (2002) ("[N]arrative has proven to be the most successful way to persuade the fact finder."); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1, 19–22 (2010) (presenting empirical evidence that judges prefer briefs that stress narrative); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 28–40 (1996) (arguing that narrative is an essential component of our thinking about legal rules and principles); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING 3, 15–46 (2009) (arguing that storytelling can enhance the effectiveness of pleadings such as complaints); Brian J. 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, 465–80 (2001) (discussing the benefits of storytelling for persuasion and explaining how to incorporate the techniques of fiction writing to tell stories in briefs). For a good overview of the scholarly literature on storytelling and the reasons why people are persuaded through stories, see J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 53–78 (2008).

138. *See generally* MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 32–41 (2d ed. 2008) (explaining how and why narrative techniques make the reader more receptive to the writer's message).

139. *See* Foley & Robbins, *supra* note 137, at 464–65 ("[L]awyers [are] . . . essentially professional storytellers [and] *should* develop that skill, and that those who do develop it will have a decided advantage over those who do not."); Nancy Levit, *Legal Storytelling: The Theory and the*

Other tools that skillful writers use to engage readers have their roots in classical rhetoric.[140] One such tool is what classical rhetoricians called *pathos*,[141] which refers to the writer's ability to connect with the reader at an emotional level, thereby increasing the reader's level of engagement by making the reader more receptive to the writer's message.[142] To be sure, pathos is not just influenced by writing style.[143] The facts themselves are normally the principal driver of the reader's emotional response, and the legal writer has no control over the inherited facts. Still, the way the legal writer tells the client's story also plays an important role in determining whether the text connects with the reader at an emotional level.[144] For one thing, the legal writer can affect the reader's emotional response by deciding which facts to include, which facts to emphasize, and how to ar-

Practice – Reflective Writing Across the Curriculum, 15 LEGAL WRITING 259 (2009) (discussing the persuasive power of storytelling).

140. These include devices such as metaphors and literary allusions. For a good overview of these devices, see OATES & ENQUIST, *supra* note 35, at 591–603. For a more detailed discussion of metaphors, literary allusions, and other so-called rhetorical figures of speech that have their roots in the classical age, see SMITH, *supra* note 138, at 195–340. *See also infra* text accompanying note 204 (regarding the role metaphor plays in elegant writing).

141. Aristotle, probably the principal architect of classical rhetoric, described rhetoric as "the faculty of observing in any given case the available means of persuasion." ARISTOTLE, RHETORIC (c. 335–30, B.C.E.), *reprinted in* POETICS AND RHETORIC 93, 105 (W. Rhys Roberts trans., Barnes & Noble classics ed., 2005). He then identified *ethos*, *logos*, and *pathos* as the three essential "modes of persuasion." *Id.* at 104–09. In simple terms, *ethos* involves establishing credibility with the audience, *logos* involves persuasion through the use of rational argument, and *pathos* involves persuasion through the writer's ability to influence the emotions of the audience. For a general overview of these concepts, see SMITH, *supra* note 138, at 94–101.

142. The literature discusses *pathos* primarily as a tool for making writing more *persuasive*, rather than a tool for making it more *engaging*. *See, e.g.*, ARISTOTLE, *supra* note 141, at 104–09; SMITH, *supra* note 138, at 84, 87–119. Thus, *pathos* is more closely associated with what I have referred to as the *effectiveness* of a document (*see supra* text accompanying notes 23–29), rather than the quality of its writing *per se*. Nevertheless, even a non-persuasive document that connects with the reader at an emotional level (e.g., through effective storytelling) is usually more engaging because the emotional connection keeps the reader attuned to the writer's message, even if the writer's purpose is merely to convey information rather than to persuade.

143. In fact, for Aristotle, *pathos* was only tangentially relevant to *writing* at all, as he was primarily concerned with "the modes of persuasion furnished by the spoken word . . . ." ARISTOTLE, *supra* note 141, at 105.

144. *See* SMITH, *supra* note 138, at 105 ("Undoubtedly, the most effective way for an advocate to evoke emotions based on the facts of the matter is to present the facts in the context of a compelling story."); John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 3 J. ASS'N LEGAL WRITING DIRECTORS. 154, 156 (2006) ("The emotions that underlie human conflict are contained in the facts or the 'story' of your case."); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 771 (2006) ("[A]ny decent trial lawyer already knows that storytelling is a critical part of effective advocacy.").

range the factual presentation.[145] Of course, simply omitting key facts can backfire because the writer's credibility (i.e., *ethos*) suffers if the reader gets the sense the writer is hiding something.[146] But even if two stories are based on the exact same events, they can make significantly different impressions on the reader depending on how the writer organizes the facts, as well as which facts are emphasized or de-emphasized.[147]

The writer's choice of language can also influence the reader's emotional response. By employing emotive words that resonate with the reader's deeply held feelings and values, the writer can make the reader more sympathetic to the writer's message. This technique plays an important role in making Justice Brandeis's concurrence in *Whitney v. California*[148] so powerful. Brandeis's references to the founding fathers as "courageous, self-reliant men" and as "[t]hose who won our independence by revolution," and his liberal use of emotive words such as "free men," "liberty," and "democracy," serve to engage and persuade the reader by evoking feelings of patriotism and civic duty.[149] They also inspire a feeling of community between the writer and the reader by calling attention to their shared heritage and their shared political values.

