LESSONS IN RHETORIC FROM OLDER CASE LAW

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INTRODUCTION

Have you ever been caught off guard by someone wearing an eyepatch in public? Not in a discriminatory or uncomfortable way, but more in a quizzical, do-people-even-still-wear-eyepatches? kind of way. You understand this is just another person and talking with them should be the same as any other exchange; and yet, at the same time, you know that a conversation (while looking them in the eye) will require more concentration on your part than usual.

Many litigants have the same reaction upon seeing a citation to a case from the nineteenth century.[1] They may quibble at the thought of sifting through ostentatious legalese, gratuitous heretofores and whereins, and other anachronistic prose evocative of their first semester in law school. Be that as it may, "old rules often stand the test of time because wisdom underlies them."[2] While many will read this proposition and reflexively stir up historical counterexamples,[3] respect for the rationales behind established legal precedent is certainly valuable.[4] There is a reason why William Blackstone and Sir

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1. At the risk of ruining the metaphor by way of explanation—which, if you happen to live or spend time in a community filled by eyepatch wearers, you can substitute with a top hat or monocle—the eyepatch is the nineteenth century case that someone made the conscious decision to don in spite of its association with those "nautical cutthroats with . . . peg legs who board galleons to plunder cargo." Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 908 (9th Cir. 2002). The point here is it is just another case you have to read, but then it is also a very *old* case that inherently feels out of place and therefore flippantly jejune.

2. Dietz v. Bouldin, 579 U.S. 40, 54 (2016) (Thomas, J., dissenting).

3. Justice Thomas was, after all, qualifying (or perhaps disagreeing outright with) a quip from Justice Holmes, who famously found it "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *Id.* (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)). Justice Cardozo espoused a similar conviction to Holmes when he opined that "[t]he more we study law in its making, at least in its present stages of development, the more we gain the sense of a gradual striving toward an end, shaped by a logic which, eschewing the quest for certainty, must be satisfied if its conclusions are rooted in the probable." BENJAMIN CARDOZO, THE GROWTH OF THE LAW 70 (1924).

4. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 16 (2016) (quoting EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 300 (1953)) ("[T]his notion

Edward Coke loom large over our conceptions of the law and modern jurisprudential developments.[5] Likewise, state supreme court decisions from bygone eras illustrate early policy justifications for contemporary substantive and procedural laws.[6] Knowledge of precedential origins allows one to grasp why the law first emerged, how its contours molded over time, and where it may go accordingly.[7]

But it would be a mistake to treat policy considerations as the only utility ascribed to these older cases, as a return to older case law can also give us insight into the rhetoric of the day when those decisions were handed down. Effective rhetoric is unassailably vital to legal advocacy.[8] Lawyers are tasked with

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of precedent has been largely peculiar to the English-speaking peoples. It is said to be 'the most distinctive characteristic of English law and American law.'"); *cf.* 21 C.J.S. *Courts* § 184 (2023) (recognizing that stare decisis encompasses "the psychological need to satisfy reasonable expectations" for those seeking their day in court); Jerome Hall, *Reason and Reality in Jurisprudence*, 7 BUFF. L. REV. 351, 359 (1958) ("The basic conceptions, which may be termed the 'ontology' of law, serve jurisprudence in the same way that other basic notions and postulates form the foundations of other sciences and disciplines.").

5. In recent years, these writings have been cited with approval by both conservative and liberal justices on a range of subjects from common law precedents to upholding *Roe v. Wade* to subpoenaing presidents. *See, e.g.*, Kahler v. Kansas, 140 S. Ct. 1021, 1027–28 (2020); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2226–27 (2020) (Kagan, J., concurring in part and dissenting in part); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2038–39 (2020) (Thomas, J., dissenting).

6. *See, e.g.*, John's Adm'r v. Pardee et al., 109 Pa. 545, 550 (1885) (per curiam) ("[I]t would be bad policy to permit one, who by his indorsement, has put into circulation a commercial instrument, afterwards to aver there was a taint upon it at the time it passed through his hands."); Field v. Eaton, 1 Dev. Eq. 283, 288 (N.C. 1829) ("Such evidence will be contradictory to the plain language of the will. The law excludes, from principle and policy, the introduction of parol evidence to contradict or alter instruments of writing. They are presumed to be repositories of truth. Principle prohibits it because such instruments are, in their nature and origin, entitled to higher credit than that which appertains to parol evidence. Policy forbids it because it would be followed by mischievous and inconvenient consequences.").

7. *See* Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 65 n.34 (2001) (sampling commentators who agree that public policy arguments are an important aspect of judicial decision-making); *see also* Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 487 (2008) ("Historical evidence is so appealing to lawyers in part because it provides historical authority for legal interpretations.").

8. *See* J. M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 211, 212 (Peter Brooks & Paul Gerwith, eds., Yale Univ. Press 1996) ("[T]he art of rhetoric was seen as organically related to the practice of law. Indeed, what we would today regard as legal education was to a significant degree education in rhetoric."). *But see* Marcel Becker, *Aristotelian Ethics and Aristotelian Rhetoric*, *in* ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 109 (Liesbeth Huppes-Cluysenaer & Nuno M. M. S. Coelho, eds., 2013) ("[I]n the twenty-first century, as in Aristotle's time, rhetoric is not undisputed. Plato disqualified it as a perverted skill, and in contemporary speech rhetoric is often synonymous with using (cheap) tricks and is seen as a way of speaking in which important arguments are obfuscated.").

synthesizing all kinds of legal matters, be they factual disputes, statutory interpretation, and—for purposes of this article—absorbing and appreciating case law in ways that improve their rhetoric.[9] Commentators have discussed judges' prose,[10] whether their writing is efficacious *vel non*,[11] and what rhetorically we should discern from their opinions.[12] As this article will hopefully illuminate, more focus should be paid to older opinions published prior to 1943.[13] A return to these cases—prior to many courts of appeals being established,[14] prior to fledgling law clerks ghostwriting many of their judge's opinions,[15] and prior to the torrent of modern-day litigation encumbering the

9. *Cf.* Balkin, *supra* note 8, at 215 ("[W]hen we try to justify a particular rule of law to another person, we must find arguments that justify it, and to do this we ourselves must analyze the situation and determine the most plausible arguments for and against the position that we are taking.").

10. Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 580 (1983) (mentioning "the too-frequent clumsiness of legalistic style and even grammar that [other] critics have often observed" of judicial opinions); Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75, 106–07 (2018) ("[O]bservers have perceived Gorsuch's rhetoric as unusually bold and confident. However, my quantitative results suggest that Gorsuch's opinions also contain an abnormal degree of uncertainty or hesitancy."); David Margolick, *At the Bar; Sustained by Dictionaries, a Judge Rules that No Word, or Word Play, Is Inadmissible*, N.Y. TIMES, Mar. 27, 1992, at B16 ("In other words, Judge Selya, who sits on the United States Court of Appeals for the First Circuit in Boston, would forsake the usual boring legalisms for lively, polysyllabic words of the sort found only in the unabridged *Oxford English Dictionary*, puns of the sort once found in the headlines of *Barron's* and *The Sporting News*, and figures of speech found primarily in the 'Block That Metaphor!' department of *The New Yorker* magazine.").

11. *See, e.g.*, Andrew Jensen Kerr, *The Perfect Opinion*, 12 WASH. U. JURIS. REV. 221, 228 (2020) ("Being asked what our favorite is encourages us to select an opinion because of its content separate from its consequence. We don't think about what it stands for but what it is. A favorite judicial opinion is not reduced to its holding or made a non-literal representation of an adjunct principle that future lawyers or judges have equated it with."); Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 ("In decisions on questions great and small, the [Roberts C]ourt often provides only limited or ambiguous guidance to lower courts. And it increasingly does so at enormous length.").

12. *See* ROSS GUBERMAN, POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES (Oxford Univ. Press 2015); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1496 (1995) ("The ability to think of people's lives in the novelist's way is, [Justice] Breyer suggests, an important part of the equipment of a judge . . . .").

13. While Bryan Garner posits that an "ancient case" is generally "from the nineteenth century or earlier," GARNER ET AL., *supra* note 4, at 176, my article is using 1943 as the applicable (albeit somewhat arbitrary) date for when a decision is deemed suitably old. The reason is that this is eighty years prior to when this article was finished, and because the vast majority of attorneys and judges have no direct connection to any case or legal work that far back.

14. For some context, Michigan's Court of Appeals was created by the state's 1963 Constitution, and the North Carolina Court of Appeals was established in 1967.

15. *See* Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307 (2011); Aaron Tang, *Legal Scholarship Highlight: Judicial Ghostwriting and the Court*, SCOTUSBLOG (Nov. 4, 2011, 11:07 AM),

court system[16]—reveals a wellspring of beautiful, well-crafted rhetoric that could be incorporated into modern advocacy. Attention to the prose in older opinions offers new ideas to the conscientious advocate seeking to sharpen his or her skills in anticipation of their next argument.[17]

As a litigator, this article has a twofold goal. First, I want to provide some insight into why it may behoove lawyers to look to the past for fresh ways of improving their legal writing. Second, on a less altruistic note, just a few years into practicing family law, I began to grow bored of the drab, run-of-the-mill prose that permeates virtually all property and parenting disputes. (I cannot imagine what an endless stream of these cases is like for judges, but I fully understand why many are conditioned to anticipate "boring word-gravel."[18]) And to this latter aim, I posit that enough attorneys bettering their prose will, in turn, equip courts to better process and understand the arguments made by lawyers. This, ultimately, helps the entire legal community at large. Accordingly, this article will proceed as follows: Part II will provide an overview of various rhetorical considerations related to legal writing, and Part III will delve into lessons in legal writing we can glean and embrace from the rhetoric in older cases.

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https://www.scotusblog.com/2011/11/legal-scholarship-highlight-judicial-ghostwriting-and-the-court/.

16. *See Judges Help Judges When Courts Face Heavy Caseloads*, US COURTS (Nov. 8, 2018), https://www.uscourts.gov/news/2018/11/08/judges-help-judges-when-courts-face-heavy-caseloads ("The demand for intercircuit assignments increased by twenty-seven percent in 2017 from the previous year, as many courts juggling heavy caseloads looked for relief."); *As Workloads Rise in Federal Courts, Judge Counts Remain Flat*, TRAC REPORTS (Oct. 14, 2014), https://trac.syr.edu/tracreports/judge/364/ ("Civil and criminal filings in the federal district courts are substantially higher than they were twenty years ago – rising twenty-eight percent since FY 1993."); Walter E. Oberer, *Trial by Ambush or Avalanche? The Discovery Debacle*, 1987 MO. J. DISP. RESOL. 1, 9 (1987) ("The lamentable truth of the current system of litigation is that it is out of control.").

17. This is so notwithstanding the fact that "[j]udges have no obligation to write evocative, lively, or literary opinions, just as legislators and legislative drafters need not worry about appealing to their readers in that way." Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 113–14 (2021). As a general matter, judicial opinions signify a recognition that the law will consistently and uniformly apply to all citizens alike. One of the aims of any opinion is to clarify the court's reasoning against the precedents used to reach its holding—*see* Brooks v. City of West Point, Miss., 639 F. App'x 986, 990 (5th Cir. 2016) (Dennis, J., concurring)—marshaled at least in part "in response to social needs and in the light of the need to reconcile conflicting social values," Charles D. Breitel, *The Common Law Tradition—Deciding Appeals*, 61 COLUM. L. REV. 931, 936 (1961); *see also* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995). As will be evident by case illustrations and explanatory footnotes in this article, there are many decisions from the 1800s in which judges were clearly grappling with wide-ranging societal issues that are still present today. *See, e.g.*, *infra* note 101.

