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ESSAY

The Words Under the Words

Patrick Barry*

People didn't choose between things, they chose between descriptions of things.

—Daniel Kahneman¹

I don't think writers are sacred. but words are. They deserve respect. If you get the right ones in the right order, you can nudge the world a little

—Tom Stoppard²

The words lawyers choose can change the decisions people make. Psychologists call the mechanics of this change “framing.”³ They’ve found, for example, that more people will decide to have a surgery if they are told that the “survival rate is 90%” than if they are told that the “mortality rate is 10%”⁴—even though a survival rate of 90% is exactly the same as a mortality rate of 10%. They’ve also found that having to pay a “surcharge” for using a credit card rankles people (especially people in the credit card lobby) more than if they

* Clinical Assistant Professor of Law, University of Michigan Law School. I would like to thank Shai Dothan, Tim Pinto, and Vivek Sankaran for helpful suggestions, as well as Julie Aust, Hannah Hoffman, and Joel Richert for excellent research assistance. The essay is significantly better because of each of them—and because of the tremendous edits made by the staff at the *Stanford Law Review*, who went beyond just cleaning up the citations and actually improved both the content and organization of the piece.

1. MICHAEL LEWIS, *THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS* 343 (2017).
2. TOM STOPPARD, *THE REAL THING* 54 (1983).
3. See, e.g., Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *J. BUSINESS*, April 1986, at S251, S257 (1986) (“[Framing] consists of a preliminary analysis of the decision problem, which frames the effective acts, contingencies, and outcomes. Framing is controlled by the manner in which the choice problem is presented as well as by norms, habits, and expectancies of the decision maker.”); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Economy of Choice*, 211 *SCIENCE* 453, 453 (1981) (“We use the term ‘decision frame’ to refer to the decision-maker’s conception of the acts, outcomes, and contingencies associated with a particular choice.”).
4. Tversky & Kahneman, *Rational Choice*, *supra* note 3, at S254-55.

were simply told they would get a “discount” for instead using cash.⁵ They’ve even found that meat labeled “75% lean” will taste better to consumers than the same meat labeled “25% percent fat.”⁶ Framing, it seems, extends all the way to taste buds.

The researcher who pioneered the study of framing within the legal context is the psychologist Elizabeth Loftus, whose expertise has been used in trials as different and influential as the O.J. Simpson trial, the Timothy McViegh trial, and the trial of mass murderer Ted Bundy.⁷ One of Loftus’s most well-known experiments showed that changing just a single word when questioning eyewitnesses about a car accident can significantly alter their memory of that accident. If you ask witnesses, “Did you see *the* broken headlight?,” you’ll likely get more yeses than you would if you instead ask them, “Did you see *a* broken headlight?”⁸ This discrepancy persists even in scenarios where none of the cars in the accident actually had a broken headlight.⁹ Simply asking the question using the definite article “the” instead of the indefinite article “a” seems to create a (false) broken headlight in people’s minds.

Keep these findings in mind when you approach any piece of writing. Think about more than just the straightforward definition of the words you use. Think about the connotations of those words as well, about the ideas they might evoke, about the reactions they might elicit, the images and emotions they could stir up.

The poet Naomi Shihab Nye has a wonderful phrase for all this below-the-surface action. She calls it, in a poem about her grandmother, “the words under the words.”¹⁰

The next time you write draft a motion, create a contract, or even just send a memo, think about the words under the words in the message you hope to communicate. The same goes for less formal modes of communication. It could be an email. It could be a text message. It could be an invitation, thank you letter, or tweet. Whatever you compose, and whomever you compose it for, the words under your words will play a role. Be aware of the work they are doing.

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5. *Id.* at S261. (“It is easier to forgo a discount than to accept a surcharge because the same price difference is valued as a gain in the former case and as a loss in the latter. Indeed, the credit card lobby is said to insist that any price difference between cash and card purchases should be labeled a cash discount rather than a credit surcharge.”).
 6. See Irwin P. Levin & Gary J. Gaeth, *How Consumers Are Affected by the Framing of Attribute Information Before and After Consuming the Product*, 15 J. CONSUMER RES. 374, 374 (1988).
 7. Roc Morin, *The World’s Top False-Memory Expert Explains Why Everything You Know Might Be Wrong*, VICE (Nov. 5, 2014, 8:27 AM), <https://perma.cc/WA7T-GUPB>.
 8. See, e.g., Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC’Y 86, 88 (1975) (emphasis added).
 9. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560, 562 (1975).
 10. Naomi Shihab Nye, *The Words Under the Words*, in WORDS UNDER THE WORDS: SELECTED POEMS 36, 36 (1995).