In addition to these straightforward devices for incorporating pathos into a document, commentators have also discussed some subtler ways the legal writer can engage the reader by influencing the reader's emotions. For example, the legal writer can take advantage of *pathos* by tapping into certain narrative myths, metaphors, and archetypes that resonate with the reader, such as the story of a hero on an epic journey or quest.[150] A growing body of literature has discussed the important role these narrative structures play in people's understanding of the world, and in how lawyers and judges inter-

145. *See* SMITH, *supra* note 138, at 84–85 (describing how the legal writer can affect the emotions of the reader through the strategic inclusion, emphasis, and organization of the facts presented).

146. EDWARDS, *supra* note 41, at 338 (explaining that omitting material facts from a brief "will only damage your credibility before the judge, causing the judge to wonder how much she can rely on the other facts you assert").

147. SCALIA & GARNER, *supra* note 32, at 93–96 (discussing the importance of strategic emphasis and juxtaposition in crafting a persuasive statement of the facts).

148. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

149. *Id.* at 375–78.

150. *See* Robbins, *supra* note 144, at 790–800 (discussing the archetype of the heroic journey and how it can be incorporated into persuasive legal writing).

pret legal arguments.[151] By incorporating these types of structures into clients' stories, these commentators argue, the legal writer can harness the powerful emotions that archetypal narratives evoke in us.[152] Ruth Anne Robbins, for example, argues that "[b]ecause people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately integrate into their storytelling the larger picture of their clients' goals by subtly portraying their individual clients as heroes on a particular life path."[153] Of course, some clients are more easily cast as heroes than others.[154] But Robbins's general point about the psychological effect of tapping into narrative archetypes is well taken.

A lawyer seeking to employ *pathos* in a legal document needs to be judicious, however. Blatant emotional appeals can be counterproductive if they make judges feel like they are being manipulated.[155] And sometimes the use of *pathos* is simply not productive. For example, *pathos* is less effective in cases where the law is relatively clear-cut than in cases where the law is reasonably subject to interpretation.[156] Likewise, since *pathos* is primarily a tool of persuasion,

151. *See, e.g.*, Robbins, *supra* note 144, at 790–800; *see generally* Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883 (2010) (exploring some of the cultural archetypes that influence legal analysis).

152. *See* Greig E. Henderson, *The Cost of Persuasion: Figure, Story, and Eloquence in the Rhetoric of Judicial Discourse*, 75 U. TORONTO Q. 905, 916 (2006) ("Our first hearing of 'once upon a time' and 'they lived happily ever after' begins the process whereby a grammar of narrative is embedded into our psyches along with a storehouse of images, archetypes, stereotypes, myths, formulas, plots, and so forth. Narrativity, the innate capacity to generate and comprehend stories, is at the core of human signification. Story is inescapable.").

153. Robbins, *supra* note 144, at 768–69.

154. In fact, given the realities of litigation, it is likely the exceptional case that lends itself readily to portraying the client as a heroic figure. It may be true, as one old advertising campaign used to proclaim, that life itself would be impossible without chemicals, but that doesn't necessarily make it any easier to sell to a jury the notion that one's chemical-company client is engaged in some kind of heroic quest. Thus, litigators more commonly rely on archetypes like the *villain* and the *careless bumbler* in pitching their cases to juries. In other words, rather than trying to portray their own clients as heroes or saints, lawyers tend to focus on portraying the opposing party as either malevolent or incompetent.

155. *See* SMITH, *supra* note 138, at 105 ("[J]udges may view overt emotional arguments as inconsistent with their role in the legal system and, thus, as inappropriate."); SCALIA & GARNER, *supra* note 32, at 32 ("[O]vert appeal to emotion is likely to be regarded as an insult."); Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 396-97 (2002) (arguing that judges can be insulted by obvious emotional appeals because they imply that the judges are susceptible to irrational arguments).