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

I. RHETORIC IN THE LAW: CONTOURS, CONSIDERATIONS, AND UNDERSTANDING YOUR AUDIENCE[19]

"The law is a profession of words."[20] Although the overwhelming majority of attorneys do not litigate,[21] those lacking a handle on language are to

19. One prefatory elephant in the room concerns the definition of "rhetoric." Feel free to skip this lengthy footnote if you are okay with simply acknowledging that we all have some general understanding of the term and its classical usage. However, a search for a clear meaning yields a medley of descriptions divaricating from one abstract notion to another.

"While no single definition is adequate to its many uses, a certain shape is nonetheless discernable." David Fleming, *Rhetoric as a Course of Study*, 61 COLL. ENG. 169, 169 (1998). As a discipline, rhetoric may be boiled down to the art of persuasion, both oral and written. *Compare* Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRS. 129, 129–30 (2006), *and* CICERO, DE ORATORE, *reprinted* in DE ORATORE: BOOK III, DE FATOR, PARADOXA STOICORUM, DE PARTITIONE ORATORIA 2, 369 (H. Rachkaham trans., Harv. Univ. Press 1942) ("[E]loquence is nothing else but wisdom delivering copious utterance . . . ."), *with* Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491, 504–05 (1998) (observing commentary that rhetoric "is the universal form of human communication, which even today determines our social life in an incomparably more profound fashion than does science"), *and Rhetoric & Writing Studies*, SDSU (last visited Dec. 16, 2022), rhetoric.sdsu.edu/about/what-is-rhetoric ("I tell the students in my undergraduate rhetorical theory class that the study of rhetoric is the study of how we use language and how language uses us.").

The seminal text on the subject is still Aristotle's *Rhetoric*, where he defined rhetoric as "the faculty of discovering in any particular case all of the available means of persuasion." GEORGE A. KENNEDY, ARISTOTLE ON RHETORIC: A THEORY OF CIVIC DISCOURSE 14 (George A. Kennedy trans., Oxford Univ. Press 1991). Think about the use of the word "discovering"—see EUGENE GARVER, ARISTOTLE'S RHETORIC: AN ART OF CHARACTER 25 (1994) ("[T]he rhetorician might not persuade his audience, but he will exercise his rhetorical power and fulfill his rhetorical function if he discovers the possible means of persuasion in a given case.")—and how rhetoricians versed in the craft "recognize the ways that rhetoric shapes not just utterances or inscriptions, but also beliefs, values, institutions, and even bodies," Jay Dolmage, *Disability Rhetorics in* THE CAMBRIDGE COMPANION TO LITERATURE AND DISABILITY 214 (Clare Barker & Stuart Murray eds., 2018). On a fundamental level, viewing rhetoric through this lens emphasizes *argumentation* over *winning* the argument. GARVER, *supra* at 32. That rhetoric is often referred to as an "art" only reinforces this impression. The oration in ancient Athenian courts rivaled performances of their still-celebrated plays; and where harsh punishments hung in the balance, those Athenians bereft of strong rhetorical skills were (at best) placed in a vulnerable, precarious set of circumstances. Indeed, Aeschines, a politician and actor in the fourth century B.C., would beseech jurors to adhere and remain faithful to the law, rather than well-executed rhetorical pageantry. *Id.*; *see also* Delia B. Conti, Comment, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 DUQ. L. REV. 457, 468 (2001).

"[M]odern society does not have public forums for resolving disputes in the same way Athenians did," but "the rhetorical concepts arising out of this tradition can help us think about our own times, challenges, and condition." WILLIAM M. KEITH & CHRISTIAN O. LUNDBERG, THE ESSENTIAL GUIDE TO RHETORIC 8–9 (2008). Other influential writers have tangentially echoed this sentiment. Aristotle's *Rhetoric* remains a cornerstone in civic discourse, *see* Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 61–62 (2002), as well as "a veritable encyclopedia of persuasion and merits review" for practicing attorneys, Robert H. Henry, *Overcoming Advocacy*, 58 U. KAN. L. REV. 161, 163 (2009). And this cogitation upon the nature of emotion, reason, and deductive certainty—specifically on how it will resonate with the audience—

some extent lost at sea whether they realize it or not.[22] A command of language not only allows you to recognize how your communications will be received and interpreted, but also betters your ability to connect and find common ground with others.[23] It follows that the means with which you go about persuading an intended audience are essential features for an attorney.[24] Figures of speech that lend color to one's communication (e.g., analogy and antithesis) derive from classical rhetoric,[25] and "elements of time and place, motivation and response," denote the import of context.[26] One's rhetoric therefore forms a basis for the accuracy, brevity, and clarity necessary to persuade.[27] Naturally, those well versed in the art of rhetoric generally manifest clear thinking that translates to intelligible prose and orality.[28]

Litigators, in particular, must make their case in light of an overburdened judicial system, one in which the judges are balancing a back-breaking docket.[29]

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has endured as a living artifact 2,300 years after it was initially published. *See id.* at 165; Jamar, *supra* at 62 ("Indeed, one could argue that Aristotle, through his focus on tying one's argument to what the audience values, provides the best means yet devised for engaging in civic discourse to create what John Rawls has called an 'overlapping consensus' among disparate groups."); *cf.* Lori D. Johnson & Melissa Love Koenig, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 NEV. L.J. 1037, 1066 (2020) ("It is the oldest 'authoritative' guide to persuasion and the techniques of developing arguments, and it greatly influenced Roman rhetoricians such as Cicero and Quintilian.").

20. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963).

21. Steven Lubet, *Is Legal Theory Good for Anything?*, 1997 U. ILL. L. REV. 193, 203 (1997).

22. *Nota bene*: While this article is aimed more so at litigators, a sound foundation in rhetoric has obvious payoffs for transactional attorneys or those who simply do not go to court. Meaningful interactions between non-litigators and clients or other attorneys entail some ability to communicate thoughts and provisions with clarity and persuasion. For example, every estate planning attorney has at least one horror story in which a mulish, iron-willed client has strong thoughts on how to set up a trust that the attorney knows is either impossible, illegal, highly impractical, or some combination of the three; talking sense into this type of client requires patience and determination and, perhaps above all else, the capacity to reach into one's rhetorical arsenal and ascertain just how to break through to them. *See* Jarome E. Gautreaux, *Persuasion Principles for Lawyers*, 74 MERCER L. REV. 599, 607 (2023).

23. Erec Smith, *Why Rhetoric Still Matters*, DISCOURSE (Mar. 3, 2022), https://www.discoursemagazine.com/p/why-rhetoric-still-matters; *What is Rhetoric?*, UIS (last visited Nov. 5, 2022), https://www.uis.edu/learning-hub/writing-resources/handouts/learning-hub/what-is-rhetoric#:~:text=Rhetoric%20gives%20you%20a%20framework,to%20agree%20with%20your%20perspective.

24. Thomas O. Sloane & Chaim Perelman, *Rhetoric*, BRITANNICA (last visited Apr. 10, 2023), https://www.britannica.com/topic/rhetoric.

25. *Id*.

26. *Id.*

27. Albert P. Blaustein, *On Legal Writing*, 18 CLEV.-MARSHALL L. REV. 237, 238 (1969); GARVER, *supra* note 19, at 25.

28. Blaustein, *supra* note 27, at 238.

29. *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 24 (2008) ("[Judges] are an impatient, unforgiving audience with no desire to

Most people underestimate the amount of work judges manage,[30] but the increased workload engenders "inaccessible and delayed justice, reduced quality of judgments, judicial burnout, declining public confidence in the courts, and the vanishing trial phenomenon."[31] Succinct and clear writing is, of course, the antidote to this predicament. Justice Thomas' practice was to assume the court was already inundated with work:

> [S]o I wrote [briefs] understanding that mine was not the most important thing [the judge] would read that day. Now, if you assume that, how would you write it? Would you use all fifty pages? Would you reduce the font so you could hide the fact that you didn't edit it? Would you keep repeating an argument you've made five times? String-cite something that's obvious? You see what I'm saying? It should be obvious to you that people are really busy.[32]

As commonsensical as this sounds, quality and compendious briefing is a scarce resource.[33] One does not need to search high and low to see there is a

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spend more time on your case than is necessary to get the right result. Never, never waste the court's time.").

30. *See* Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH. & LEE L. REV. 1457, 1474 (2017) ("Markets that sustain substandard professionals may drive public costs. . . . Judges and attorneys may spend excessive amounts of time addressing frivolous or plainly meritless arguments, generating crowded dockets, and slowing the delivery of justice generally."); Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQ. L. REV. 3, 21 (2013) [hereinafter Posner, *Judicial Opinions*] (noting the ratio of American attorneys to federal judges equates is *5,000:1*); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705 (1977) ("[T]he costs of dispute resolution and the impact of delay are rarely limited to the particular parties—the social costs involved are borne by society as a whole.").

31. Christoph Engel & Keren Weinshall, *Manna from Heaven for Judges: Judges' Reaction to a Quasi-Random Reduction in Caseload*, 17 J. EMPIRICAL LEGAL STUD. 722, 722 (2020); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*?, 78 N.Y.U. L. REV. 982, 984 (2003) (explaining how "excessive and frivolous litigation overwhelms the judicial system's capacity to administer speedy and efficient justice, leads to higher costs for litigants and society at large, and even hinders America's competitive position in the global economy").

32. Interview with Justice Clarence Thomas, 13 SCRIBES J. LEGAL WRITING 99, 101–02 (2010).

33. One informal yet informative survey reveals the low expectation appellate judges hold of attorneys' briefs:

> Judge Thomas Reavley, a highly respected jurist, put the range of helpful briefs in the Fifth Circuit at five to ten percent. Judge Frank Easterbrook of the Seventh Circuit, one of our most interesting judicial writers, said that it would be "extravagant to say that three percent of the briefs are of a high professional caliber." Another Fifth Circuit jurist, Judge Thomas Gibbs Gee, termed the brief writing he saw "[e]xecrable," and then "[h]orrible."

Henry, *supra* note 19, at 165–66; *see also* Roger J. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 N.Y.L. SCH. L. REV. 1, 6 (1989) ("Unnecessary digressions, the mixing of fact statements with legal opinions, and lack of order in the presentation of arguments have been identified as some of the deficiencies found.").

spate of literature lamenting the poor caliber of legal writing and its effect on the profession.[34] Many lawyers know all too well that a gallimaufry of syntactical, grammatical, and lexical errors can easily add up to what Judge Posner once described as "sheer gobbledygook."[35] As one provocative lecture asserted, "[i]f you don't need a weatherman to know which way the wind blows, you don't need a literary critic to know how badly most legal prose is written."[36] What's worse is this is not a novel crisis by any means. As it happens, with every new generation of lawyers there is a reinvigorated disquietude within the community over the lack of formal education on rhetoric and grammar.[37] It is regrettable, then, that law students begin their studies reading stodgy opinions that present an unflattering depiction of, and introduction to, legal writing.[38] (In

34. *See, e.g.*, Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL PROF. 259, 271–72 (2017) ("The most common shortcomings in briefs that improperly shift the burden of attorney workload to court personnel (or to opposing counsel) are lack of thorough legal research, thin legal analysis, poor citations to the factual record and legal authority, and disregard of express court rules regarding content and format."); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 64 (1992) ("In my twelve years on the bench, I have seen much written work by lawyers that is quite appalling."); Miner, *supra* note 33, at 9 ("[I]n my experience it is the rare brief-writer who seizes the opportunity to employ the clarity, simplicity, and directness of expression necessary to endow a brief with maximum persuasive force."); *see generally* Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 5 J. LEGAL WRITING INST. 143, 145–46 (1999) (explaining how "legal writing is hindered by a number of factors" at the law-school level).

35. Fox Valley AMC/Jeep, Inc. v. AM Credit Corp., 836 F.2d 366, 368 (7th Cir. 1988).

36. Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984).