I. Case Study: “Password”

Being aware of the words under the words is especially important when crafting headings. From appellate briefs to internal reports, headings represent some of the most valuable written real estate around. They give lawyers a chance to frame an issue and pitch their story even before the reader gets to the main text. The best advocates treat them like headlines in a newspaper. That level of economy and precision is required—as is the understanding that a busy reader might not read much else.

Take, for example, a heading from an appeal handled by the Unemployment Insurance Clinic at the University of Michigan Law School, which is a group of faculty and students that give free legal representation to aggrieved workers. The case involved a client, Mr. Louis,¹¹ who had worked as a pharmacy technician for over a decade in a busy Detroit hospital. We don’t need to go into all the details of the case; it is enough to know that during a particularly hectic day, Mr. Louis used the password of a coworker so he could fill prescriptions for patients more quickly. Doing so was (unbeknownst to Mr. Louis) against company policy. So he was fired.

The law students who represented Mr. Louis did not appeal the pharmacy’s decision to fire him. His termination was perfectly legal. What they appealed is whether his actions that day rise to the level of misconduct necessary to keep him from getting unemployment benefits. Here is the heading the students used to argue that his actions do not indeed rise that high. It could use some editing.

Given that Mr. Louis maintained a good-faith belief that he could more rapidly serve patients by utilizing a pharmacist’s password, he was not willfully and wantonly disregarding his employer’s interest and thus, should not be disqualified from unemployment benefits.

One reason this heading could use some editing is because the whole thing is too long and unwieldy. It’s tough even to think about the words under the words when there is so much other junk in the way.

Another reason involves the phrase “utilizing a pharmacist’s password.” Put aside for the moment how “utilize” may strike many readers as an ugly, pretentious substitute for “use”; focus instead on the last two words: “pharmacist’s password.” Those pose a bit of a problem for Mr. Louis—which means they also offer an opportunity for some careful editing to make a major impact.

The students representing Mr. Louis are fortunate because there is case law in Michigan that says if you are fired for actions you thought were actually helping your employer, you are not necessarily disqualified from receiving unemployment benefits.¹² But the help this case law gives to Mr. Louis’s case might get lost if the reviewing judges fixate on the word “password,” a term

11. The client’s name and other minor details about the case have been changed for privacy purposes.

12. *See Razmus v. Kirkhof Transformer*, 357 N.W.2d 683, 685 (Mich. App. 1984).

that, especially when paired with a verb that says Mr. Louis took something from somebody else, doesn't put Mr. Louis in the best light. The words under the words of "password" connote an invasion of privacy. They suggest, in this context, shiftiness, even theft.

The students could address these concerns by ditching the term "password" and reframing the whole heading to better show that (1) Mr. Louis was simply trying to help the pharmacy serve its clients and (2) Mr. Louis's actions therefore do not rise to the level of misconduct required to disqualify him from unemployment benefits.

Here's the original heading again:

Given that Mr. Louis maintained a good-faith belief that he could more rapidly serve patients by utilizing a pharmacist's password, he was not willfully and wantonly disregarding his employer's interest and thus, should not be disqualified from unemployment benefits.

And here's a new version, after several rounds of editing:

Mr. Louis's good-faith effort to help the pharmacy more quickly serve its patients does not rise to the level of misconduct required to disqualify him from unemployment benefits.

Notice the use of "good-faith effort" right at the beginning of the heading. These words appeared in the students' draft as well, but now they are quickly followed by the phrase "to help the pharmacy." That pairing nicely highlights the point the students need to make to the court: that Mr. Louis wasn't trying to sabotage the pharmacy or in any way shirk his responsibilities. He was just trying to do his job.

Notice also the phrase "rise to the level." The words under the words of that phrase helpfully indicate that "misconduct" is a high burden. Not just any wrong action will do. As one of the lawyers supervising the students explained during the rewriting phase, "We want to make clear that getting to 'misconduct' involves climbing a big-ass mountain. The judges need to know just how high a bar this is." Inserting "rise to the level of" communicates that information. It plants the big-ass mountain on the page.

II. Nobody Has a Monopoly on Effective Language

None of these edits will earn anyone a Pulitzer Prize. Nor will they automatically win the case for Mr. Louis. Some might have even made you uneasy. I know I get nervous when it seems words are being used to manipulate an event or experience, especially when I remember that nobody has a monopoly on effective language. Many glorious deeds have been helped along by powerful phrases, but many terrible deeds have as well. The ability to marshal the words under the words is not reserved for noble minds like Maya Angelou, Abraham Lincoln, and Elie Wiesel.