156. *See* SMITH, *supra* note 138, at 103 ("If the law on a legal issue and its application to the matter at hand are clear, the emotional facts and values implicated by the matter will be less significant in the decision-making process . . . . If, on the other hand, the law on a legal issue

it is generally not as useful where the central purpose of the document is merely to convey information rather than to persuade, as in an office memorandum.[157] But the appropriate use of *pathos* in a brief—even an appellate brief[158]—can make an argument more compelling, particularly when the brief appeals to the judge's sense of justice and fairness.[159] Thus, in determining whether to take advantage of *pathos*, the legal writer should evaluate the context of a document, taking into account the purpose of the document, as well as the needs, interests, and background of the intended audience.

Finally, in order for a legal document to be appropriately engaging, it is important that the document strike a proper *tone*. This is a difficult concept to define, but essentially it involves making sure that the subject matter of the document and writing style are in sync, so that they reinforce each other's effect on the reader.[160] Suppose, for example, that a plaintiff's lawyer sends a demand letter to the defendant that is otherwise well written (i.e., is clear and concise), but its tone is too matter-of-fact or even friendly. The letter would more effectively engage the reader if its tone were more serious so that it evoked some concern on the defendant's part as to the consequences of not settling. Otherwise, the tone interferes with the content of the letter, and the writer's message gets diluted. Or imagine a defendant's brief that treats a sensitive topic such as the plaintiff's grievous injuries in an insensitive manner. Because the tone of the brief is inappropriate, the reader (i.e., the judge) may take offense to it and pay less attention to the writer's central message. In both of these cases, the writer's failure to make the writing style appropriate to the subject matter of the document may cause the reader to disengage.

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or its application to the matter at hand is unclear, then pathos will play a significant role in the decision-making process.").

157. BRONSTEEN, *supra* note 35, at 132 (the tone of a legal memorandum should be "objective and dispassionate"). To be sure, a good memorandum should inform the reader whether the facts of the case are likely to have an emotional impact on the jury or the judge, so that the lawyer or client reading the memorandum can make a rational assessment of potential damages. But it is not the purpose of an advisory memo to stir the passions of the *reader* through the use of *pathos*; that is likely to be counterproductive if the goal is to enable the decision-maker to calmly and rationally assess the options. So while a memorandum does need to evaluate the potential role *pathos* will play in a case, it does not itself need to connect with its intended audience at an emotional level.

158. *See* Shepherd & Cherrick, *supra* note 144, at 161–65; Chestek, *supra* note 131, at 130–36.

159. SCALIA & GARNER, *supra* note 32, at 26–27.

160. For more on the topic of *tone* in legal writing, see Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 LEGAL WRITING 65, 99–107 (2010).

3. The tension between engagement and clarity

Clarity and engagement are both fundamental qualities of good legal writing, yet at times these qualities may conflict. When they do, the skillful legal writer needs to find an appropriate accommodation between them. Consider, for example, the use of repetition. As discussed in Part I, repetition is a device that writers sometimes use to ensure that their message is clear to the reader.[161] Yet it can also make writing less engaging if the writer gets bored hearing the same message repeatedly.[162] Likewise, the use of simple sentences and plain words helps to ensure that the writer's message is clear.[163] But at the same time, one way to make writing more engaging is to vary linguistic patterns, such as sentence structure and word use.[164]

Certain narrative techniques that make writing more engaging can also conflict with the goal of clarity. Consider, for example, how writers present factual accounts. The simplest and most straightforward way to present facts is chronologically. When the facts are presented in a linear time sequence, the story is easy to follow. But writers sometimes present stories in a non-linear fashion (i.e., out of chronological sequence) in order to emphasize certain facts and create an interesting narrative.[165] Think, for example, of the movie *Pulp Fiction*,[166] where Quentin Tarantino divides the story into a number of discrete scenes, but then presents the scenes out of chronological order. The result is an interesting and compelling story: by challenging the viewer to figure out exactly what is happening and when, Tarantino adds intrigue to the plot and keeps the audience engaged. But while the technique helps to make the movie engaging, it also detracts somewhat from the clarity of the plot because it makes the storyline more difficult to follow. So when telling stories, the legal writer needs to strike a balance between simple but dull chronological presentations of the facts and more complicated and interesting narrative accounts that may not be quite as clear.[167]

161. *See supra* text accompanying note 65.

162. *See* LECLERCQ, *supra* note 41, at 52 ("[R]epetition results in lengthy documents and uninteresting reading . . . .").

163. *See supra* text accompanying notes 40–42.

164. *See supra* text accompanying notes 104–109.

165. For a more detailed discussion of this narrative technique, see FAJANS ET AL., *supra* note 87, at 200–05.

166. PULP FICTION (Miramax Films 1994).

167. FAJANS ET AL., *supra* note 87, at 395 ("Uncertainty of meaning often creates rich and complex layering in fiction, but it produces costly and time-consuming litigation in legal documents, especially rule-making documents.").