37. *Compare* Stark, *supra* note 36, at 1389; *see also* Miner, *supra* note 33, at 5 ("[I]ncompetence in expression now permeates the profession because of deficiencies in the early education of young lawyers. Modern education seems to provide an insufficient foundation in English grammar, style, and usage. As a law teacher, I have been astounded by some of the inadequacies in written and oral expression demonstrated by the brightest students."), *with* Bryan A. Garner, *Do Law Students Become Worse Writers?*, ABA (May 1, 2013), https://abaforlawstudents.com/2013/05/01/law-students-become-worse-writers/ ("Although law students may have gotten a little worse as writers, the reality is that many who think they've lost skills they once possessed in fact never really had them at all."). On balance, it is not completely correct to say that this is solely a problem within legal education, but rather one that stems from fundamental ways in which English pedagogy has, over time, shifted its focus away from the mechanics of grammar to expressing student-drawn inspiration. *See* Dana Goldstein, *Why Kids Can't Write*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/ 2017/08/02/ education/edlife/writing-education-grammar-students-children.html. There is actually a great deal of convincing literature explaining why a study of rhetoric and linguistics produces little net gain for the students' education when you account for the work and effort that goes into teaching them these kinds of rules and structures. Students are likely not to remember what a gerund phrase is or how one is to be deployed in one's own writing. Generally speaking, grammar rules are good at *identifying* what something is on the page, but they are easily forgettable and do not improve one's own writing.

38. In all candor, I am not positive I agree with this sentiment in its entirety. The notion is bolstered by some academic works like Ms. Fordyce-Ruff's piece, Tenielle Fordyce-Ruff, *Cutting the Clutter: Three Steps to More Concise Legal Writing*, 54 ADVOCATE 41 (2011), and I have a personal memory of my first-year research professor lamenting the writing in *Pennoyer v. Neff*, 95

fact, "[t]he law's long-standing love affair with run-on sentences becomes less mysterious when one knows that law clerks were traditionally paid by the page," ergo, "clerks resorted to repetition and wordiness to puff up their fees.)[39]" These law school-oriented opinions are saturated with legalese that no doubt taint the way students fashion their own prose.[40]

The reality is that "our ability to think, speak, and write 'like lawyers' appears to support the legitimacy of the legal system itself,"[41] meaning the entire profession suffers as these attributes wane.[42] With regard to legal writing, this form of argument will almost always be the first time your position is presented to the court for review—so it needs to be a good first impression.[43] Moreover, at both the trial and appellate level, oral argument is deemed subordinate to written submissions.[44] Justice Ginsburg once remarked that while she

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U.S. 714 (1877), and how *Pennoyer* is an unavoidable cornerstone in civil procedure. (Ask most law school graduates about *Pennoyer* or *International Shoe* and you are likely to be met with something akin to "I remember that case," but with a tone closer to someone recovering from PTSD as opposed to a warm memory.) Part of me, however, believes that there are probably a lot of cases law students read their first semester they would find more interesting if they were (1) better versed in reading through an opinion after a year or so of practice, and (2) less paralyzed by the Socratic method being deployed in front of their peers. I would submit that if my theory is even somewhat true, there are probably a great many outlandish tort cases or trivial yet hyperbolized real property disputes third-year students would enjoy. On the other hand, *Pennoyer* will probably never be a page-turner regardless of one's fluency with *in rem* jurisdictional disputes. And it bears mentioning that none other than Charles Dickens complained in *Bleak House* about how lawyers have a "liking for the legal repetitions and prolixities"—so it's possible that this is all just rose-tinted, Candide-like conjecture on my part.

39. Adam Freedman, THE PARTY OF THE FIRST PART: THE CURIOUS WORLD OF LEGALESE 11–12 (2007).

40. *See id.* at 5.

41. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1545 (1990).

42. Professor Stark's disquisition has a response to this charge. He posits that lawyers are well aware that their writing is not good, but they continue to lean into poor drafting because they are financially incentivized to do so: "[I]f lawyers stopped writing like lawyers, they might have trouble charging as much for their work. Every time lawyers confound their clients with a case citation, a 'heretofore,' or an 'in the instant case,' they are letting everyone know that they possess something the nonlegal world does not." Stark, *supra* note 36, at 1389. Similarly, almost thirty years earlier, Edward S. Greenbaum, one of New York's leading lawyers and court reformers who actually represented Stalin's daughter after fleeing the Soviet Union, *see Edward S. Greenbaum, Lawyer, Is Dead at 80*, N.Y. TIMES (June 13, 1970), https://www.nytimes.com/1970/06/13/archives/edward-s-greenbaum-lawyer-is-dead-at-80.html, acknowledged this issue when he wrote: "Pride in our work and pride in our profession should impel us to use simpler language. We lawyers are not popular. Our prolix circumlocution is one of the reasons for this." Edward S. Greenbaum, *Lawyers Talk Too Much*, 19 F.R.D. 217, 219 (1956).

43. *See* Stephanie A. Vaughan, *Persuasion Is an Art . . . but It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 651 (2009).

44. *See* Roger D. Townsend, *Changes in Appellate Judges and Practice During the Last 50 Years*, 53 JUDGES' J. (SUMMER 2014) 18, 19 (2014) ("Because many judges admit that oral arguments rarely change their minds, it is safe to say that most oral arguments are something of a ritual."); *see also* Philip N. Meyer, *Confessions of a Legal Writing Instructor*, 46 J. LEGAL EDUC.

encountered "few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs," she saw "several potential winners become losers in whole or in part because of clarification elicited at argument."[45] As trite as it may sound, by merely reviewing your work for inaccurate citations, typographical and grammatical errors, and gratuitous hyperbole, you can separate yourself as a writer with incisive arguments.[46] To quote Daniel Webster, "the power of clear statement is the great power at the bar."[47]

In addition to unpolished prose, defaulting to repetition and verbosity will obscure the substance of your message.[48] On the topic of longiloquent arguments, Justice Rutledge clarified that this "overanalysis . . . really is a type of underanalysis,"[49] and Justice Ginsburg admitted overly-long briefs contribute to "eye-fatigue" and frustration.[50] Prolixity—the tendency to multiply words in an effort to make the meaning clear, even though "little or nothing is gained by attempting to speak with absolute clearness and endless specifications"[51]—annoys the court and forces the reader to ferret out the relevant material from the morass of verbiage.[52] (And let's not even talk about the ramblings from *pro se* litigants, which clog up the docket and exacerbate pretty much all the aforementioned problems to a Wagnerian level.[53]) Bryan Garner advocates for

27, 34 (1996) (noting that while sometimes "it didn't matter what was on the page," the "difficult legal arguments did not play well orally . . . .").

45. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999).

46. *See* Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 SCRIBES J. LEGAL WRITING 19, 20 (1992).

47. PETER HARVEY, REMINISCENCES AND ANECDOTES OF DANIEL WEBSTER 118 (Boston, Little, Brown, and Co. 1877).

48. *See* James Constr. Grp. v. Westlake Chem. Corp., 594 S.W.3d 722, 772 (Tex. App. 2019) (Frost, C.J., concurring and dissenting), *aff'd in part, rev'd in part*, 650 S.W.3d 392 (2022).

49. Wiley Rutledge, *The Appellate Brief*, 19 DICTA 109, 115 (1942); *cf.* Turner v. New Jersey State Police, Civ. No. 08-5163 (KM) (JBC), (D.N.J. June 10, 2016) ("By no means do I wish to encourage overlong briefs, which are often quite unhelpful to the Court.").

50. Interview with Justice Ruth Bader Ginsburg, 13 SCRIBES J. LEGAL WRITING 133, 137 (2010).

51. Nelson P. Miller, *Why Prolixity Does Not Produce Clarity: Francis Lieber on Plain Language*, 11 SCRIBES J. LEGAL WRITING 107, 107–08 (2007).

52. *See* Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1281, at 365 (1969)).

53. Think of that one person in your life who talks a lot but says very little, then think about what that person's diary might look like; now think about them pouring out their grievances vis-à-vis a legal proceeding. *See* Green v. Bornstein, No. 3:17-cv-201-DJH-DW, 2018 WL 2392550, at *1 (W.D. Ky. May 25, 2018) ("Courts are not required to entertain a pro se plaintiff's claim that defies comprehension or allegations that amount to nothing more than incoherent ramblings." (citation and internal quotations omitted)); Mitchell v. City of Nashville, No. 3:08-cv-0844, 2008 WL 4646169, at *1 (M.D. Tenn. Oct. 20, 2008) ("The paper document filed by plaintiff to initiate this action consists of three handwritten pages containing disjointed, often repetitive, sometimes obscene, fragmented, largely unintelligible ramblings.").

halving the page limit,[54] an attainable goal given how unnecessary it is to bombard every legal issue in your brief or motion with an avalanche of citations and illustrations.[55] Trenchant writing can obviate any temptation to over-argue, and a regimen of editing and revising advances your ability to capture and boil down ideas.[56]

Then there is the audience that legal writers must take into consideration. At least with appellate work, you should be mindful of the law clerks who will likely play a notable role in reviewing the case and drafting the opinion.[57] It is by now common knowledge that the vast majority of appellate judges, at least at the federal level, elect *not* to draft their own opinions from the ground up.[58] Regard for the faceless law clerk matters when you think about how, by and large, these clerks have de minimis experience in the arena. They lack basic

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54. *See* BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS 615–16 (3d ed., Oxford Univ. Press 2014); LawProse with Bryan A. Garner, *Hon. David S. Perelman, U.S. Magistrate Judge (Cleveland): On Halving Page Limits*, YOUTUBE (Dec. 25, 2014), https://www.youtube.com/watch?v=jsut4oVMf9o&t=9s ("When I see a brief that is nineteen-and-a-half pages long, I immediately think, 'my God, why did they have to take up all twenty pages'; and usually I find that what they said over nineteen-and-a-half pages could have been said much better over ten or twelve.'").

55. *See* Jason Dykstra, *Bridging the Gap: Transitioning Law School Legal Writing Skills to Practicing Law*, 59 ADVOCATE 62, 63 (2016); *see also* Gautreaux, *infra* note 152 and accompanying text.

56. *Cf.* Pinno v. Wachtendorf, 845 F.3d 328, 331–32 (7th Cir. 2017) (commenting on the lengthy briefing—totaling 250 pages, 219 of which are the parties' arguments—and how "[t]here is no justification for such verbosity.").

57. *See* Michael Abramowicz*, En Banc Revisited*, 100 COLUM. L. REV. 1600, 1604 n.15 (2000) (observing how law clerks are one of many instruments used to stem the tide of appeals filed with the federal courts); JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 113 (1958) ("As the work load [*sic*] increases, the methods must be streamlined or else the work output will go down.").

58. Posner, *Judicial Opinions*, *supra* note 30, at 24–25. Aside from ghostwriting judicial opinions, the clerks will often research legal issues, draft bench memos, and assist their judge with coming to a conclusion about the case. Deeva Shah & Greg Washington, *Beyond Symbolism: Accepting the Substantive Value of Diversity in Law Clerk Hiring*, 97 NOTRE DAME L. REV. REFLECTION 318, 321 (2022). Other judges may task their clerks with additional duties. *Id.* ("Clerks may also perform clerical tasks, such as managing a judge's docket, organizing materials for hearings, and generally assisting a judge with the day-to-day work of running chambers."); Stephen L. Wasby, *The World of Law Clerks: Tasks, Utilization, Reliance, and Influence*, 98 MARQ. L. REV. 111, 117 (2014) ("Judges may also specifically ask for reactions to particular arriving opinions or may also task the clerk to watch for the presence of particular matters in the opinions of certain other judges."). The law clerk has become an institution—a role that is usually both comprehensive and consequential to the chambers, the judge, and ultimately the law itself.