But to be an effective advocate for your clients, for your organization, or for yourself, it is important to embrace the point with which this essay began:

the words lawyers choose can change the decisions people make. Or as the epigraph from Nobel Prize winning psychologist Daniel Kahneman put it, “People don’t choose between things; they choose between descriptions of things.”¹³

Knowing that will help protect you from being duped by someone else’s words. It will also help you give voice to the ideas, issues, and causes you think deserve fuller, more eloquent articulation. Perhaps the single most important thing lawyers—especially young lawyers—can do to improve their effectiveness is follow this directive: become good with words.

* * *

The “Questions and Examples” section below is designed to help you start to do that. Treat it as a way to build your writerly acumen and awareness. The goal is not to get every question right. The goal is simply to start to pay close attention to the force and flexibility of language, to the way words shape everything from custody battles, to sporting events, to how we tell stories about ourselves and others.

13. LEWIS, *supra* note 1, at 343.

Questions

(1) **Family Law:** A team of psychologists led by Princeton’s Eldar Sharif have found that when people are asked to decide between two parents in a custody dispute, how you frame the question matters a lot.¹⁴ More people will give the child to a parent with a certain set of qualities when the question is “To which parent would you *award* sole custody?” But more will give the child to the other parent—who has a different set of qualities—when the question is “Which parent would you *deny* sole custody?”

Here are the options Sharif and his team gave the decisionmakers.

<u>Parent A</u>	<u>Parent B</u>
Average Income	Above-Average Income
Average Health	Very Close Relationship with Child
Average Working Hours	Extremely Active Social Life
Reasonable Rapport with Child	Minor Health Problems
Relatively Stable Social Life	Lots of Work-Related Travel

- How do you think Parent A fared when the question was “To which parent would you *award* sole custody?” Do you think more people instead picked Parent B? How about when the question was “Which parent would you *deny* sole custody”? Who did more people pick then?
- After checking the answers in the footnote,¹⁵ think about these questions:
 - What are the words under the words of “*award* sole custody” that might explain the findings of the study? How about the words under the words of “*deny* sole custody?”
 - Which qualities in the parents do you think the decision
 - makers focused on when they were asked to *award* sole custody to one of the parents? Which qualities do you think they focused on when the question was reframed using the word *deny*?

14. Eldar Shafir et al., *Reason-Based Choice*, 49 COGNITION 11, 16 (1993).

15. More decisionmakers gave the child to Parent B when the question was “To which parent would you award sole custody?” *Id.* (comparing how 36% awarded custody to Parent A versus 64% awarded custody to Parent B). More decisionmakers gave the child to Parent A when the question was “Which parent would you deny custody?” *Id.* (comparing how 45% denied custody to Parent A versus 55% denied custody to Parent B).

(2) **Legislation:** The “Death Tax” and the “Estate Tax” refer to the same piece of legislation: a tax on your right to transfer property at your death.

- What are the words under the words of “Death Tax”?
- What are the words under “Estate Tax”?
- Why do you think more people oppose the tax when it called the “Death Tax” than when it is called the “Estate Tax”?

(3) **Business:** Many companies don’t call their workers “employees.” Match the companies below with the term (or terms) it has used instead.

<u>Company</u>	<u>Term</u>
Trader Joe’s	Cast Members/Imagineers
Disney Theme Parks	Baristas
Starbucks	Geniuses/Creatives
Walmart	Food Champions
Apple	Associates
Taco Bell	Crew Members ¹⁶

- What are the words under the words of each of these terms?
- What do the terms signal to customers, to managers, to other employees?

(4) **Human Trafficking:** Compare these terms for someone who has been trafficked.

A trafficking victim.
A trafficking survivor.

- How do the words under the words of these terms differ?
- In what contexts might you use one instead of the other?
- A similar comparison can be made between a “domestic violence victim” and “a domestic violence survivor”, or between a “victim of sexual violence” and a “survivor of sexual violence.”¹⁷

16. Answers: Trader Joe’s → Crew Members; Disney → Cast Members/Imagineers; Starbucks → Baristas; Walmart → Associates; Apple → Geniuses/Creatives; Taco Bell → Food Champions.

17. See, e.g., LIZ KELLY, SURVIVING SEXUAL VIOLENCE 163 (1988); Tami Spry, *In the Absence of Word and Body: Hegemonic Implications of “Victim” and “Survivor” in Women’s Narratives of Sexual Violence*, WOMEN & LANGUAGE, Fall 1995, at 27, 27 (1995); Stacy L. Young & Kathryn C. Maguire, *Talking About Sexual Violence*, WOMEN & LANGUAGE, Fall 2003, at 40, 42-43 (2003).