In striking an appropriate balance between the qualities of clarity and engagement, the legal writer should carefully evaluate the *context* of the document, looking to its purpose[168] as well as the needs, interests, and background knowledge of the intended audience. When in doubt, the legal writer should err on the side of clarity. As discussed in Part II,[169] a document is of little use to a legal reader if the reader does not understand what the writer is trying to say.[170] But at the same time, a justifiable aversion to legalese and turgid legal prose should not push legal writers into a reactionary mode, whereby they completely abandon stylistic interest in the name of clarity.[171] Writing that is engaging holds the reader's attention because it makes the job of reading less arduous, and it also stimulates the reader's own thought processes.

III. ELEGANCE—THE HALLMARK OF GREAT LEGAL WRITING

Legal writing that is clear, concise, and engaging is good writing. As discussed in the previous sections, such writing facilitates a reader's ability to make professional decisions.[172] Yet there is something about the very best examples of legal writing that goes beyond these three fundamental qualities. The best legal writing is not just writing that is especially clear, concise, and engaging; rather, what characterizes great legal writing is a separate, aesthetic quality, which I will refer to as *elegance*.[173] It is because of this aesthetic quali-

168. For a discussion of the principal purposes of legal writing, see OATES & ENQUIST, *supra* note 35, at 4–5 (describing the principal purposes of legal writing as explaining, persuading, and memorializing). I am indebted to Brian Simpson for his suggestion that *justification* may be another basic purpose of legal writing. Judicial opinions exhibit this purpose. One could argue that the purpose of a judicial opinion is to *persuade* the reader that the court is correct; however, that seems too strong because the decision has already been made and there is no further need to convince the reader. Alternatively, one could argue that the purpose of a judicial opinion is merely to *explain* the court's decision; however, that seems too weak because something more is going on besides a dispassionate effort to educate. What the judge is really attempting to do is *justify* the decision of the court to the reader—an objective that is related to persuasion and explanation, and yet different.

169. *See supra* text accompanying notes 33–34.

170. *See* GARNER, *supra* note 57, at 40.

171. *See id.* at 46 (stressing the importance of writing style and quoting Voltaire for the proposition that "every style is good save that which bores").

172. *See supra* text accompanying note 30.

173. I use the term "elegance" in order to capture the artistic quality of the best writing. Some commentators use the term *eloquence* to refer to this aesthetic quality. *See, e.g.*, OATES & ENQUIST, *supra* note 35, at 593 ("Eloquent writing . . . is more than clear and energetic: it is memorable, striking, even poetic because the writer has paid attention to the sound, rhythm, and imagery of language."). But strictly speaking, "eloquence" is not concerned with the aes-

ty that we often refer to the finest examples of writing as being "beautifully written." As Cicero said of great oratory, "One thing there will certainly be, which those who speak well will exhibit as their own; a graceful and elegant style, distinguished by a peculiar artifice and polish."[174] Great legal writing, therefore, is writing that, in addition to facilitating legal decision-making, also exhibits an artistic flair.

The value of elegance in writing does not principally reside in its functionality.[175] Rather, elegance adds value to writing for the same reason that beauty is valuable in any human endeavor: it gives expression to mankind's essential creative nature. As the noted psychologist Carl Seashore observed, "The pursuit of beauty is one of the most universal and most persistent efforts of mankind in all ages and all cultures."[176] Likewise, George Santayana, the well-known, twentieth-century philosopher, described the pursuit and appreciation of beauty as a fundamental and pervasive human drive, and an integral part of human nature:

> In all products of human industry we notice the keenness with which the eye is attracted to the mere appearance of things: great sacrifices of time and labour are made to it in the most vulgar manufactures; nor does man select his dwelling, his clothes, or his companions without reference to their effect on his aesthetic senses. Of late we have even learned that the forms of many animals are due to the survival by sexual selection of the colours and forms most attractive to the eye. There must therefore be in our nature a very radical and wide-spread tendency to observe beauty, and to value it. No account of the principles of the mind can be at all adequate that passes over so conspicuous a faculty.[177]

thetic. Rather, it entails persuasiveness, forcefulness, and fluency. *See* 1 SHORTER OXFORD ENGLISH DICTIONARY 808 (5th ed. 2002) (defining *eloquence* as "[t]he fluent, forceful, and apt use of language"); WEBSTER'S COLLEGIATE DICTIONARY 375 (11th ed. 2003) (defining *eloquence* as "the quality of forceful or persuasive expressiveness"). So I think "elegance" is a more appropriate term to describe the artistic quality of great writing; "eloquence" is more closely related to the quality of engagement discussed in Part II than to the quality of elegance.

174. MARCUS TULLIUS CICERO, *On the Character of the Orator*, *in* ON ORATORY AND ORATORS 19 (J.S. Watson trans., 1878) (c. 55 B.C.E.).

175. *But see infra* text accompanying notes 194–197 (noting that elegant writing may be more persuasive).