To be sure, a glaring and oft-cited criticism of this reality concerns the influence clerks may have over the judge they work for. With that being said, "the judge is the boss and is fully capable of saying 'no' even if saying it more diplomatically. This is part of the larger matter that a law clerk's submitting work to a judge doesn't mean the judge will use it." *Id.* at 123. More likely is that "information provided to the judge is important, and the clerk is having an effect through providing that information, if only by undertaking research assigned by the judge (and not slanting it toward a particular result)." *Id.* at 124.

understandings of how the game is played or how the sausage is made—clean and clear-cut law school opinions do not prepare clerks for the chaos and messiness that attend most legal proceedings.[59] For better or worse, the brief must be rather formalistic, simplified, and concise so that the law clerks (and, by extension, their judge) will more easily grasp the argument and translate their thoughts into the opinion they are tasked to draft.[60]

As for the decisions themselves, "judges are expected to express their opinions in texts that deserve and withstand scrutiny,"[61] connecting the present controversy to past precedents and limiting the extent to which the opinion establishes future precedent.[62] In that sense, we confront something of a cyclical interplay between courts and attorneys: on any particular issue on appeal, a litigant will brief an argument based on the existing law and the facts of the case, and in turn the appellate court hands down a decision and establishes precedent on the matter;[63] and because these opinions are central texts that shape our understanding of the law moving forward, they affect the way litigants craft future arguments to both trial and, once again, appellate courts.[64] The opinions themselves serve to convey the court's reasoning and rationale, and this transparency acts as a check on any given judge's discretion in a way that promotes confidence in the judiciary.[65] To that end, these opinions are only successful insofar as they are intelligibly written.[66] Rhetoric in an opinion is ideally catered to both lawyers and the general public,[67] as the precedent

59. *See* Julius Paul, *Jerome Frank's Contributions to the Philosophy of American Legal Realism*, 11 VAND. L. REV. 753, 754 (1958) ("[T]he trouble with most of the studies of judicial decisions is that they concentrate on upper court opinions (and hence, the legal rules) and not the decisions of the trial courts, where the vital fact-finding process takes place.").

60. Chad Oldfather & Todd C. Peppers, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1, 5 (2014) ("As clerk-written opinions become the norm, judges increasingly come to regard that style of opinion as the ideal.").

61. Thomas Morawetz, *Law's Essence: Lawyers as Tellers of Tales*, 29 CONN. L. REV. 899, 911 (1997).

62. *See* Armour & Co. v. Wantock, 323 U.S. 126, 132–33 (1944) ("It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.").

63. The debate surrounding whether unpublished opinions should have precedential value is one I'd rather not wade into at this time, so let's simply acknowledge that some type of public ruling will come from the court that may well impact future cases.

64. *See* JAMES BOYD WHITE, JUSTICE AS TRANSLATION at xv (1990); *see also* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMANITIES 201, 201–02 (1990).

65. *See* Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987).

66. Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 655 (2012) ("[J]udicial opinions cannot notify, inform, persuade, or otherwise make oversight possible if they cannot be understood.").

67. *Id.* at 656 ("[T]he general principle of comprehension inherent in judicial opinions entails, in its practical application, a standard of public comprehension. Thus, the audience for which judicial opinions ought to be intelligible is wide indeed.") (emphasis omitted).

established in these cases impacts legislation, the democratic process, similarly-situated parties, experts, lower courts applying the law to future cases, and myriad other aspects of life.[68]

Although there is much to say about the rhetoric of judicial opinions and why litigants should be cognizant of and learn from courts' writing,[69] this is not to suggest advocates should seek to airily emulate the prose in case law.[70] Concise explanations carry weight with judges,[71] but the same rules do not apply to the courts writing the opinions: "[T]hey are much longer than they used to be, far more extensively footnoted, and generally less well-written than those from earlier times."[72] And the plain fact of the matter is judges are not perforce good writers, the same way someone with a driver's license is not necessarily someone who knows anything about cars. No doubt this is underscored by the quasi-boilerplate language that pervades many opinions.[73] Dismissive phrases relating to precedent—e.g., "it is manifest," "it is axiomatic," and "it is beyond cavil"—are deployed with regularity in modern case law; and this is irrespective of whether these statements, read literally, are shamefully untrue when you consider that the contents of these opinions are completely foreign to the general public and attorneys alike.[74] Unpublished cases are even worse about exploiting

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68. *See* Emily Kuhl, Stare Decisis *and Stylistic Devices: How Rhetoric Impacts the Supreme Court and Its Majority Opinions*, 1 ALETHEIA 2, 2–3 (2016).

69. *See, e.g.*, Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2035 (2002) ("Supreme Court opinions are a rhetorical enterprise and that this fact profoundly influences much of what the Court does and also how the Court's decisions should be evaluated.").

70. *See id.* at 2021 ("I cannot think of recent opinions that had the eloquence of Justice Louis Brandeis's explanation for the protection of freedom of speech in *Whitney v. California*, or of Justice Robert Jackson's in *West Virginia State Board of Education v. Barnette*.") (footnote omitted).

71. *See* Bryan A. Garner, *The Art of Boiling Down*, 9 GREEN BAG 2D 27, 27, 30–31 (2005).

72. Chemerinsky, *supra* note 69, at 2021; *see also* Jon O. Newman, *The Supreme Court—Then and Now*, 19 J. APP. PRAC. & PROCESS 1, 4 (2018); Liptak, *supra* note 11 (observing that while *Brown v. Board of Education* was fewer than 4,000 words, "[w]hen the Roberts court returned to just an aspect of the issue in 2007 in *Parents Involved v. Seattle*, it published some 47,00 words, enough to rival a short novel.") (emphasis added).

73. *See* Wald, *supra* note 17, at 1373.

74. *See, e.g.*, State v. Thomas, 995 A.2d 65, 70 (Conn. 2010) (quoting State v. Crawford, 778 A.2d 947 (Conn. 2001)) ("It is axiomatic that appellate jurisdiction is limited to final judgments of the trial court[, but] there is a small class of cases however that meets the test of being effectively unreviewable on appeal from a final judgment and therefore, is subject to interlocutory review."); Brown v. People, 239 P.3d 764, 773 (Colo. 2010) (en banc) ("Section 18-1-408(6) notwithstanding, it is manifest that a trial court is not obliged to charge a jury with respect to an included offense in the absence of a timely and proper request to do so."); Lake Sana Devs., LLC v. Miami-Dade Cnty., 406 So. 3d 169, 170 (Fla. Ct. App. 2020) (quoting Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086 (Fla. 2010)) ("On second-tier certiorari, it is axiomatic our 'inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law . . . .'"); Truth Temple v. Word Proclaimed Church of God in Christ, Inc., No. COA21–737, 2022 WL 2439794, at *4 (N.C. Ct. App. July 5, 2022) ("It is beyond cavil that religious associations may sue and be sued as entities unto themselves without the inclusion of individual party-plaintiffs, and that clergy and members of churches may testify in such cases without themselves being parties to the action."); TownCenter Plaza, LLC v. Hems, D060560, D061581, 2013 WL 3389552, at *7

these phrases.[75] So, unless the issue presented is irrefutably quotidian,[76] litigants are not contributing much to their cause when these phrases are used in briefs or memoranda.

All this is to say that litigants need to account for whether the rhetoric in appellate opinions is truly helpful and worth imitating; and, if not, then what ideas can you take from the writing? With his characteristic measured-yet-panache delivery, David Foster Wallace commented that:

> Somebody like a judge or a professor who is himself [whispering] kind of a shitty writer is nevertheless usually a really good reader. And he or she will not necessarily make the number of connections you're worried that "[i]f I turn in this pellucid, lapidary marvel, somehow the judge won't like it because it's not like the judge's own style." I would say if judges are like profs, ninety-nine percent of them will reward you for clarity, for precision, for minimizing the unnecessary effort they have to make.[77]

Wallace's sentiment aligns with a generally accepted proposition: one's legal writing does not have to be tedious to read.[78] The question is how to keep things fresh for both the judge and litigant. At least in my own case—and for reasons I will explain next—I often turn to older cases for inspiration.

(Cal. Ct. App. July 9, 2013) ("It is common knowledge that as a result of section 1213's constructive notice provision, '[m]any purchasers will purchase land only if they can secure title insurance.'"). But, to be fair, older case law can be guilty of downplaying the readers' erudition as well. *See, e.g.*, State v. Poynter, 81 N.W. 431, 434 (Neb. 1899) ("Again, it is manifest that the personal property of corporations engaged in the business of insurance is exempt from taxation for all purposes whatever . . . .").

75. Wald, *supra* note 17, at 1373 (explaining the ubiquity of phrases such as "precedent is clear" and "there is nothing new here" in unpublished decisions, and interpreting these statements as ways to tell the losing party "[y]ou never had a real chance, and we have gone to the least possible trouble to tell you why.").

76. *Cf.* Leflar, *supra* note 10, at 580–81 ("[S]ome opinions will be of real interest primarily, or even only, to the immediate parties and their counsel. Such opinions can be written simply, without much effort expended on achievement of literary quality. A clear statement is enough.").

77. DAVID FOSTER WALLACE & BRYAN A. GARNER, QUACK THIS WAY 44–45 (2013) (emphasis omitted).

78. *See, e.g.*, Susan Swann, *Q & A: Judge Kevin Burke's Lessons from 36 Years on the Bench*, 35 WESTLAW J. WHITE-COLLAR CRIME 8 (2020) ("When you fall asleep reading the work of a lawyer, something is wrong. There is nothing in the rules that mandates legal writing should be boring."); *cf.* Mary Dunnewold, *Establishing and Maintaining Good Working Relationships with 1L Writing Students*, 8 PERSPECTIVES 4, 5 (1999) ("Because the legal writing course necessarily spends considerable time on what can seem to be rule-bound, formalistic topics like the IRAC format, grammar, and editing techniques, students can easily perceive legal writing itself as being boring, uncreative, and mechanical.").

II. EXAMPLES OF RHETORIC IN FORGOTTEN OPINIONS

The ability to break new ground on rhetorical pedagogy is reserved for a select few, especially within the confines of legal writing.[79] Frankly, to say that writers must outline, revise, be direct, and speak plainly is (at best) generic advice and (at worst) hoary instruction. Yet these pieces of advice continue to be trotted out because people tend not to follow them. The truth is that people will improve their writing only if they want to improve, and it is puerile to think the average attorney seeks out newly published law review articles setting forth legal writing scholarship. With that being said, there are some who do care about refining their way with words—be they associates, clerks, law students, etc.—and one overlooked strategy to build on one's rhetoric is to look to the distant past for lessons and ideas.

Even a cursory review of cases from the nineteenth and early twentieth centuries reveals that those decisions look nothing like those of today's opinions. They tend to be filled with ornate and ostensibly directionless prose that, as Justice Alito concedes, can make it "very hard to follow what's going on."[80] Yet certain judges marked their place in history for "their ability to devise apt, just, and understandable rules of law," forging "clear expressi[ve] thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct."[81] To demonstrate this, the following subsections delve into numerous examples of wonderful prose from these older cases that should by no means be declared superannuated or obsolete.

A. Framing Parties and Realities

Consider this sapient observation that may seem foreign to anyone reading a modern opinion in the hopes of finding some literary merit: "Circumstance, ideological difference, institutional authority, public disagreement, and political explosiveness combine to make language especially memorable."[82] Such a notion feels alien because, unless you are dealing with a particularly feisty court,[83] most judges steer clear from controversy or offending the parties

79. *See, e.g.*, Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285 (2010); Carol McCrehan Parker, *The Signature Pedagogy of Legal Writing*, 16 LEGAL WRITING 477 (2010); Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (Without Grading Papers)*, 10 LEGAL WRITING 23 (2004).