(5) **Education:** In *Work Hard. Be Nice.: How Two Inspired Teachers Created the Most Promising Schools in America*, journalist Jay Matthews describes how the founders of the system of charter schools known as KIPP (“Knowledge is Power Program”) stopped calling the educational excursions they took with their students “Field Trips.”¹⁸ Instead they call them one of the answers below:

- (A) “Field Adventure”
- (B) “Field Work”
- (C) “Field Lessons”
- (D) “Field Fun”
- (E) “Field Freetime”

- After checking the answer in the footnote,¹⁹ think about these questions:
 - What are the words under the words of the right answer? What is being emphasized?
 - How might students act during a “Field Adventure” versus a “Field Trip”? How about during “Field Fun” versus “Field Work”? “Field Lessons” versus “Field Freetime”?
 - Why might it be easier to get funding from administrators or donors using some of these names rather than using others?
 - Which would you pick if you were just trying to get kids excited about going? Which would you pick if you wanted to get kids excited about going but you also wanted to get funding?

(6) **Judge Posner:** Judge Richard Posner of the Seventh Circuit Court of Appeals, one of the most influential judges ever to sit on a federal bench, insists that his law clerks call him by his first name. The idea behind this practice, according to Posner’s biographer William Domnarski, is to create a work environment that encourages free thought and open debate.²⁰

- What are the words under the words of “Judge”—especially when said by a subordinate—that might make free thought and open debate more difficult?

18. JAY MATHEWS, *WORK HARD. BE NICE.: HOW TWO INSPIRED TEACHERS CREATED THE MOST PROMISING SCHOOLS IN AMERICA* 36 (2009).

19. The correct answer is (C) “Field Lessons.” *See id.* at 36, 135.

20. WILLIAM DOMNARSKI, *RICHARD POSNER* 97 (2016).

- If you ran a hospital, would you want nurses to call doctors by their first name? Would you want patients to?²¹
- How about if you ran a school: Would you want third-graders to call their teachers by their first name? Would you want high schoolers, undergraduates, or law students to?
- Along these same lines, what are the words under the words of “Professor”? How can that term be helpful? How can it not?²²
- Think of professors you call by their first name. Now think of the professors you don’t. Is there any difference in respect level? Is there any difference in fondness or trust? How about in your willingness to disagree with them?

(7) **NFL Football:** After the 2017 Super Bowl between the New England Patriots and the Atlanta Falcons, two headlines appeared on ESPN.COM.

“Historic Comeback Carries Patriots to Super Bowl Victory”²³

*“Falcons Build Championship Case But Can’t Close
with Historic Collapse”²⁴*

- What are the words under the words of the first headline? Which team seems more responsible for the outcome of the game?
- How about with the second heading?²⁵

21. For discussions of a related question—“Should doctors call patients by their first names?”—see Robert D. Gillette et al., *First Name or Last Name: Which Do Patients Prefer?*, 5 J. AM. BOARD FAM. PRAC. 517, 518 (1992); Michael Lavin, *What Doctors Should Call Their Patients*, 14 J. MED. ETHICS 129, 129-31 (1988).

22. See Stephanie Francis Ward, *Should Students Call Law Professors by Their First Names?*, ABA JOURNAL (Aug. 23, 2016, 1:45 PM CDT), <https://perma.cc/WWX2-DGAA>; Eugene Volokh, *Should Law Students Call Professors ‘Professor X’ or Use First Names?*, WASH. POST: VOLOKH CONSPIRACY (Aug. 22, 2016), <https://perma.cc/3MYB-AWM6>.

23. Mike Reiss, *Historic Comeback Carries Patriots to Super Bowl Victory*, ESPN: NEW ENGLAND PATRIOTS (Feb. 5, 2017), <https://perma.cc/XDQ5-PYCU>.

24. Vaughn McClure, *Falcons Build Championship Case But Can’t Close with Historic Collapse*, ESPN: NFL NATION (Feb. 5, 2017), <https://perma.cc/G682-HDDA>.

25. For some additional examples of how headlines frame athletic events, see Patrick Barry, *The Force of Focus: Harvard vs. Yale*, YOUTUBE (Aug. 5, 2015), https://youtu.be/2AHbLFBo6No?list=PL7g_COSIG4S-uUaq7bLvXNImxKdMRDnaf; Patrick Barry, *The Force of Focus: Italy Won, France Lost, and Hillary Clinton’s Husband*, YOUTUBE (July 24, 2015), https://youtu.be/yzifrNjI7s?list=PL7g_COSIG4S-uUaq7bLvXNImxKdMRDnaf.