176. Carl E. Seashore, *In Search of Beauty in Music*, 28 THE MUSICAL Q. 302, 302 (1942).

177. GEORGE SANTAYANA, THE SENSE OF BEAUTY 5–6 (1955).

Thus, it should not be surprising that we would value beauty in writing, just as we do in all of our creative endeavors. A utilitarian object such as a chair or a watch is not considered museum-worthy merely because of its functional qualities; instead, it is principally the artistic quality of the design that makes it a great watch or a great chair. So too with writing: great writing transcends its functional purpose and exhibits an artistry not found in ordinary writing. As Joseph Williams puts it,

> Anyone who can write clearly, concisely, and coherently should rejoice to achieve so much. But while most of us prefer bald clarity to the density of institutional prose, others feel that relentless simplicity can be dry, even arid. It has the spartan virtue of unsalted meat and potatoes, but such fare is rarely memorable. A flash of elegance can not only fix a thought in our minds, but give us a flicker of pleasure every time we recall it."[178]

But even if we grant that literature and perhaps even some works of prose can be beautiful or elegant, and that this quality is the hallmark of great writing generally, is there really such a thing as a beautifully written brief or legal opinion? And even if elegance is attainable in legal writing, it is really a worthy goal for the legal writer, given the practical nature of the profession? After all, lawyers and judges write documents to aid professional decision-making, not to entertain audiences or create great works of literature.

While these are certainly worthwhile questions, an examination of some of the great writing in the field demonstrates that elegance—while definitely not commonplace—is attainable in legal writing, and that it has value, at least in certain contexts. Three well-known First Amendment cases help to illustrate this point.

The first is Justice Jackson's opinion in *West Virginia Board of Education v. Barnette*.[179] In that case, the Court upheld an injunction preventing enforcement of a state regulation requiring school children to salute the American flag. Writing for the majority, Justice Jackson paints a stark picture of the dangers inherent in state-coerced nationalism and the repression of dissenting views:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism

178. WILLIAMS & COLOMB, *supra* note 37, at 141.

179. 319 U.S. 624 (1943).

> is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security . . . and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[180]

Next consider Justice Brennan's still-controversial opinion in *Texas v. Johnson*,[181] another famous case involving the American flag. The issue there was whether flag burning was constitutionally protected speech. The Court held that it was. Writing for the majority, Justice Brennan delivers a powerful defense of free speech:

> We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires . . . . We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength . . . . The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong . . . . And, precisely because it is our flag that is in-

180. *Id.* at 640–41.
181. 491 U.S. 397 (1989).

> volved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.[182]

Finally, consider Judge Easterbrook's dissenting opinion in *Miller v. Civil City of South Bend*.[183] In that case, the majority held that non-obscene nude dancing performed as entertainment was subject to protection under the First Amendment as a form of expression.[184] In his dissent, Judge Easterbrook takes issue with the majority's characterization of nude dance as a legitimate form of expression.[185] While not as emotionally charged as the Jackson and Brennan opinions, Easterbrook's dissent is nevertheless an elegant piece of judicial prose:

> Pervading this opinion is a belief that states may draw no lines where art is concerned. Sophisticates go to the museum and see Renoir's Olympia or to the opera and see a soprano strip during the Dance of the Seven Veils in Strauss' Salome. If the First Amendment protects these expressions, the argument goes, Joe Sixpack is entitled to see naked women gyrate in the pub. Why does this follow? That a dance in Salome expresses something does not imply that a dance in JR's Kitty Kat Lounge expresses something, any more than the fact that Tolstoy's Anna Karenina was a stinging attack on the Russian social order implies that the scratching of an illiterate is likely to undermine the Tsar. Rembrandt applied paint to canvas; a bucket of paint hurled at a canvas also deposits paint. A conclusion that Rembrandt's paintings are speech would not imply that all paint is expressive. Juvenile delinquents who deface subway cars with spray paint may be "expressing themselves" in a col-

182. *Id.* at 418–20.

183. 904 F.2d 1081, 1120–31 (7th Cir. 1990) (en banc) (Easterbrook, J. dissenting), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

184. *Id.* at 1130–31.

185. *Id.* at 1131.

> loquial sense, but they are not communicating ideas beyond their disdain for the sensibilities of others. The First Amendment does not let a government draw lines based on the viewpoint the performer expresses; it does inquire whether particular "entertainment" is "expression" in the first place. The Constitution does not protect "the freedom of entertainment." "Speech"—by implication "expression" of thoughts through conduct—is the foundation for its application.[186]

Jackson, Brandeis, and Easterbrook are all widely regarded as exceptional writers. And the excerpts set out above unquestionably exemplify writing that is clear, concise, and engaging. But what sets these opinions apart as models of great legal writing is the elegant manner in which they are written.[187] They have a literary quality[188] that is lacking in ordinary documents—even those that are considered very well written. Even if you do not agree with one or more of the results, you find yourself wanting to read the language of the opinions more than once, not because you don't understand it the first time, but because you want to pause and admire the craftsmanship of the writing.[189] There is something about the cadence of the sentences, the juxtaposition of the words, and the vividness of the descriptions that, while difficult to analyze, appeals to our aesthetic sensibilities.[190]

186. *Id.* at 1125 (citation omitted).