80. Interview with Justice Samuel A. Alito, Jr., 13 SCRIBES J. LEGAL WRITING 169, 180 (2010).

81. Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1619 (1966); *see also* Chemerinsky, *supra* note 69, at 2021.

82. Ferguson, *supra* note 64, at 203.

83. The United States Court of Appeals for the Seventh Circuit is renowned for issuing scathing opinions that are as interesting to read as they are horrifying to the litigants in the line of fire. *See, e.g.*, United States v. Johnson, 745 F.3d 227, 232 (7th Cir. 2014) ("Brindley may not have set out to develop a reputation as a lawyer whose word cannot be trusted, but he has acquired it. This opinion serves as a public rebuke and as a warning that any further deceit will lead to an order requiring Brindley to show cause why he should not be suspended or disbarred.").

involved.[84] There are strict rules about judges owing respect to the law and parties that appear before them, at least to the extent that their behavior furthers faith in the integrity of the judiciary.[85] In that sense, judges are encouraged to employ language and analyses that are even-keeled when rendering a decision.

By comparison, courts from long ago seized on the opportunity for rhetorical flourishes that helped shape the realities we find ourselves in today, and they did so in bold ways. "In order to be fully rational a judge must be capable of literary imagining and sympathy,"[86] which may well account for societal reverberations that flow from a particular ruling. Take for example the following passage from 1871 regarding the need for educating North Carolina's youth, a passage riddled with the kind of hard-truths that might draw backlash nowadays:

> It is a mistake to regard the public system as a mere charity. It is a great governmental consideration. The Constitution requires that every child "shall attend" school, and one is not generally required to accept charity. It is a great truth, that knowledge is necessary to good government; without it, the laborer is nothing but muscle, with neither skill nor contrivance, consuming what he produces and adding nothing to general prosperity. The soldier is stolid and impairs the nation's strength; the voter is ignorant of men and measures, and exercises his right and duties at a venture; art and science languish; and the whole nation is imbecile, and must rank low with the powers of the world, to say nothing of the interest of morality and religion.[87]

This passage reads as if it were a speech, and one can easily imagine a stately manner in which it is delivered. Note the presence of isocolons that add natural cadence, (e.g., "the laborer is nothing but muscle," "the voter is ignorant of men and measures"), and how the alliteration makes for easy reading both aloud and in your head, (e.g., "the soldier is stolid," "knowledge is necessary"). And while some of the language is likely impossible to see in modern times for

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84. For example, many opinions out of Washington State begin with a prefatory footnote assuring the reader that reference to the parties' given names is not meant to be disrespectful. *See, e.g.*, In re Knight, 473 P.3d 663, 665 n.1 (Wash. 2020) (en banc); In re Estate of Blessing, 248 P.3d 1107, 1108 n.1 (Wash. Ct. App. 2011).

85. *See* UNITED STATES COURTS, GUIDE TO JUDICIARY POLICY, VOL. 2A, CH. 2, 3 (2019). And, on a more cynical level, "Elected judges know they need to be reelected if they want to keep their jobs," Michael S. Kang & Joanna Shepherd, *Judicial Campaign Finance and Election Timing*, 2021 WIS. L. REV. 1487, 1492 (2021); *see also* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 278 (2008) ("[T]he essence of the judicial role—the rulings with which judges bind litigants and, sometimes, the broader populace—and both draw on the public choice notion that, whatever other aspirations or intentions they might have, the basic objective function of elected judges, like all other elected officials, is to get reelected."), and that usually entails some type of respect amongst the community and catering to public opinion and other private interests. *See id.* at 290.

86. Nussbaum, *supra* note 12, at 1519.

87. Lane v. Stanly, 65 N.C. 153, 158 (1871) (emphasis omitted).

risk of offending either the parties or the general public,[88] the scope of this passage's reach is an exemplar of concise legal writing. At 128 words, the Court sets out numerous ramifications to a contrary outcome. Indeed, the penultimate and antepenultimate sentences precipitating the passage tee up the Court's rationale: "But would this be if every township were allowed to have its own regulations, and to consult its own caprices? In some townships there would be no schools; in others, inferior ones, and in others extravagant ones, to the oppression of the taxpayers."[89] Simply put, *Lane* offers an effective call and response, as well as a brilliant series of observations strung together with careful diction and precise figures of speech.

There are countless other sagacious decisions that reflect the growth of the legal profession in America, and specifically the legal writing of the times.[90] The history of the legal profession in our country is by now well traced: law schools were largely nonexistent early on,[91] so we shouldn't be too surprised that the oldest practitioners in North Carolina were labeled "cursed hungry Caterpillars" whose fees "eat out the very Bowels of our Common-wealth."[92] Clerkships and apprenticeships became a frequent method for passing the bar, with these pupils observing court sessions and performing routine tasks as part of a generalized training.[93] The exceedingly motivated pupils might opt to read from established treatises—e.g., Patrick Henry, who devoured Coke's *Institutes* and the Virginia statutes in the month prior to taking the bar examination.[94] Thomas Jefferson, who went the route of apprenticeship, asserted that *Institutes* "was the universal elementary book of law students."[95]

But "for much of its history, legal writing had very few professionals dedicated to exploring legal writing as an academic topic."[96] Until midway

88. For some, *Lane*'s reference to "the whole nation [being] imbecile" may hearken back to Justice Holmes' infamous *Buck v. Bell* opinion that was handed down some fifty-six years later—274 U.S. 200, 208 (1927) ("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. . . . Three generations of imbeciles are enough.")—and discussing the troops in any potentially unflattering way is probably going to entail blowback.

89. *Lane*, 65 N.C. at 158.

90. It should be noted that, in returning to the past for inspiration, I am not advocating that anyone turn a blind eye to cases like *Dred Scott*, *The Slaughterhouse Cases*, and other abhorrent nineteenth century decisions that tortured the law in ways that stifled the ideal of justice for so many. I am not speaking to those cases or their rationales.

91. *See generally* Michael L. Rustad & Thomas H. Koenig, *A Hard Day's Night: Hierarchy, History & Happiness in Legal Education*, 58 SYRACUSE L. REV. 261, 269 (2008) (summarizing the evolution of "professional law schools" that first emerged with the Litchfield Law School in 1748).

92. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 96 (2d ed. 1985).

93. Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 199 n.199 (2006).

94. Matthew Steilen, Response, *Our Imperial Federal Courts*, 74 VAND. L. REV. EN BANC 125, 135 (2021).

95. Klopfer v. State of N.C., 386 U.S. 213, 225 (1967).

96. Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS'N LEGAL WRITING DIRECTORS 1, 22 (2004).

through the twentieth century, legal writing was viewed as unintellectual and insipid for students and teachers alike.[97] Even still, these attorneys of yore, trained by practitioners in the arena and/or primed with treatises written by redoubtable jurists, penned exceedingly graceful rhetoric in formulating arguments. We know this to be true because older case reporters "were interested almost entirely in the arguments of counsel" rather than the opinion of the court.[98] And these are not all mere prolegomenous argumentation; it is hard to conceive of a modern analog to the appellant's argument in the 1805 case of *Fitch v. Brainerd* describing the import of marriage:

> The harmony and good order of society result naturally from peace and harmony in families, which will no where be found, without an entire union of interests between husband and wife. Our happy state of society, of which we frequently, and very justly, boast, will be found to rest, in a great measure, on that domestic harmony, which is produced only by the two heads of the family becoming emphatically *one*.[99]

Although for the sake of self-preservation, I am going to disavow virtually every part of the appellant's argument prior to and past this point.[100] Regardless, it follows that those lawyers who went on to become judges were able to write on subjects in ways that encapsulate sweeping proclamations concisely and with

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97. Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 327 (2011).

98. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 35 (1959); *see also, e.g.*, Elkin v. Buschner, 17 A. 102 (Pa. 1888) (per curiam).

99. Fitch v. Brainerd, 2 Day 163, 172–73 (Conn. 1805).

100. As it turns out, extolling the virtues of marriage was a conduit for a larger argument against a "feme-covert"—i.e., a married woman—being allowed to make a will and therefore devise her real estate. *Id.* at 163. I wrestled with whether to cite *Fitch* at all for any proposition in this article, but it ultimately serves as a springboard for a well-warranted caveat to my entire thesis that you can derive rhetorical ideas from these older cases without expressly citing them. People borrow sentence structure and diction and other useful indicators of persuasive writing each and every day, consciously or unconsciously. And although I am going to lengths to evince wonderful-albeit-forgotten writings from long ago, a great deal of these cases are no longer good law, predicated on statutes that have seen revisions and repeals. To state the obvious, an attorney making an argument nowadays should probably steer clear from citing the appellant's argument in *Fitch* for the sheer reason that one's credibility will instantly crater upon the other attorney (or judge) recognizing the context surrounding said argument. (They may also quickly dismiss the case in their mind as soon as they see the year it was decided, something discussed in more detail in Part III(C).) This article is concerned with *lessons* in rhetoric, and any student with a functioning frontal lobe knows that many lessons in history emerge from failings, backslides, and stubborn positions that stifle societal progress—e.g., *Fitch*. Moreover, this means that litigants searching for a new clever turn of phrase are not limited to research within his or her own jurisdiction. This, of course, casts a far wider net than what most litigants are used to, which means you are much more likely to find something (1) that is helpful, and/or (2) faster than you might otherwise.

clarity, and case law is replete with these examples—some of which may truly surprise you (and are just about the opposite of *Fitch*).[101]

Moving away from wide-ranging summations of life, we can also focus on the interesting ways in which older decisions introduce the parties and characters in each dispute. "Most appellate decisions allow one to learn something about the people who are parties in the cases, such as what their jobs are, what activities they undertake that lead to litigation, and occasionally what their characters are like."[102] As a litigator, describing your client's character and positive attributes takes on a special meaning, insofar as the narrative you craft for the judge begins with who your client is and why this client matters. Older opinions offer vibrant ways to describe parties to an action. Consider the Court of Appeals of Law and Equity of South Carolina's musings over a wife and her husband: "She may be perfectly chaste, and yet a termagant, or she may have the misfortune to have one of those sour, cross-grained, ill-natured husbands, whom it is impossible to please, and whose unruly passions it is as impracticable to govern, as for man to control the hurricane or tornado."[103] Or consider another account from the Kansas City Court of Appeals of a "young and innocent" woman, "hardly more than a child in intelligence" who "could not be expected to know the ease and security with which the machinery of justice could be set in motion for her protection and for the punishment of her wrong."[104]

Even if you needed to look up the word "termagant" in the first example, you probably were able to follow the overall tenor of the Court's prose. That, for better or worse, is a huge part of constructing effective rhetoric.[105] Because the tone that a writer strikes will correspond to the type of narrative being advanced, finding a balance between tone and narrative becomes a step in the writing process. The next section tackles this step.

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101. *See, e.g.*, State v. Coyle, 130 P. 316, 316 (Okla. Crim. App. 1913) ("[I]t is a fact well known to the legal profession and to the country, that many of our appellate courts, both state and federal, have in the past been largely dominated by men, who, before their elevation to the bench and while they were practicing lawyers, were more or less under monopolistic influences. It matters not how honest, able, and learned a judge may be, his decisions are more or less colored by the viewpoint from which he considers questions which are submitted to him."); Westmoreland Coal Co. v. McCartney, 20 Pa. D. 58, 58 (1910) ("We have no doubt that companies that employ large bodies of men will, if unrestrained, encroach upon the individual rights of employees if that can be done with impunity. It is human nature for each person or each company to endeavor to obtain as much profit out of a business or an employment as is possible.").

102. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1075 (1985).