Examples

- (1) **Toni Morrison:** “I wish they would stop calling it welfare and go back to the word they used when my mother was a girl. Then it was called, ‘relief.’ Sounds much better, like it’s just a short-term breather while you get yourself together.”²⁶
- (2) **Allow vs. Forbid:** “The word ‘forbid’ seems to be the key to [the] difference [in people’s answers]. Sixty-two per cent say ‘no’ when asked if the United States should *allow* speeches against democracy, but only 46 percent say ‘yes’ when asked if such speeches should be *forbidden*. Evidently the ‘forbid’ phrasing makes the implied threat to civil liberties more apparent, and fewer people are willing to advocate suppression of anti-democratic speeches when the issue is presented in this way.”²⁷
- (3) **Legal Standing:** “Consider the view that whether an injury is speculative depends on how you characterize it. If the injury in [*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)] and [*Gratz v. Bollinger*, 539 U.S. 244 (2003)] is characterized as a denial of admission, standing should be denied; if it is characterized as an opportunity to compete, standing should be available.”²⁸
- (4) **Child Psychology:** “This dovetails with new research led by the psychologist Christopher J. Bryan, who finds that for moral behaviors, nouns work better than verbs. To get 3- to 6-year-olds to help with a task, rather than inviting them ‘to help,’ it was 22 to 29 percent more effective to encourage them to ‘be a helper.’ Cheating was cut in half when instead of, ‘Please don’t cheat,’ participants were told, ‘Please don’t be a cheater.’ When our actions become a reflection of our character, we lean more heavily toward the moral and generous choices.”²⁹
- (5) **Sex and Gender:** “Everyone laughed when [Justice Ruth Bader Ginsberg] told the story of when she was at Columbia [Law School] in the 1970s and her bright secretary Millicent, who typed her briefs, articles, and speeches about sex discrimination, remarked: ‘I have been typing this word, *sex, sex, sex*, over and over. Let me tell you, the audience you are addressing, the men you are addressing . . . the first association of that word is not what

26. Toni Morrison, *Sweetness*, NEW YORKER (Feb. 9, 2015), <https://perma.cc/X6R6-P6Y4>.

27. Daniel Rugg, *Experiments in Wording Questions: II*, 5 PUB. OPINION Q. 91, 92 (1941).

28. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 116 (7th ed. 2013).

29. Adam Grant, *Raising a Moral Child*, N.Y. Times (Apr. 11, 2014), <https://perma.cc/2DRL-9BCV>.

you are talking about. So I suggest that you use a grammar-book term. Use the term *gender*. It will ward off distracting associations.”³⁰ Note that Justice Ginsberg followed Millicent’s advice and started using the term “gender discrimination” from then on.³¹

- (6) **Medicine:** “In recent years, expressions such as ‘cancer survivor’ have replaced more traditional labels—namely, ‘[cancer] victim’ and ‘[cancer] patient’—for those diagnosed with cancer. Both the National Coalition for Cancer Survivorship and the Office of Cancer Survivorship at the National Cancer Institute have adopted the more active term ‘cancer survivor’ as a way to recognize this shift in the cancer culture and in recognition of the unique needs of this growing population. Moreover, research suggests that individual’s adoption of a more active cancer-related identity, such as ‘cancer survivor[,]’ may have positive consequences for their health and well-being.”³²

30. RUTH BADER GINSBURG, MY OWN WORDS 188 (2016).

31. Jeffrey Toobin, *Heavyweight: How Ruth Bader Ginsburg Has Moved the Supreme Court*, NEW YORKER (Mar. 11, 2013), <https://perma.cc/7W4P-6DQM> (“Henceforth, she changed her claim to ‘gender discrimination.’”).

32. Keith M. Bellizzi & Thomas O. Blank, *Cancer-Related Identity and Positive Affect in Survivors of Prostate Cancer*, 1 J. CANCER SURVIVORSHIP 44, 44 (2007).

- (7) **Contracts:** “Although a duty is generally expressed as a covenant for business and legal reasons, that duty can alternatively be expressed as a right. For example:

Version 1

Payment of Purchase Price: The Buyer shall pay the Seller \$200,000 at Closing.

Version 2

Entitlement of Purchase Price: The Seller is entitled to be paid \$200,000 at Closing.

In both examples, the Buyer must pay \$200,000. The difference is the focus: the Buyer’s duty to pay versus the Seller’s right to payment.”³³

- (8) **Gilead:** “I believe he was a saint of some kind. When someone remarked in his hearing that he had lost an eye in the Civil War, he said, ‘I prefer to remember that I have kept one.’”³⁴

33. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 26 (2014) (parenthetical text omitted).

34. MARILYNNE ROBINSON, GILEAD 31 (2004).