187. One could object here that elegance is subjective, and that people will sometimes disagree as to what constitutes an example of elegant writing. But that objection does not undermine the argument that elegance is the hallmark of great legal writing. People may occasionally disagree as to whether a particular object such as a vase or a chair is elegant too. But nevertheless, the reason why a particular vase or chair ends up as a museum piece is precisely because a majority of people (or at least a majority of those who make decisions about these types of things) regard the object as beautiful, even if some others disagree. So elegance can still be the distinguishing characteristic of great legal writing (that is, an essential part of what it *means* for a piece of writing to be considered great), even if people sometimes disagree as to whether a particular piece of writing deserves that accolade.

188. For a comprehensive discussion of the relationship between legal opinions and literature, see RICHARD A. POSNER, LAW & LITERATURE 329–85 (3d ed. 2009).

189. *See* Henderson, *supra* note 152, at 906 ("[A]ny piece of language that calls attention to itself is drawing upon the literary function by making us conscious of the words themselves and thereby forcing us to prolong and intensify our concentration.").

190. As Strunk, Jr. & White put it: "Who can say confidently what ignites a certain combination of words, causing them to explode in the mind? Who knows why certain notes in music are capable of stirring the listener deeply, though the same notes slightly rearranged are impotent? These are high mysteries." STRUNK, JR. & WHITE, *supra* note 35, at 66.

Opinions such as these demonstrate that elegance in legal writing is attainable,[191] and that it is a worthy goal, at least with respect to certain types of legal writing, such as important judicial opinions.[192] After all, writing (even legal writing) is a creative endeavor, and creativity by its very nature opens up the possibility of artistry. As J.B. White puts it, "the law is an art, a way of making something new out of existing materials—an art of speaking and writing."[193]

Furthermore, elegance may make writing more persuasive. As discussed above, the pursuit of elegance is a pervasive human quest, common to all of our creative endeavors.[194] Even in such seemingly unlikely fields as physics and mathematics, scholars look to elegance as an important criterion for evaluating their fields' greatest discoveries.[195] As the physicist Hans Albert Einstein once observed of his famous father, "He had a character more like that of an artist than of a scientist as we usually think of them. For instance, the highest praise for a good theory or a good piece of work was not that it was correct nor that it was exact but that it was beautiful."[196] Just as elegance can make a scientific or mathematical theory more compelling, it can sometimes make a legal document more compelling as well.[197]

It is beyond the scope of this Article to analyze precisely what it is that makes writing elegant.[198] Ever since Plato, philosophers have

191. *See* DERNBACH ET AL., *supra* note 35, at 191 ("The law is a literary profession; legal writing should and often does approach the level of good literature. Many judicial opinions, for example, are remembered not only for their ideas but also for the way in which the ideas are expressed.").

192. It is not entirely coincidental that I chose three First Amendment cases to illustrate the quality of elegance. The lofty ideas that we associate with First Amendment jurisprudence lend themselves well to elegant descriptions, in a way that more mundane topics may not.

193. WHITE, *supra* note 113, at xiv.

194. *See supra* text accompanying notes 176–177.

195. *See, e.g.*, H. E. HUNTLEY, THE DIVINE PROPORTION: A STUDY IN MATHEMATICAL BEAUTY 75–76 (1970) ("That the feeling for beauty, however, can produce a mental ferment and generate new ideas in mathematics, and can serve as a guide to truth is an affirmation that many high ranking mathematicians endorse."); A. ZEE, FEARFUL SYMMETRY: THE SEARCH FOR BEAUTY IN MODERN PHYSICS 3 (2007) ("The reader may perhaps think of physics as a precise and predictive science and not as a subject fit for aesthetic contemplation. But, in fact, aesthetics has become a driving force in contemporary physics."); IT MUST BE BEAUTIFUL: GREAT EQUATIONS OF MODERN SCIENCE xi–xvi (Graham Farmelo ed., 2002) (describing how some great scientists such as Einstein and Dirac have refused to accept theories that could not be expressed as beautiful equations).

196. JAMES W. MCALLISTER, BEAUTY AND REVOLUTION IN SCIENCE 96 (1996).

197. *See* ENQUIST & OATES, *supra* note 23, at 147 ("An eloquent brief is a more persuasive brief.").