103. Anonymous, 19 S.C.L. (1 Hill) 251, 253–54 (1833).

104. Linville v. Green, 102 S.W. 67, 71 (Mo. Ct. App. 1907).

105. *See* Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC 229, 255 (2012) ("Style also influences the tone of legal writing and therefore fosters the relationship between advocate and reader.").

B. Narrative and Urgency

Wielding a persuasive narrative can certainly be a powerful arrow in one's rhetorical quiver, but "the relationship between law and narrative is a complex one . . . ."[106] On a technical level, people gravitate toward symbols and stories to connect old experiences to new stimuli.[107] A properly constructed narrative contains characters with motives and overarching plots that are used to limn both abstract legal concepts and societal institutions.[108] And although rules like the ban against hearsay serve to temper unrestrained storytelling that might impermissibly tip the scale in one party's favor,[109] narratives set forth by judges are not cabined in the same way.[110] Judges are not subject to page restrictions or word limits that may otherwise cut short important aspects of the record. They are free to provide a lucid (if not lengthy) narrative with regard to the facts and applicable law, intertwined in whatever manner aptly explains the decision. To the extent that judges "us[e] words as tools to produce a desired reaction," it has been said that writing a convincing judicial opinion is akin to writing a novel.[111]

Needless to say, the lessons we discern from judicial narratives must comport with the applicable legal field for which it is written. Family law, for instance, is governed by broad equitable statutes such that substantial attention is devoted to the facts of each individual case;[112] consequently, litigants mired in these cases run the risk of cycling through the same rhetorical phrases and

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106. Shulamit Almog, *As I Read, I Weep—In Praise of Judicial Narrative*, 26 OKLA. CITY U. L. REV. 471, 473 (2001).

107. Conti, *supra* note 19, at 460 (quoting KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION 63 (1966)) ("Man is the symbol-using, symbol-misusing, and symbol-making animal.").

108. *Id.* at 470 ("Dramatism and narrative theory recognize that through language man fundamentally structures society . . . .").

109. *See* Almog, *supra* note 106, at 473.

110. An interesting discourse on whether the courts are only permitted to consider the record presented comes from *Rowe v. Gibson* out of the United States Court of Appeals for the Seventh Circuit. 798 F.3d 622 (7th Cir. 2015). Although *Rowe* amounted to a straightforward appeal from the grant of summary judgment, an intensive back-and-forth between the majority and dissent arose when the majority relied on medical websites to conclude that summary judgment was premature. *Id.* at 628. In defending the use of medical websites, the majority acknowledged that:

> judges and their law clerks often conduct research on cases, and it is not always research confined to pure issues of law, without disclosure to the parties. We are not like the English judges of yore, who under the rule of "orality" were not permitted to have law clerks or other staff, or libraries, or even to deliberate . . . .

Id. The dissent countered that "[a]ppellate courts simply do not have a warrant to decide cases based on their own research on adjudicative facts," and that the majority opinion set out "a nearly pristine example of an appellate court basing a decision on its own factual research." *Id.* at 638 (Hamilton, J., dissenting).

111. Jeffrey L. Harrison & Sarah E. Wilson, *Advocacy in Literature: Storytelling, Judicial Opinions, and The Rainmaker*, 26 U. MEM. L. REV. 1285, 1286 (1996).

112. *See* William B. Reingold, Jr., *Finding Utility in Unpublished Family Law Opinions*, 19 U. ST. THOMAS L.J. 607, 615 (2023).

verbs and adjectives to buttress their main points from case to case.[113] In large part, this has to do with how certain themes pervade family law proceedings in the same way that certain themes pervade the breakdown of a marriage.[114] It is easy to imagine how, in a custody dispute, a husband's alcohol consumption could act as a sword and shield for the wife:

- Why should your husband's residential time with the children be limited? *Because of his inordinate amount of alcohol consumption, both in private and also in public*.
- Why should his decisionmaking be limited? *His drinking clouds his judgment*.
- Why should he not be allowed to keep a gun when the children are in the home? *See previous answer*.
- Why are you asking the Court to limit the amount of contact your husband has with you and the children at social events like a little-league game? *Are you going to make me say it again?*[115]

You get the idea. It can border on sardoodledom. What many fail to recognize is that there are likely diminishing returns to revisiting the same points over and over in their writing.[116] Any family law attorney, no matter how green, will tell you that alcohol and substance abuse looms large over the practice because: (1) it often tends to strain marital relations to a breaking point;[117] and (2) regardless of whether the substance use is serious *vel non*, the

113. To name just a few adjectives and verbs that readily come to mind: "narcissistic," "uncaring," "mean," "domineering," "gatekeeping," "self-centered" and/or "selfish," "inattentive," "absentminded," "controlling," "lazy," "paranoid" and/or "conspiratorial," "secretive," "overbearing," etc. *See* Hernandez v. Alonso, No. 70675, 2017 WL 6055429, at *4 (Nev. Ct. App. Nov. 16, 2017) ("Divorce and custody negotiations can be amicable and smooth. But they can also devolve into contentious, bitter, petty, emotionally and financially draining, exhausting, prolonged wars of attrition . . . .").

114. *Cf.* Matthew Fray, *The Marriage Lesson That I Learned Too Late*, THE ATLANTIC (Apr. 11, 2022), https://www.theatlantic.com/family/archive/2022/04/marriage-problems-fight-dishes/629526/ ("If I had to distill the problems in failed relationships down to one idea, it would be our colossal failure to make the invisible visible, our failure to invest time and effort into developing awareness of what we otherwise might not notice in the busyness of daily life.").

115. *See infra* notes 117–18 and accompanying text.

116. Elizabeth C. Tippett et al., *Does Lawyering Matter? Predicting Judicial Decisions from Legal Briefs, and What That Means for Access to Justice*, 100 TEX. L. REV. 1157, 1187 (2022) ("[T]he use of repetition words signals excess verbiage and mindless emphasis that could have been removed through more aggressive editing.").

117. *See* Lindsey M. Rodriguez et al., *Problematic Alcohol Use and Marital Distress: An Interdependence Theory Perspective*, 22 ADDICTION RSCH. & THEORY 294, 295 (2013) ("[T]he detrimental effects of alcohol misuse occur not only for the drinkers, but also for their families and close others. When compared to spouses of non-alcoholics, spouses of individuals with AUDs [alcohol use disorders] report lower levels of marital satisfaction (i.e., marital adjustment) . . . and elevated rates of depression, anxiety, and psychological distress, as well as more frequent reports of physical and emotional abuse . . . ."); David Lester, *The Effect of Alcohol Consumption on Marriage and Divorce at the National Level*, 27 J. OF DIVORCE & REMARRIAGE 159, 160 (1997) ("In all eight nations [studied], alcohol consumption was positively associated with the divorce rate

sober spouse may turn the other's alcohol intake into one-size-fits-all argument for the entire case.[118] Compounding these issues is how too often these arguments will stretch far back into the marriage for examples of wrongs done by the drunk spouse that have little-to-no bearing on the instant divorce.[119] Judges do not need (or want) example after example of sordid drunken tirades.[120] Even the most caring judge's empathy will flag after years of reading these arguments—think of a wave that makes a major impact initially, followed by smaller ripples that are of far less influence.[121]

So then let us stay with the example and see what we can do about this predicament with the assistance of nineteenth century case law. For the litigant advocating on the wife's behalf, it may be worthwhile to view how older case law described alcohol and its deleterious effects on the person, if for no other reason than to find new ways to talk about the marital problems linked to alcohol.[122] In the 1948 case of *In re Porter*,[123] the Court of Common Pleas of Pennsylvania confronted a wife who filed for the appointment of a guardian of her husband's estate.[124] Although the issue on appeal concerned the husband's mental condition at the time of trial,[125] the Court provided an overview of the husband's personality change by making his alcoholism a focal point:

> There is no denial that respondent for many years has been addicted to the excessive use of alcohol. His wife stated that he had often told her that he began when he was but fourteen years of age. The fall of 1944, however, is selected as the time when the alleged personality changes appeared. His interests in sports and athletics waned, and although he had always dressed fastidiously, he became careless not only in his dress but in his personal cleanliness. His parental interest in his daughter and her associates was replaced by indifference and perhaps by behavior at times so offensive as to be utterly indefensible. Normally a social person, he lost interest in friends and

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(binomial $p = 0.004$), in both the correlational and the regression analyses, and the association was statistically significant for seven of the eight nations.").

118. *See* Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1701–11 (1981).

119. Absent some compelling corroborative evidence, these assertions amount to finger-pointing, "he said, she said" contests. *See* William B. Reingold, Jr., *Summary Judgment and its Niche Role in Washington Family Law*, 58 GONZ. L. REV. 209, 222–223 (2023) ("It is not uncommon for fights or unsavory episodes from decades ago to be recalled as part of the divorce to support (or attack) one of the party's cases. But memories fade, and what really transpired during that argument years ago will almost certainly not be accurately conveyed by the client absent written documentation of some kind. The retelling of that fight will likely be (at best) exaggerated or (at worst) a lie.").

120. *See supra* note 29 and accompanying text.

121. And again, all this is magnified when it comes to pro se litigants. *See supra* note 53 and accompanying text.

122. *See* Tippett et al., *supra* note 116, at 1187 (noting "the persuasive power of subtle repetition, using slightly different wording to reinforce a theme or theory of the case.").

123. In re Porter, 63 Pa. D. & C. 134 (1948).

124. *Id.* at 134–35.

125. *Id.* at 137.

> guests at his home; he became careless about the handling of firearms; he lost his phobia about fire, and finally, his repeated efforts to abstain from the excessive use of alcoholic liquors became hopelessly futile.[126]

This description amounts to an instructive artifact, implicitly establishing a tone and profile that underlies the narrative. More specifically, the Court crisply informs us that the husband's alcoholism persisted since he was a youth, (the use of *has been* in the first sentence indicates a present perfect continuous tense), then walks us through a chronology of his declining state. The examples given exemplify his deterioration, punctuated by well-placed semicolons. In the end, these strands are pulled together by the morbid reality that his alcoholism ultimately triumphed over his efforts to combat the disease. The husband lost this war. He is a loser.[127] And the consequence of his losing efforts resulted in a petition for guardian ad litem, which formed the basis for the suit in the first place. So do we feel bad for him? Is he a victim? *In re Porter* does not take a stance on what kind of character alcohol plays in this script—whether it is a villain or passerby.[128] Instead, the focus is on the husband's downturn, with alcohol situated in the background serving as the engine.

A more forceful example of a court asseverating against the ills of alcoholism comes from the Iowa Supreme Court in 1887.[129] The case of *Pearson v. International Distillery* addressed allegations that a distillery manufactured and sold out-of-state "intoxicating liquors" for purposes beyond "medicinal, mechanical, sacramental, and culinary purposes. . . ."[130] The statute in question did not foreclose transportation of liquors out of the state.[131] However, the Court digressed into a discussion about police powers and how there exists "[a] demand for protection of our people from the evils which would flow from the unrestricted manufacture of intoxicating liquors."[132] What follows is a lengthy, sweeping indictment on the negative effects of alcohol not just on the abuser, but on society and even democracy on the whole:

> The evils flowing from intoxicating liquors arise wholly from its use as a beverage. But this use is widespread, reaching all classes of the people, and both sexes, and every age. No condition of life is wholly exempt therefrom. An enumeration of all the evils arising from the

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126. *Id.* at 138–39.

127. And this isn't just my interpretation. The Court early on states that "the testimony of friends, relatives and business associates has aided materially in providing a rather complete, though pathetic, personal history." *Id.* at 135.

128. To its credit, the *Porter* Court is not unsympathetic toward mental health struggles. *See id.* ("The approach to and solution of the problem of mental illness such as we have before us are not unattended with difficulty. We are confined by legislation enacted at the beginning of the century, which we are called upon to interpret after several decades during which great though perhaps relatively superficial strides have been made by medical science. As a result, the refinement in terminology alone impedes the path to a satisfactory conclusion.").