198. I am grateful to Linda Edwards for her helpful suggestions as to what contributes to elegance in expository writing.

expounded on the nature of beauty, yet still it remains an elusive concept.[199] Nevertheless, we can get some guidance from the mathematicians and scientists who have written on this topic. They tend to associate elegance with simplicity and symmetry,[200] and it is likely that elegance in writing is closely associated with those traits as well. Indeed, Joseph Williams, who has provided perhaps the most thorough account of elegant expository writing, argues that the main factor contributing to elegance in a sentence is "a balance and symmetry among its parts, one echoing another in sound, rhythm, structure, and meaning."[201] He then goes on to show how great writers achieve symmetry and balance through devices such as coordination of sentence parts and climactic emphasis.[202]

It may also be useful to look to poetry for guidance as to the nature of elegance in writing, for it is in poetry that we most often discover writing that we think of as beautiful or elegant. And thus some of the traits normally associated with elegance in poetry probably contribute to elegance in prose as well. For example, the ways that individual words sound to us by virtue of literary devices such as rhyme, alliteration, and onomatopoeia, and the manner in which words are combined and emphasized[203] to create rhythms in sentences, give elegant writing a sort of auditory appeal that is similar to the appeal of music.[204] Likewise, the mental imagery elegant writing creates through its use of vivid words and metaphor[205]gives elegant writing a sort of visual appeal that resembles the appeal of the

199. For a brief overview of the history of aesthetics and a summary of more recent developments in the field, see Peg Zeglin Brand, *Symposium: Beauty Matters*, 57 J. AESTHETICS & ART CRITICISM 1–10 (1999). For a more comprehensive survey of the field, see WLADAYSHAW TATARKIEWICZ ET AL., HISTORY OF AESTHETICS (2005).

200. *See, e.g.*, ZEE, *supra* note 195, at 8–21 (discussing symmetry and simplicity as the hallmarks of elegance in science). Curiously, this notion of elegance could also have a bearing on contract drafting. One could make a reasonable case that a contract that is simple and symmetrical, yet at the same time precise and comprehensive enough to capture the parties' intent, is elegant in the same way that a scientific or mathematical theory is elegant.

201. WILLIAMS & COLOMB, *supra* note 37, at 141.

202. *Id.* at 141–52.

203. For a thorough discussion of emphasis, see *id.* at 82–98.

204. *See* Rappaport, *supra* note 160, at 67–68 (tracing the common connections between music and writing and suggesting that much of the appeal of great writing can be attributed to the way the words "sound" to the reader by virtue of their rhythm, flow, and tone).

205. *See* WILLIAMS & COLOMB, *supra* note 37, at 156–60 (discussing the role metaphor plays in elegant writing).

visual arts.[206] In this way, elegant prose, similar to beautiful poetry, exhibits a sensual quality that we find aesthetically pleasing.

Finally, it is important to consider when and to what extent elegance is appropriate in legal writing. For while it is easy to appreciate the value of elegance in a Supreme Court opinion on a matter of considerable social significance, justifying the quest for elegance in a typical office memorandum is an entirely different matter. Accordingly, the legal writer needs to evaluate the *context* of a given document in order to determine whether elegant writing is appropriate for that document. In the context of a typical office memorandum, for example, the principal goal is to convey information in an expeditious manner in order to help the client or the senior lawyer make wise decisions. Generally, the client is not interested in funding a literary work and does not want to spend extra money to enable a lawyer to produce a memorandum that is elegant. Therefore, in that context, elegance must give way to more practical considerations, such as cost.

On the other hand, a lawyer does not need to consciously stunt a natural aptitude for elegant prose. The point is simply that the writer should consider the context of the document in determining whether to spend time revising the document to make it more elegant. In most situations, the answer will be "no" because of cost concerns. Occasionally though (e.g., in an appellate brief concerning a matter of significant public interest), the context may warrant an effort on the part of a particularly talented legal writer to imbue the document with a touch of elegance.[207]

CONCLUSION

This Article has argued that readers judge a document to be well written if the writing advances the readers' purpose in reading the document. In the case of legal readers, that purpose is to glean information that will help the reader make professional decisions. Thus, good legal writing is writing that facilitates professional deci-

206. This similarity to the visual arts may seem more attenuated than the similarity to music. But it is apparent that certain words conjure up images in our minds (e.g., "red rose"), and these images can affect our aesthetic sensibilities in much the same way that images coming directly from our eyes affect our aesthetic sensibilities.

207. There are benefits for the legal writer as well. Employing one's creative talents in this manner can not only enhance the quality of a brief, but also help to make the practice of law a more meaningful and rewarding experience.

sion-making by making it easier for legal readers to obtain information from legal documents.