129. Pearson v. Int'l Distillery, 34 N.W. 1 (Iowa 1887).

130. *Id.* at 2.

131. *Id.* at 6.

132. *Id.* at 7.

> use of intoxicating liquors need not be attempted. They are numerous and affect the people collectively and individually. Idleness, poverty, pauperism, crime, insanity, disease, and the destruction of human life, follow indulgence in the habit of using intoxicating drinks. Millions of our fellow-countrymen are addicted to this habit, and of those, millions become drunkards. Homes are broken up, and domestic peace is destroyed by drunkenness. The prisons, almshouses, and institutions for the care of orphanage, insanity, and affliction, are largely filled by the vice. . . . But other evils attending the use of intoxicating beverages affect the state and its government. It is the prolific source of crime, pauperism, and insanity, and thereby entails taxation to defray the expenses of the conviction and punishment of criminals, and the support of almshouses, asylums, and hospitals. It deteriorates mentally and physically the human stock, rendering its victims, as well as their progeny, less capable of bearing arms in defense of their country, and of discharging other duties of the citizens. Soldiers are unfitted for duty by it, and thereby battles have been lost, and the liberty of nations, if not lost, has been imperiled. Tradition perpetuates, if history does not fully record, the evils which have flowed from the alcohol habit of officers and soldiers of our own armies. Washington struggled with difficulties occasioned by it, and other commanders of later days have had a like experience, while patriotic soldiers have suffered on account of inebriety of officers in all branches of the military service. The appetite for strong drink, possessed by so many of our countrymen, demands constant gratification, and the expenditure therefor of enormous sums of money, thus creating a business—the keeping of saloons and dram–shops, in which are employed an immense number of men. Their business, and their relations with the idle and dangerous classes of society, give them great influence in public affairs. The municipal governments of the cities, often burdened with debts, and robbed by unfaithful and mercenary officers, in all departments, give evidence of the direction in which this influence is exerted. Thinking men of this day largely concur in the opinion that the influence of the saloon, and the idleness and vice of the multitude of its clientage, united, constitute the great peril of American institutions. We think none will deny that nothing but evil flows from this source.[133]

Pearson's commentary smacks of Puritan zeal reminiscent of Johnathon Edward's famous sermons.[134] The passage is not easy reading, nor is it particularly well written. (Why is the word "idleness" mentioned thrice? And how, in the same monolithic paragraph, did we begin with negative attributes of drinking alcohol on an individual level, then shift our focus to the civics and

133. *Id.* at 7–8.

134. *See* Jonathan Edwards, *Sinners in the Hands of an Angry God*, *in* SELECTED SERMONS OF JONATHAN EDWARDS (H. NORMAN GARDINER ED., 1904).

economics of the matter, and end with a warning about the potential downfall of democracy?[135]) Regardless, there is absolutely a message here. An *urgent* message, at that. The Court is signaling that both good and bad men alike can succumb to alcoholism, and the labefaction of one person has the capability to rot core tenants of society as a whole. It touches upon history and duties of citizenship in a manner that brings to the fore a gravitas to the commonplace notion of drinking. Though unlikely, some social drinkers might think twice before having that next cocktail after reading *Pearson*, not unlike the way someone may rethink their stance on pesticides upon learning of what happens when bees go extinct.

And as hyperbolic as *Pearson* may be, perhaps there are ways to incorporate this chain of causal links into your argument. As opposed to *In re Porter* which focused solely on the individual, *Pearson* widens its scope to the ways in which the individual's alcoholism reaches those within his orbit. So, returning to our family law hypothetical: imagine a husband who drinks in spite of the family's financial straits, thus depleting vital funds that they need;[136] the husband's struggles with drinking therefore bleed into the lives of other family members, who accordingly suffer either financially due to marital waste or with regard to parenting responsibilities.[137] Or suppose a husband has an extremely important job in which he manages or oversees many employees, such that his drinking habits have the potential to negatively affect his livelihood;[138] if he makes enough mistakes at work and there is a plausible nexus with his alcohol intake, he could lose his job and therefore stanch the flow of income he

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135. This is essentially the opposite of *Lane v. Stanley*, see *supra* note 87 and accompanying text. The punctuation at times gives the impression that the author was verbally dictating his reasoning to a scribe à la stream of consciousness, a method that clearly does not always translate well for the reader.

136. This particular situation is not unique, but one example from Washington is found in *In re Clark's Marriage*, 538 P.2d 145, 147 (Wash. Ct. App. 1975), where the Court explained "that the testimony relating to Mr. Clark's profligate life style was admitted and considered by the court not for the purpose of establishing 'fault,' but for the purpose of determining whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets."

137. *See, e.g.*, *id.*; B.B.T. v. Houston Cnty. Dept. of Hum. Res., 985 So. 2d 479, 483 (Ala. Civ. App. 2007) ("Hatton, who was aware of the girlfriend's accusation of domestic abuse, indicated that her only concern regarding the father's parenting ability was his drinking."); Anstutz v. Anstutz, 331 N.W.2d 844, 846 (Wis. Ct. App. 1983) ("A party's financial contribution to the marriage may be offset by excessive gambling or drinking, or by negligent or intentional destruction of major assets by fire or accidents. To require a party to share in the debts created by a spouse's unjustified depletion of marital assets would constitute a failure to consider the total contribution of each of the parties to the marital estate."); *cf.* In re Schmid, No. 262714, 2005 WL 3536420, at *1 (Mich. Ct. App. Dec. 27, 2005) ("Evidence was presented that he showed up for some visitations with the minor child after drinking and was sent home from parenting classes because of intoxication. Therefore, the trial court did not clearly err in finding that the statutory grounds for [terminating his parental rights] were established by clear and convincing evidence.").

138. *See, e.g.*, McCarty v. Workmen's Comp. Appeals Bd., 527 P.2d 617, 618–19 (Cal. 1974) (employee caused an accident after drinking alcoholic beverages furnished by his employer at an office Christmas party).

previously generated for the family.[139] And even if the firing occurred after the marriage, this could impact issues of child support, alimony, and other post-dissolution matters.[140]

Narratives from older opinions do more than merely help with setting forth facts and descriptions of parties. They can also persuade by means of summarizing the law. Litigants briefing a contentious point "may wish to describe the law in order to persuade others to interpret the law in our favor."[141] A natural issue is how to lay out a persuasive description of the law without misrepresenting it or making the judge's life harder.[142] The job of the litigant here is to explain not just how rules and statutes and case law govern the case *sub judice*, but also why your interpretation should carry the day. To this latter point, returning to the roots of our case law can be a polestar in understanding the policy rationales that shape our rhetoric.

For example, in the 1857 case of *Elliott v. Boyles*,[143] the Supreme Court of Pennsylvania reviewed an action of slander in which the defendant spread a rumor about another man sleeping with the plaintiff's wife prior to their marriage.[144] It was further alleged that, in speaking of the plaintiff's wife, the defendant warned, "If the dirty strumpet knew that I hold her future happiness or misery in my hands, she would keep her mouth shut."[145] The plaintiff called two witnesses, one of whom was asked on cross-examination about whether he previously committed perjury in the Court of "Quarter Sessions,"[146] (which were Pennsylvania's first courts that covered, *inter alia*, "matters ranging from cursing, to selling beer without license, to fornication and bastardy").[147] This question was thrown out by the judge on the plaintiff's objection, and ultimately the jury sided with the plaintiff.[148]

On appeal, the issue presented concerned whether the lower court erred by prohibiting the witness from stating whether he had, in fact, previously

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139. *See* Gilbert v. Gilbert, FA114047908S, 2017 WL 3469917, at *1 (Conn. Super. Ct. July 5, 2017) (noting the husband was earning around $65,000 per year until he was fired for alcohol consumption; consequently, "[i]n the ensuing five years, the father has had sporadic employment, but has never earned more than $6,000 per year.").

140. *See, e.g.*, Shaw v. Shaw, 648 A.2d 836, 837 (Vt. 1994).

141. J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 128–29 (1993).

142. *See Swann*, *supra* note 78 ("Those lawyers and judges who preceded us had to go to a law library. But with the legal research revolution, there is also the possibility to pretty easily find that a lawyer has 'fudged' what the existing law is. And if a judge (or the judge's law clerk) finds that the law isn't really what the lawyer claims it is, the job of the judge gets harder.").

143. Elliott v. Boyles, 31 Pa. 65 (1857).

144. *Id.* at 66.

145. *Id.* at 65.

146. *Id.*

147. Stephanie Hoover, *Pennsylvania's Court of Quarter Sessions*, PENNSYLVANIA RESEARCH (2017), https://www.pennsylvaniaresearch.com/pennsylvania-quarter-sessions-court.html.

148. *Elliott*, 31 Pa. at 65.

perjured himself.[149] Interestingly, the Supreme Court framed the entire issue as whether this exceeded the bounds of advocacy on the defendant's counsel's part, observing in the first sentence of the opinion that "[i]t is entirely natural that . . . the earnestness of counsel should often become unduly intense . . . ."[150] The Court proceeded to delineate the nature of jury trials with the following meditation:

> Those who are zealously seeking the truth cannot always be watchful to measure their demeanor and expressions, in accordance with the feelings, or even with the rights of others. This zeal, even when inordinate, must be excused, because it is necessary in the search of truth; and generally, it is not possible to condemn it, as misguided or excessive, until its fault has been proved by the discovery of the truth in another direction; and possibly its very excess may have contributed to the discovery. When the presiding judge is respected and prudent, a hint kindly given is generally all that is needed to restrain such ardor, when it does not arise, in any decree, from habitual want of respect for the rights of others and for the order of public business.
>
> Witnesses often suffer very unjustly from this undue earnestness of counsel, and they are entitled to the watchful protection of the court. In the court, they stand as strangers, surrounded with unfamiliar circumstances, giving rise to an embarrassment known only to themselves, and in mere generosity and common humanity, they are entitled to be treated, by those accustomed to such scenes, with great consideration; at least, until it becomes manifest that they are disposed to be disingenuous.[151]

Eschewing citation to cases or statutes, the Court's mindful contemplation of how witnesses, judges, and attorneys coexist in the courtroom is framed rather beautifully. *Elliott* demonstrates that the armature of a legal concept "can dramatically influence the conclusions reached by the audience."[152] There is no sense that the Court is taking sides for or against anyone here, only an overview of checks and balances within the trial and how they operate. Plus, there is the impression that the Court understands how attorneys can easily be drawn into a case on a deeply personal and harmful level.[153] This recognition establishes the

149. *Id.* at 65–66.

150. *Id.* at 66.

151. *Id.*

152. Gautreaux, *supra* note 22, at 605.

153. The life of a lawyer can be an insalubrious one, and there is a reason so many law firms and state bars focus so much on the issue of attorney burnout. Sometimes an attorney identifies so closely with a particular case that it envelops virtually every part of their life. Advice about simply "learn[ing] to put up protective boundaries, to keep [your] emotions in check" when you go home at the end of the day is, unsurprising, easier said than done. Dianne Molvig, *The Toll of Trauma*, 84 WIS. LAW. 4, 9 (2011). Physical and mental exhaustion and stress are all unfortunate concomitants at play when you are an attorney, and we can only hope that courts "do[] not expect . . . a super-human ability to compartmentalize" their ability to do the job when the going gets tough. Spencer v. Vagnini, No. 16-cv-662-pp, 2022 WL 17967210, at *10 (E.D. Wis. Dec. 27, 2022).

lens through which the decision will be made, presenting a type of analysis and narrative we can all replicate. (And not just because the passage is bereft of unnecessary case citations or quotes that bog down the prose.[154]) Because "lawyers cannot be sure that simply reciting a bunch of facts and applying the law to those facts will always be persuasive,"[155] taking time to consider the best way to frame your case is worthwhile. Older case law is replete with examples evincing this proposition;[156] you just need to take the time to find them.

C. Aphorisms and Context

In *Making Your Case: The Art of Persuading Judges*, Bryan A. Garner and Justice Scalia point out that one can always make an appeal to equity.[157] For the litigant who is seemingly backed into a corner, the notion of an inequitable outcome could be a valuable lifeline.[158] Equity affords courts a certain limited power to adapt relief in ways to mitigate against the rigidity of strict legal rules.[159] Garner and Scalia offer a string of examples for how you can voice the need for an equitable ruling, including: "[t]he law respects form less than substance," and "[n]o one can take advantage of his own wrong."[160] These pithy expressions may well be able to reach the court's conscience; however, I would posit that it is better to pepper your arguments with direct aphorisms from older case law that fit your narrative. Take the following examples:

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154. Judge Posner famously critiqued the Bluebook in 1986 for its role in "encourag[ing] the tendency of young lawyers, many of whom in their larval stage are law review editors and in their chrysalis stage the ghostwriters of judges and senior partners (the butterflies), to cultivate a most dismal sameness of style, a lowest-common-denominator style." Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1349 (1986). Relevant here is Judge Posner's observation that one of the anti-lessons garnered from the Bluebook is to "[c]ite authority for every proposition, however obvious; maximize the ratio of citations to pages." *Id.* at 1350. It's been nearly forty years since this article was published, and the Bluebook has nearly doubled in size. It should go without saying based on this article that I agree with Judge Posner's blistering anatomization of its many flaws and that lawyers overcite their materials, even if his one-liners amounted to a pyrrhic victory in the grand scheme of things. *Cf.* Mark Painter, *More Punctuation Problems*, 33 MONT. LAW. 40, 40 (2008) ("Lawyers use too many quotations . . . .").

155. Gautreaux, *supra* note 22, at 606.

156. *See, e.g.*, Beresford v. Stanley, 9 Ohio Dec. 134, 134–35 (1898) (opening with multiple paragraphs on the purpose of a will and the evidence needed in a legal action surrounding a claim of undue influence).

157. SCALIA & GARNER, *supra* note 29, at 30.

158. *Cf.* Rose v. Nat'l Auction Grp., Inc., 646 N.W.2d 455, 460–61 (Mich. 2002) (discussing the doctrine of unclean hands, and remarking that "the preservation of the integrity of the judicial system means no court acting in equity can allow its conscience to be moved to give such a plaintiff relief").

159. *Cf.* Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160, 167 (1894) ("The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.").

160. SCALIA & GARNER, *supra* note 29, at 30.

- "The rule may be imperfect, but it is made to fit the imperfections of man, and has been found to be practical."[161]
- "Equity looks with a charitable eye . . . ."[162]
- "The old proverb, 'cut the garment according to the cloth,' has in it much practical wisdom. It is illustrated every day in private life, and is the foundation of individual integrity, contentment and success."[163]
- "Abstract theory should not be allowed to refute practical example . . . ."[164]
- "When courts of appeal resort to psychological legerdemain to force a fact into a barren record, it breaks down the law itself and can result in naught but disaster."[165]
- "Procedural rules are not ends in themselves. They are means to the attainment of this ultimate purpose of legal procedure—the ascertainment of truth."[166]
- "The common law will not halt or surrender because the situation is novel and the ordinary methods of proving values are not available, but will resort to some practical means that will be just to both parties."[167]
- "[I]t is the duty of the Jury to yield to the law, and not to set themselves above it."[168]
- "Here, as in all other cases, the law chooses the least of two evils."[169]
- "[C]ommon law maxims and definitions, framed while the judges were still under the spell of the feudal system, must be construed by us in the light of changed conditions."[170]

Some of the foregoing examples are punchier than others, to be sure. Yet none are lengthy or require a second reading.[171] In my view, pulling direct quotes from these cases adds significantly more weight than blanket pleas for an equitable result. Older aphoristic language promotes the idea that your

161. State v. Kephart, 106 P. 165, 166 (Wash. 1910).

162. Edwards v. Seal, 130 A. 513, 514 (Me. 1925).

163. French v. Bd. of Comm'rs, 74 N.C. 692, 697 (1876).

164. In re Frasch, 31 P. 755, 756 (Wash. 1892).

165. Smith v. Rowe, 100 P.2d 401, 403 (Wash. 1940).

166. Bartlett v. Kan. City Pub. Serv. Co., 160 S.W.2d 740, 742 (Mo. 1942).

167. Indus. & Gen. Tr. v. Tod, 73 N.E. 7, 12 (N.Y. 1905).

168. State v. Jim, 12 N.C. (1 Dev.) 508, 511 (1828).

169. Ingram v. Hall, 1 N.C. (Mart.) 193, 211 (1795).

170. Thrift v. Elizabeth City, 30 S.E. 349, 351 (N.C. 1898).

171. With the possible exception of *Smith* and its use of the word "legerdemain," a word I have personally had swirling around in my head for most of my life due to an unhealthy childhood fixation with magic and sleight of hand. (It took a friend proofreading this article to inform me this is not a widely known word, and this footnote would not be here were it not for him and his judgmental brow when we discussed it.) Even still, context can disambiguate, and an appellate judge enmeshed in these types of arguments would likely be able to process the sentence and paragraph as a whole.

proposition is one grounded in history and therefore able to stand the test of time. Most judges are understandably reluctant to overturn precedent.[172] This is so notwithstanding how these cases are meant to be persuasive rather than substantive, providing courts with historical context in rendering a decision;[173] the point is that

> an ancient case['s] . . . persuasiveness depends on the degree to which its underlying principles have been buttressed or weakened by later cases and events. The fact that a case remains an accurate statement of the law through many generations often shows that it should be afforded special respect for much the same reason as a leading case.[174]

Of course, you want to make sure the quote lines up with the case at bar.[175] Consider this line from *State v. Shelton* in 1871: "[J]ust as the ocean is angry, long after the storm has passed, so the passions of men do not become calm in a day . . . ."[176] Keen and figurative, this quote, at first blush, seems like it could be transplanted into any number of cases ranging from criminal offenses to First Amendment matters. However, background surrounding *Shelton* should give pause.

Although *Shelton* addressed a murder conviction, the heart of the case centered on the State Amnesty Act of 1866.[177] The legislature enacted the SAA after the Civil War, and provided that no officer or private, in either the United States or Confederate armies, shall be held to answer on any indictment for any act done in discharge of any duties imposed on them by the laws of the United States, or of the Confederate States, or by virtue of any army order.[178] It "embrace[d] all who may be supposed to have committed crimes or injuries, by reason of their connection with the late war."[179] The *Shelton* Court considered the spirit of the SAA in determining that the homicide arose from connections to the Civil War, and that certain crimes spawned by lingering strife after the war were, for a period of time, entitled to amnesty.[180] In particular, the legislature wanted "to show the same clemency to criminals who acted under

172. United States v. Lamon, 893 F.3d 369, 371 (7th Cir. 2018) (per curiam) ("[T]he mere existence of a circuit split does not justify overturning precedent."); McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1095 (11th Cir. 2017) ("We recognize that overturning precedent is and should be a rare occurrence."); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1105 (2002) ("The need to constantly rethink all legal questions anew in a world without stare decisis would increase the workload . . . .").

173. GARNER ET AL., *supra* note 4, at 178 ("Because law often pays heed to history, ancient cases will often be powerful precedent. But their relative strength always depends on the context in which they are deployed.").

174. *Id.* at 176.

175. *See id.* at 179 ("Every opinion is rendered under a specific set of conditions . . . .").

176. State v. Shelton, 65 N.C. 294, 297 (1871).

177. *Id.* at 295.

178. State v. Cook, 61 N.C (Phil.) 535, 536 (1868).

179. State v. Blalock, 61 N.C. (Phil.) 242, 247 (1867).

180. *Shelton*, 65 N.C. at 296–97.

the frenzy of vengeance after the war . . . for outrages committed during the war, as to those who committed the outrages."[181] All this to say that directly quoting *Shelton* when you are representing, say, a client charged with simple assault, is a precarious strategy.[182]

Nevertheless, the simile itself stands strong and worth trying to imitate in one's own writing. It conjures images in the reader's mind that serve the argument in various ways: it (1) helps communicate the substance of the writer's point, (2) demonstrates that the writer is credible and intelligent, (3) conveys specific emotions in the reader, and (4) emphasizes the writer's point.[183] Much has been written about the powerful nature similes and metaphors can have in legal writing,[184] and you have to choose wisely as to what and how you deploy a metaphor.[185] Metaphors in particular "are richest when they are subtle and unexpected," and by the same token "poorest when they are corny, vague, intricate, lengthy, unoriginal, forced, trivialized, or overused."[186] Overall, however, there is consensus that "[s]killful use of metaphor is one of the highest attainments of writing."[187] To the extent that the source of a simile or metaphor can emerge from virtually anywhere,[188] looking to those penned by judges from the nineteenth century could shine a light on new ideas of your own.

CONCLUSION

To improve your writing, you have to want to be a better writer. Given the way judges tend to bemoan the writing presented by litigants,[189] it is relatively safe to say many attorneys are not actively looking to refine their prose. Nevertheless, for those motivated writers who seek to hone their skills, there is a bevy of literature with pointers and lessons and regimens to develop

181. *Id.* at 297; *see also Blalock*, 61 N.C. (Phil.) at 247 ("It is most beneficially intended, as it is well calculated to lull strife to sleep.").

182. For one thing, you run the risk of the judge assuming you are blowing things far out of proportion or being melodramatic, especially if the court reviews the case and sees that this has little materiality to modern-day crimes. Relatedly, you do not want to lose credibility in the eyes of the court by conflating a simple assault with civil war writings.

183. *See* Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 940 (2007).

184. *See generally* Jonathan K. Van Patten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295, 298 n.17 (2013) (sampling various articles and treatises discussing the subject); Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519, 560 n.8 (Wis. 2022) (Bradley, J., concurring).

185. Van Patten, *supra* note 184, at 304.

186. Gerald Lebovits, *Not Mere Rhetoric: Metaphors and Similes*, 74 N.Y. STATE BAR ASS'N J. 64, 64 (2002); *see also* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 558 (2d ed. 1995) ("[G]raceless and even aesthetically offensive use of metaphors is one of the common scourges in writing, and especially of legal writing . . . .").

187. *Id.* at 558.

188. Van Patten, *supra* note 184, at 304.

189. *See supra* note 33 and accompanying text.

one's rhetoric. Teachers like John Trimble, Bryan Garner, and even Kurt Vonnegut[190] are people we can all learn from.

All that to say this article is not meant to break new ground on any pedagogical front. Really, this article serves as a reminder that our nation's case law amounts to nearly 250 years' worth of text that has largely been forgotten or cast aside. This is a shame. These cases are not devoid of merit. And for those who are willing to find and read these older cases—for those of a mind to ground their Boolean search terms and research in the nineteenth century—there can be immense payoff. In addition to having a fuller understanding of history and rationales that predicate current laws and rules, attention to these cases evinces grammatical and lexical styles that are informative for modern writers. They are filled with metaphors, cadences, and turns of phrases that can spark fresh ideas for advocates. In that sense, this article is a take on the parabolic "old wine in new bottles" idiom; because, like so many other lessons we glean from history, the past can shed light on our present realities. As Justice Cardozo so gracefully said, "[H]istory, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."[191]

190. *See* KURT VONNEGUT & SUZANNE MCCONNELL, PITY THE READER: ON WRITING WITH STYLE (2019).

191. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 53 (1928).