There are three fundamental qualities that enable writing to do this: clarity, conciseness, and engagement. This Article has examined why each of these qualities is essential to legal writing, and it has looked at how legal writers can incorporate these qualities into their writing. Lastly, this Article has examined what it is that characterizes the very best legal writing. It has argued that great legal writing is not merely writing that is particularly clear, concise, and engaging; rather, great legal writing exhibits a fourth fundamental quality—elegance—that is aesthetic in nature. Thus, the difference between great legal writing and good legal writing is one of kind, and not merely one of degree.

An additional, recurring theme of this Article is the need for legal writers to be cognizant of contextual considerations, such as the nature of the intended audience and the purpose(s) of the document in question. Contextual considerations guide the writer's choices. They determine how the writer should balance among competing interests when the writer's various goals conflict. For example, the writer may have to strike a balance between plain language and the use of precise technical terms when determining what will be clearest to the intended audience. Likewise, the writer may have to balance between varied sentence structures that make writing more engaging and simple sentence structures that make it clearer. It is largely these contextual considerations that help the writer determine what is appropriate for any given legal document.

While this Article has not focused on writing pedagogy directly, it is important to consider briefly two pedagogical implications of this analysis. One problem with the traditional method of teaching legal writing in law school is that it tends to inundate students with detailed organizational formats (e.g., IRAC) and usage rules (e.g., "avoid the passive voice") without providing them an adequate conceptual framework around which students can organize the information they acquire. Students learn specific techniques to improve their writing, but they tend not to explore the fundamental goals that these techniques advance. A better approach would be to organize instruction around the type of conceptual framework set out in this Article, which gives structure to the individual formats and rules. In other words, instructors should concentrate their efforts on getting students to strive for writing that is clear, concise, and engaging, and they should organize their teaching of specific techniques around those fundamental goals. Doing so will make it

easier for students to understand and apply the specifics, and it will also make it easier for them to balance competing interests when their various goals conflict. Learning to write well is not a mechanical process. Writers often have to make difficult choices in their writing, as this Article has discussed throughout, and the rules will not always guide those choices. Stepping back to examine the big picture helps writers makes sense of the specific rules they learn and also provides them a better understanding of when it is appropriate to disregard or modify these rules in order to advance the broader goals of legal writing.[208]

The other main pedagogical implication of the analysis set out in this Article is that it supports a "learn-by-example" approach to legal-writing pedagogy. Writers do not become proficient at their craft by memorizing a lot of picayune rules, or by applying checklists of "do's" and "don'ts" to their writing.[209] They become proficient at writing primarily by reading the works of good writers and by practicing their own writing.[210] Focusing students on the fundamental goals of legal writing—i.e., clarity, conciseness, and engagement—while at the same time exposing them to examples of excellent writing, allows students to analyze for themselves the tools masters of the craft employ to achieve these fundamental goals.[211] And the lessons learned that way are likely to be more meaningful and enduring than the lessons learned by memorizing rules of grammar and usage.[212]

208. *See* BRONSTEEN, *supra* note 35, at 36 ("[I]n many cases, a thought can be expressed most clearly by violating a traditional grammar rule.").

209. *See* FISH, *supra* note 19, at 14–15, 20–21 (learning how to craft clear and meaningful sentences is not primarily a matter of learning rules, but rather of coming to appreciate the broader perspective of how the various constituents of sentences are logically related).

210. SCALIA & GARNER, *supra* note 32, at 61–64 (observing that one of the best ways to learn how to write well is to read great writing, including writing outside the field of law); ZINSSER, *supra* note 60, at 34 ("Make a habit of reading what is being written today and what was written by earlier masters. Writing is learned by imitation. If anyone asked me how I learned to write, I'd say I learned by reading the men and women who were doing the kind of writing *I* wanted to do and trying to figure out how they did it. But cultivate the best models.").

211. It is an open and important question whether this is best accomplished by exposure to examples of good *legal* writing, to examples of good writing generally, or to some combination of the two. In an interview with Bryan Garner, Judge Frank Easterbrook recommended that students of legal writing read works of fiction from authors such as Hemmingway and Faulkner, as well as works of prose from sources such as *The Atlantic* or *Commentary*. *See* GARNER, *supra* note 57, at 16–17.

212. *See* WILLIAMS & COLOMB, *supra* note 37, at 160 ("You won't acquire an elegant style just by reading this book. You must read those who write elegantly until their style runs along your muscles and nerves. Only then can you look at your own prose and know when it is elegant or just inflated.").

In sum, understanding the fundamental goals of legal writing is important because it helps legal writers focus on the overarching objective of legal writing: to make it easier for readers to obtain from legal documents information that will assist them with their professional decision-making. The ability to write in such a manner is one of the most important skills a lawyer can possess, and developing that skill should be one of the principal objectives of a law school education.